Cox v. Porsche Financial Services, Inc. et al

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA Case No. 16-23409-CIV-GAYLES/LOUIS

STEVEN MICHAEL COX, individually and on behalf of those similarly situated,

Plaintiff, v. PORSCHE FINANCIAL SERVICES, INC.,

Defendant.

/ ORDER THIS CAUSE comes before the Court on cross-motions for partial summary judgment [ECF Nos. 225 & 241] The Court heard argument on the Motions on January 29, 2020. [ECF No. 258]. The Court has reviewed the Motions and the record and is otherwise fully advised. For the reasons that follow, the Motions are each granted in part and denied in part.

I. BACKGROUND

A. Factual 1 This action stems from a 2015 lease transaction that Plaintiff Steven Michael Cox completed with a non-party dealer, Porsche of Fort Myers (the . The Dealer agreed to

1 The facts relevant to the Motions are undisputed unless otherwise indicated and are taken from the following statements of facts along with their accompanying exhibits [ECF No. 135], Support of his Amended Motion for Partial Summary Judgment [ECF No. 241- , and Statement of Disputed Material Facts [ECF No. 245 . give Plaintiff $25,000 for his 2015 Hyundai Genesis and then agreed to apply that trade-in value to Pl 2015 Porsche Cayman. Plaintiff took the deal and executed with the Dealer a single-payment lease 2

for $36,539.30 due at lease signing. [Id., ¶ 18]. Plaintiff paid with a check for $11,539.30 and with the $25,000 credit for his trade-in. [Id.].

agreement - show that a vehicle is being traded in as part of a lease agreement. [Id., ¶ 25]. 3

The Dealer listed - on his lease form. [Id., ¶ 24]. agreement - , which represents the gross agreed-upon value of a trade-in less the balance owed on the trade-in. [Id., ¶ 6]. The Dealer assigned -in a gross value of $25,000. [Id., ¶ 27]. Plaintiff owed no balance on the trade. [Id.]. However, under the NTIA section of not applicable. [Id.].

-in Allowance, rebate, noncash credit, or

cash you pay that reduces the Gross Capitalized Cost 4

[Id., ¶ 31]. Dealers may apply a CCR to a lease to reduce may reduce other lease terms, such as the interest and taxes paid on the lease. [Id., ¶¶ 31 32]. Under the CCR section of Pla

2 By completing a single-payment lease, Plaintiff paid the total payment for the lease up front in exchange for more favorable financing terms rather than making periodic payments over the course 3 Though Defendant indicates that this statement is disputed, see disputes Plaintiff characterization of the 4 The Gross Capitalized Cost is the agreed-upon value of the leased vehicle increased by the Capitalized Cost was $64,935.00. [Id.].

When Plaintiff noticed that his , he asked the Dealer where the credit for his trade-in was. [Id., ¶ 19]. The Dealer pointed to the section showing total due at signing: $36,539.30. [Cox Dep., ECF No. 241-8 at 83:13 14]. Satisfied, Plaintiff signed the lease form and left the dealership with his 2015 Porsche Cayman and no money owed to the Dealer. [Id., at 84:1 3; 86:1 4]. Weeks later, Plaintiff reviewed the lease [Id., at 95:3 96:19]. After later consulting an attorney, Plaintiff came to believe that the Dealer

overcharged him $3,970.93 in interest and sales tax by failing to apply his trade-in as a CCR SUMF, ¶ 39].

Defendant Porsche Financial Services, Inc., generates and provides to the Dealer lease agreement forms that l law and the law of the state where the Dealer is located, if completed accurately. [Id., ¶¶ 3, 4]. Defendant also reviews every lease that the Dealer executes through a two-step process: (1) credit underwriting and (2) contract processing. [Id., ¶ 9]. Credit underwriting involves Defendant running a lease determine whether it will accept the risk of lending to the applicant. [Id.]. Contract processing applicant execute a lease agreement, Defendant reviews the lease agreement to, among other things, ensure that the lease is compliant with the Truth-in-Lending Act. [Id., ¶¶ 10 11]. If Defendant decides to purchase the lease, then the lease is assigned to Porsche Leasing Ltd., 5

and serviced by Defendant. [Id., ¶ 8; 9]. Relevant here, Defendant provided to the Dealer the lease agreement that

5 Plaintiff states that it is undisputed that the Dealer is required to assign completed lease forms to Defendant, not Porsche Leasing Ltd., but he cites to record evidence demonstrating that the lease agreements require the Dealer to assign leases to either Porsche Leasing Ltd., or Defendant. See [Pl.s SUMF, ¶ 8 (citing Supena Dep., ECF No. 241-10, 45:18 46:1)]. And Defendants form leases state that leases will be assigned to Porsche Leasing Ltd., or an assignee designated by Porsche Leasing Ltd. [ECF No. 241-5]. Plaintiff completed agreement for compliance with the Truth-in-Lending Act, and currently services [, ¶¶ 16, 17, 20, 21].

B. Procedural On August 8, 2016, Plaintiff filed this class action 6

under both federal question and diversity jurisdiction against Defendants (1) Porsche Cars North America, Inc., (2) Porsche Leasing Ltd., and (3) Porsche Financial Services, Inc., alleging nine counts 7

: and Regulation M violations, (2) per se violation of the Florida Deceptive and Unfair Trade Practices FDUTPA based on CLA and Regulation M violations, (3) FDUTPA violation based on the D was applied, (4) FDUTPA violation based on the De CCR, (5) breach of contract, (6) breach of covenant of good faith and fair dealing, (7) negligent training and supervision (only against Defendant Porsche Cars North America, Inc.), (8) unjust enrichment, and (9) negligence. [ECF

6 On February 14, 2019, the Court affirmed and adopted Judge Louis Report and under Federal Rules of Civil Procedure 23(b)(3) and 23(b)(2). [ECF No. 216 at 2]. The Court certified

Persons who leased a Porsche vehicle in Florida through the standard form Motor Vehicle Lease Agreement from Defendants and, as part of the transaction, traded in a vehicle with a positive monetary value that was not assigned a positive Net Trade-in Allowance. This Class only covers individuals whose leases either are outstanding or were terminated within four years before the filing of this action. The Court also cert

Persons who leased a Porsche vehicle in Florida through the standard form Motor Vehicle Lease Agreement from Defendants and, as part of the transaction, traded in a vehicle with a positive monetary value that was not properly credited as a Capitalized Cost Reduction. This Class only covers individuals whose leases either are outstanding or were terminated within four years before the filing of this action. 7 Plaintiff alleged all counts against all Defendants unless otherwise stated. No. 1]. In his Complaint, Plaintiff sought damages and declaratory and injunctive relief enjoining D continuing to violate federal and Florida law relative to the unlawful treatment [NTIA] and the imposition and collection of sales taxes. Id. at 39].

On November 28, 2017, all Defendants jointly filed their Motion for Summary Judgment . [ECF No. 109]. On October 19, 2018, the Court affirmed and adopted Judge Louis Report [ECF No. 190] granting in part and denying in part D , leaving only Counts 1 4 against remaining Defendant, Porsche Financial Services, Inc. [ECF No. 202].

On August 1, 2019, Defendant filed a Motion for Partial Summary Judgment on two issues 8

: (1) whether Florida law permits private parties to pursue civil penalties under FDUTPA and (2) whether the Court has subject matter jurisdiction to . [ECF No. 225]. On August 30, 2019, Plaintiff filed his Amended Motion for Partial Summary Judgment , arguing that summary judgment is warranted in his favor as to (1) all elements of his FDUTPA claim under Count 4 9 voluntary payment doctrine. [ECF No. 241].

8 [ECF No. 229], the Court is moot because Plaintiffs counsel conceded that they will not pursue class claims for members that fall outside the limitations period. [ECF No. 239]. 9 but he fails to specify to which FDUTPA Count he refers. [ECF No. 241-1 at 7]. Plaintiff

Florida sales tax statutes and regulations that require the capitalized cost of the lease to be reduced by the amount credited for the trade- -1 at 11]. The Court therefore olicy, and practice of failing to apply the [ECF No. 1, ¶ 146]. II. LEGAL STANDARD

Summary judgment, pursuant to Federal R if the movant shows that there is no genuine issue as to any material fact and the movant is entitled

Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (per curiam)

provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 48 (1986)

record evidence, could rationally find in favor of the nonmoving party in light of his burden of proof. Harrison v. Culliver Hickson Corp. v.

N. Crossarm Co., 357 F.3d 1256, 1259- Eternal

Word Television Network, Inc. v. Sec y of U.S. Dep t of Health & Human Servs., 818 F.3d 1122, 1138 (11th Cir. 2016).

The Court must construe the evidence in the light most favorable to the nonmoving party SEC v. Monterosso, 756 F.3d 1326, 1333 (11th Cir. 2014). However, to prevail on a motion for summary judgment must offer more than a mere scintilla of evidence for its position; indeed, the nonmoving party

must make a showing sufficient to permit the jury to reasonably find on its be- Urquilla-Diaz v. Kaplan Univ., 780 F.3d 1039, 1050 (11th Cir. 2015). Further, conclusory and uncorroborated allegations by a party in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well-supported summary judgment motion. See Earley v. Champion Intern. Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). s disposition of cross-motions for summary judgment employs the same legal standards applied when only one Certain Underwriters at Lloyds, London Subscribing to Policy No. SA 10092-11581 v. Waveblast Watersports, Inc., 80 F. Supp. 3d 1311, 1316 (S.D. Fla. 2015) (citation omitted). III. DISCUSSION

A.

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1. Subject Matter Jurisdiction T that the Court lacks jurisdiction based on the Tax Injunction Act, 28 U.S.C. § 1341, fails. The Tax Injunction Act bars the exercise of federal jurisdiction when two conditions are met: (1) the relief requested by the plaintiff will enjoin, suspend, or restrain a state tax assessment and (2) the state Terry v. Crawford 630 (11th Cir. 2015) (citation omitted). Here, Plaintiff does not seek to enjoin, suspend, or restrain

Defendant from charging tax. Rather, he seeks to enjoin Defendant from engaging in conduct that violates FDUTPA. [ECF No. 1 at 39]. And the record evidence does not demonstrate that such alleged conduct includes tax assessments. Accordingly, the Tax Injunction Act does not divest the Court of its jurisdiction. See Fox v. Loews Corp., 309 F. Supp. 3d 1241, 1252 (S.D. Fla. 2018) (denying motion to dismiss based on Tax Injunction Act because plainti

Defendant also argues that the Court lacks jurisdiction because Plaintiff failed to exhaust his administrative remedies under Florida Statut procedure and remedy for refund claims between individual funds and accounts in the State Treasury Defendant argues that Florida Administrative Code Rule 12A-1.014 sets forth this req taxpayer who has overpaid tax to a dealer secure a refund of the tax from the dealer and not from the [Florida] Department of Revenue Defendant further submits that if the dealer declines to provide the taxpayer a refund, she must request from the dealer an assignment of her tax refund rights before contesting the tax assessment in court. See Technical Assistance Advisement 2004(A)- Feb. 2, may issue an assignment of

First, Florida Statute § 215.26(4) is inapplicable here because Plaintiff does not seek a tax refund; he seeks, among other things, actual damages that include alleged overcharges for interest and fees on his lease. [ECF No. 1 at 39]. Defendant cites no, and the Court is unaware of, authority stating that a plaintiff who is not seeking a tax refund must exhaust administrative remedies under § 215.26(4). Even so, that a may issue an assignment of rights to his/her customer in lieu does not demand Plaintiff to have sought such assignment before bringing suit. See Technical Assistance Advisement 2004(A)-005. Accordingly, the Court has jurisdiction. 10

2. Civil Penalties Under FDUTPA The Court finds that summary judgment is warranted with respect to that Plaintiff is unable to pursue civil penalties, in addition to damages, under FDUTPA. Florida Statute § 501.2075 may be recovered in any action brought under this part by the enforcing authority Fla. Stat. § 501.2075 (emphasis added). The statute defines an Department of

10 Defendant also argues that Florida Statute § 213.756 strips the Court of jurisdiction. Not so. As discussed infra, the Court finds that the st Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing or fails to act upon a violation within 90 days Id. § 501.202(2). As Plaintiff is not an enforcing authority under the statute, the Court grants summary judgment in favor of penalties pursuant to FDUTPA.

B. Motion for Partial Summary Judgment

1. s The purpose of FDUTPA enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, Kenneth F. Hackett & Assocs., Inc. v. GE Capital Info. Tech. Sols., Inc., 744 F. Supp. 2d 1305, 1312 (S.D. Fla. 2010) (citing Fla. Stat. § 501.202(2)). A FDUTPA claim has three elements: Dolphin LLC v. WCI Communities, Inc., 715 F.3d

1243, 1250 (11th Cir. 2013) (citation omitted). establishing a traditional FDUTPA violation or a per se FDUTPA violation.

Traditional FDUTPA violations occur when a de

occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in showing of probable, not possible, deception[.] Zlotnick v. Premier Sales Grp., 480 F.3d 1281,

1284 (11th Cir. 2007) (citations and internal quotations omitted). This is an objective test; a plaintiff need not prove reliance. Carriuolo v. Gen. Motors Co., 823 F.3d 977, 984 (11th Cir. 2016). In determining deception, a court must view the relevant Cold Stone Creamery, Inc. v. Lenora Foods I, LLC, 332 F. Appx 565, 567 (11th Cir. 2009). An unfair trade practice is one that offends established public policy; it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC, 198 F. Supp. 3d 1332, 1338 (S.D. Fla. 2016) (citation omitted). 11

Whether conduct is deceptive or unfair is a question of fact. Siever v. BWGaskets, Inc., 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009) (citation omitted).

A defendant per se violates FDUTPA in one of two ways: (1) if the law, statute, rule, regulation, or ordinance expressly constitutes a violation of FDUTPA or (2) if the law, statute, rule, regulation, or ordinance proscribes unconscionable, deceptive, or unfair acts or practices and therefore operates as an implied FDUTPA predicate. State Farm Mut. Auto. Ins. Co. v. Performance Orthopedics & Neurosurgery, LLC, 315 F. Supp. 3d 1291, 1300 (S.D. Fla. 2018) (citing Fla. Stat. § 501.203(3)(c)). When a law operates as an implied FDUTPA predicate, a plaintiff need only demonstrate a violation of the law. See e.g., KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. 5d DCA 2008) were considered unfair and deceptive trade practices under Federal Trade Commission Act).

If a defendant violates a rule that does not operate as an implied FDUTPA predicate, a is unfair or deceptive under traditional FDUTPA standards. See e.g., Webber v. Bactes Imaging Sols., Inc., No. 2D18-2964, 2020 WL 215819, at *2 (Fla. 2d DCA Jan. 15, 2020) (holding overcharging patients for medical

11 -settled in this District. Compare Deere Constr., LLC, 198 F. Supp. 3d at 1338, with Tr. Co., No. 12-80372-CIV, 2015 WL 11347664, at *5 (S.D. Fla. Aug. 6, 2015) (citing Porsche Cars N. Amer., Inc. v.

Diamond, 140 So. 3d 1090, 1096 (Fla. 3d DCA 2014)) (an unfair practice requires that the injury to the consumer: (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition; and (3) must be an injury that consumers themselves could not reasonably have). The Court need not weigh in on the dispute for purposes of this Order because its ruling stands under either definition. records in violation of Florida Administrative Code Rule 64B8 was an unfair practice because such frustrates patient access to medical records In both traditional and per se FDUTPA violations, a defendant is liable initiate nor was the principle actor in the violations. Galstaldi v. Sunvest Communities USA,

LLC, 637 F. Supp. 2d 1045, 1056 (S.D. Fla. 2009); see KC Leisure, Inc., 972 So. 2d at 1074 (

Plaintiff argues that Defendant committed two traditional FDUTPA violations by (1) using a lease calculation that violates Florida tax law 12

and (2) reviewing, accepting, and approving such an unlawful calculation. As discussed below, summary judgment is unwarranted as to both bases.

First, Plaintiff claims that Defendant violated FDUTPA by directly participating in Plaintiffs unlawful lease calculation because Defendant [d] the monthly or single payment amount. Plaintiff only cites to his lease for support, but the lease nowhere indicates that Defendant made this calculation. [ECF No. 135-2]. To counter, Defendant presented evidence that the Dealer, not Defendant, determines this calculation by negotiat[ing] Harris Dep., ECF No. 109-7, ¶ 3]. Non-conclusory statements such as these can defeat summary judgment when based on personal knowledge or observation. United States v. Stein, 881 F.3d 853, 857 (11th Cir. 2018). However, because genuine issues of material fact remain as to whether in calculation, Galstaldi, 637 F. Supp. 2d at 1056, the Court denies Plaintiff summary judgment as to this claim.

12 Though Plaintiff bases this argument on a Florida tax law violation, the Court does not construe Plaintiff to be arguing that Defendant per se violated FDUTPA because Plaintiff based his per se FDUTPA claim (Count 2 f the CLA and Regulation M, not Florida tax law. [ECF No. 1 at 28: 121]. See Thomas v. Egan 54 (2d Cir. 2001) (citing Fed. R. Civ. P. 8(a)) (a claim must be set forth in the pleadings, in order Additionally, the Court notes that because a genuine factual dispute remains as to Plaintiffs lease calculation, discussed infra, it need not determine whether the calculation was lawful.

Second, Plaintiff claims that his unlawful s and is, therefore, an unfair trade practice under FDUTPA. [ECF No. 241-1 at 16]. But Plaintiff fails to offer evidence to support this argument, district Chavez v. Sec y Florida Dep t of Corr., 647 F.3d 1057, 1061 (11th Cir. 2011). Furthermore, whether conduct constitutes an unfair trade practice is a question of fact for the jury to decide. Siever, 669 F. Supp. 2d at 1293. Accordingly, the Court denies summary judgment . 13

2. The Court grants Plaintiff summary judgment with respect to s affirmative defense based on

Florida Statute § 213.756. The statute reads:

In any action by a purchaser against a retailer, dealer, or vendor to obtain a refund of or to otherwise recover taxes, fees, or surcharges collected by the retailer, dealer, or vendor from the purchaser . . . It is an affirmative defense to the action when the retailer, dealer, or vendor remitted the amount collected from the purchaser to the appropriate taxing authority, less any discount or collection allowance authorized by law. Fla. Stat. § 213.756. (emphasis added). Plaintiff correctly submits that the statute is inapplicable where, as is the case here, the action is not against a retailer, dealer, or vendor, and the plaintiff does not seek a tax refund. Summary judgment is warranted as to this defense. However, the Court denies Plaintiff summary judgment as to voluntary payment doctrine defense. Under the common law voluntary payment doctrine money voluntarily paid under a claim of right, with full knowledge of the material facts, cannot be

13 The Court declines to grant summary judgment as to only some elements of claim. See e.g., Cluck-U Chicken, Inc. v. Cluck-U Corp., 358 F. Supp. 3d 1295, 1313 (M.D. Fla. 2017) (denying summary judgment as to FDUTPA claim without address and damages elements because plaintiff failed to offer evidence of deceptive conduct). recovered merely because the paying party, at the time of the payment, mistook the law as to his liability to , 34 F. Supp. 3d 1206, 1210 (M.D. Fla. 2014). that the person who made the payment had full knowledge of the relevant facts, including allegedly wrongful conduct Carrero v. LVNV Funding, LLC, No. 11-62439-CIV, 2014 WL 6433214, at *6 (S.D. Fla. Oct. 27, 2014). As Plaintiff has provided no evidence that the circumstances have changed since the Court affirmed Judge ether Plaintiff entered into the lease deal with knowledge of the factual circumstances[,] , the Court denies . IV. CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that: 1. is GRANTED as to

civil penalties being unavailable to Plaintiff under FDUTPA and DENIED as to its

2. GRANTED as to

DENIED as to both (1) his FDUTPA claim and as to under the voluntary payment doctrine.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of February, 2020.

_____ DARRIN P. GAYLES UNITED STATES DISTRICT JUDGE