STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL ONE BANK USA N.A.,

Plaintiff/Counter-Defendant/Appellee,

v

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

MYCAR INSURANCE GUIDE.COM,

Defendant,

and

SHERMETA ADAMS &VON ALLMEN PC,

Third-Party Defendant/Appellee,

and

WENDY S. REINHARDT, Personal Representative for the Estate of PAMELA PONTE, AMERICAN CENTURY INVESTMENT SECURITIES INC., KEITH REDLIN, THOMAS COLBY, and SPENCER PONTE,

Third-Party Defendants.

UNPUBLISHED
December 19, 2013

No. 307664
Washtenaw Circuit Court
LC No. 10-000722-CK

CAPITAL ONE BANK USA N.A.,

Plaintiff/Counter-Defendant/Appellee,

v

No. 308159
Washtenaw Circuit Court

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

SHERMETA ADAMS &VON ALLMEN PC,

Third-Party Defendant/Appellee,

and

WENDY S. REINHARDT, Personal Representative for the Estate of PAMELA PONTE, AMERICAN CENTURY INVESTMENT SERVICES INC., KEITH REDLIN, THOMAS COLBY and SPENCER PONTE,

Third-Party Defendants.

LC No. 11-000762-CK

CAPITAL ONE BANK USA N.A.,

Plaintiff/Counter-Defendant/Appellee,

v

No. 308160
Washtenaw Circuit Court
LC No. 11-000763-CK

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

SHERMETA ADAMS &VON ALLMEN PC,

Third-Party Defendant/Appellee,

and

WENDY S. REINHARDT, Personal Representative for the Estate of PAMELA PONTE, CONSTANCE L. JONES, and MARTIN E. BLANK,

Third-Party Defendants.

CAPITAL ONE BANK USA N.A.,

Plaintiff/Counter-Defendant/Appellee,

v

No. 308161
Washtenaw Circuit Court
LC No. 11-000998-CK

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

SHERMETA ADAMS &VON ALLMEN PC,

Third-Party Defendant/Appellee,

and

WENDY S. REINHARDT, Personal Representative for the Estate of PAMELA PONTE, AMERICAN CENTURY INVESTMENT SERVICES INC., KEITH REDLIN, THOMAS COLBY, and SPENCER PONTE,

Third-Party Defendants.

CITIBANK SOUTH DAKOTA N.A.,

Plaintiff/Counter-Defendant/Appellee,

v

No. 308163
Washtenaw Circuit Court
LC No. 11-000999-CK

ROBERT F. PONTE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

SHERMETA ADAMS &VON ALLMEN PC,

Third-Party Defendant/Appellee,

and

WENDY S. REINHARDT, Personal Representative of the Estate of PAMELA PONTE, AMERICAN CENTURY INVESTMENT SERVICES INC., KEITH REDLIN, THOMAS COLBY, and SPENCER PONTE,

Third-Party Defendants.

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In these consolidated cases, Robert F. Ponte appeals as of right the trial court's grant of summary disposition in favor of plaintiffs/third-party defendants Capital One Bank USA N.A. and Citibank South Dakota N.A. on their complaints against him and on his counter-complaints against them and dismissal of his claims in their entirety, as well as the trial court's grant of summary disposition in favor of third-party defendant Shermeta Adams & Von Allmen, P.C. with respect to Ponte's third-party complaints against it. We affirm.

These five consolidated cases all concern unpaid credit card debt by Robert Ponte. Capital One Bank USA N.A. ("Capital One") initiated four actions against Ponte with respect to four different credit cards it had issued to him and Citibank South Dakota N.A. ("Citibank") initiated the fifth action with respect to one credit card it had issued to Ponte. In each case, Ponte filed a counter-complaint alleging that Capital One and Citibank had violated the Fair Debt Collection Practices Act, the Michigan Collection Practices Act, the Michigan Consumer Protection Act and the Truth in Lending Act. Ponte additionally filed third party complaints against, among others, Shermeta, Adams & Von Allmen, P.C., the debt collector for Capital One and Citibank, alleging that it violated the same acts. Upon Shermeta, Adams & Von Allmen, P.C.'s ("Shermeta") motion, all five cases were consolidated in the trial court.

The trial court granted summary disposition in favor of plaintiffs Citibank and Capital One as to their claims against Ponte. The trial court also dismissed all counter-claims brought by Ponte and his third-party claims against Shermeta. Amended judgments were ultimately entered on November 23, 2011, in favor of plaintiffs and against Ponte. These appeals followed.

This Court reviews de novo the trial court's decision to grant summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's claim, based on the pleadings alone, to determine whether the plaintiff has set forth a claim on which relief may be granted. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206; 828 NW2d 459 (2012). If no factual development could justify the plaintiff's claim, summary disposition under subrule (C)(8) is appropriate. *Id.* In reviewing a motion under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence introduced by the parties to determine whether no genuine issue of material fact exists and the

moving party is entitled to judgment as a matter of law. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 119–120; 597 NW2d 817 (1999). The evidence submitted must be considered in the light most favorable to the non-moving party. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).

On appeal, Ponte first contends that the trial court erred in finding that he failed to state claims of violation of the Michigan Collection Practices Act, the Michigan Consumer Protection Act, and the Fair Debt Collection Practices Act in his counter and third-party complaints and thus erred in granting summary disposition in favor of Capital One, Citibank, and Shermeta. We shall address each alleged violation in turn.

I. Michigan Collection Practices Act

Two acts in Michigan govern collection practices. MCL 339.901 *et seq.* and MCL 445.251 *et seq.* Both are referred to as the Michigan Collection Practices Act, together and individually. Both acts contain nearly identical sections listing prohibited acts; however, Ponte has alleged violations of prohibited acts listed only in MCL 445.252. In his complaints, Ponte alleged that Capital One, Citibank, and Shermeta were collection agencies, creditors, or principals, within the meaning of MCL 445.251(b) and (e) and that they, in attempting to collect payment on the alleged debt engaged in unfair and deceptive acts methods or practices, to wit:

> a. falsely reporting or threatening to report to various credit reporting agencies that Ponte continued to be liable on the alleged debt in the amounts claimed in violation of MCL 445.252(f)
>
> b. misrepresenting the legal status of the debt in violation of MCL 445.252(f)(i) and (iii);
>
> c. making inaccurate, misleading, untrue or deceptive statements or claims in communication to collect a debt in violation of MCL 445.252(e)
>
> d. employing persons required to be licensed under MCL 339.901 to collect a debt who were not, in fact licensed in violation of MCL 445.252(s)
>
> e. failing to implement procedures designed to prevent violations of MCL 445.252 by its employees in violation of MCL 445.252(q)

Assuming that MCL 445.252 *et seq.* applies to Capital One and Citibank in this case, Ponte made no specific factual allegation in his complaint, or at oral argument, that they engaged in any conduct in violation of the Act. Ponte acknowledged at oral argument that, in the banks' complaints against him ". . . the banks have stated amounts that they claim are due, and I have supplied no contesting affidavit, no contesting facts." Ponte further stated ". . . in my brief responding to this motion regarding the responsibilities of the banks here, which is up in front of the court, my complaint has to do with their collection efforts." Yet, it is also acknowledged by all that the banks hired Shermeta as their collection agency and Ponte has not alleged at any time that anyone from the banks had any contact with him. All of the collection efforts complained of correspond to the actions of Shermeta. Ponte provided no indication that either of the banks "falsely report[ed] or threaten[ed] to report to various credit reporting agencies that Ponte

continued to be liable on the alleged debt in the amounts claimed," "misrepresent[ed] the legal status of the debt," or "ma[de] inaccurate, misleading, untrue or deceptive statements or claims in communication to collect a debt." While he has offered affirmative defenses that he claims should excuse his responsibility to pay, Ponte did not otherwise deny his liability for the debts alleged and has not specified any particular statement made by any bank representative that would fall under any of the three allegations above.

Ponte has also failed to support the allegation in paragraph d., that either Capital One or Citibank "employ[ed] persons required to be licensed under MCL 339.901 to collect a debt who were not, in fact licensed in violation of MCL 445.252(s)." Again, in reply to the motions for summary disposition or at oral argument, Ponte provided no specificity or substantiation for this allegation. As to paragraph e. "failing to implement procedures designed to prevent violations of MCL 445.252 by its employees in violation of MCL 445.252(q)," Ponte did not specify what procedure the banks should have implemented, what employee of the banks violated any section of the Act, and which sections of the Act were violated by a bank employee. Summary disposition was thus appropriate in the banks' favor pursuant to MCR 2.116(C)(8).

Ponte presented the exact same allegations as violations of the Michigan Collections Practices Act concerning Shermeta. However, Ponte relied almost exclusively on bare allegations and provided no documentary evidence to support his allegations. He provided no documentary support to establish that Shermeta falsely reported or threatened to report to various credit reporting agencies that Ponte continued to be liable on the alleged debt in the amounts claimed in violation of MCL 445.252(f), misrepresented the legal status of the debt in violation of MCL 445.252(f)(i) and (iii), or employed persons required to be licensed under MCL 339.901 to collect a debt who were not, in fact, licensed in violation of MCL 445.252(s).

The only allegations in Ponte's complaint pertaining to violations of the Michigan Collection Practices Act on Shermeta's part that have any potential merit whatsoever are his allegations that Shermeta made "inaccurate, misleading, untrue or deceptive statements or claims in communication to collect a debt in violation of MCL 445.252(e)" and that Shermeta failed "to implement procedures designed to prevent violations of MCL 445.252 by its employees in violation of MCL 445.252(q)." These allegations are essentially (1) that a Shermeta employee told him that if he wanted to see a proof of service in one of the cases, he could go and look in the court file, when, according to Ponte, none was actually located there, and (2) that a Shermeta employee refused to extend him time to answer a complaint. These actions, however, are not *directly* concerned with Shermeta acting as a debt collector and its collection of the debt owed by Ponte. They are communications concerned with Shermeta's actions as counsel for Capital One in Capital One's lawsuit against Ponte for collection of the debt. And Ponte has provided no authority suggesting the actions are violative of the Act in any event.

Ponte also took issue with a process server employed by Shermeta yelling at his door that Ponte would not get away with this again (Ponte had been difficult to serve in all of the cases) and that the process server was reporting Ponte to the bar association (Ponte is an attorney). Ponte has provided no evidence that the process server is an employee of either Shermeta or either of the banks and, again, Ponte has not explained or established how the statements made by the process server were violative of the Act. Summary disposition was thus appropriate in

favor of Shermeta based upon MCR 2.116(C)(8) and (10) concerning the claim of a violation of the Michigan Collection Practices Act.

II. Michigan Consumer Protection Act

The Michigan Consumer Protection Act, MCL 445.901 et seq., is a remedial statute designed to "protect consumers in the purchase of goods and services" and it must be "liberally construed to achieve its intended goals." *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000), overruled on other grounds *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). To that end, it prohibits various methods, acts, and practices in trade or commerce and provides remedies for violations of the Act.

MCL 445.904 specifically exempts from the Act, however, a lengthy list of transactions including "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States," MCL 445.904(1)(a), and "an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by . . . [t]he banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105 . . . [or t]he savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804 . . . ." MCL 445.904(2)(a) and (c).

It is undisputed that the transactions giving rise to Ponte's claims were the purchase of consumer goods on credit issued by the banks and the banks' enforcement of the terms of the credit card agreements. The issuance of credit, including disclosures that must be made to consumers, is regulated by the Consumer Credit Protection Act, 15 USC 1601 *et seq*. The Consumer Credit Protection Act was specifically enacted because:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter 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 USC 1601

The chapter of the United State Code governing Consumer Credit Protection is administered by the Bureau of Consumer Financial Protection, 15 USC 1602(b), the Board of Governors of the Federal Reserve System, 15 USC 1602(c), and the Federal Trade Commission, 15 USC 1607(c), among others. Thus, the general transactions at issue in these cases are specifically authorized under laws administered by a regulatory board or officer, acting under statutory authority. Thus, the Michigan Consumer Protection Act does not apply to Capital One or Citibank and the trial court properly granted summary disposition in their favor on this claim pursuant to MCR 2.116(c)(8).

As to Shermeta, in his third-party complaints, Ponte alleged that Shermeta violated the Michigan Consumer Protection Act by causing the probability of confusion or of misunderstanding as to the legal rights, obligations or remedies of a party to a transaction in violation of MCL 445.903(1)(n); failing to provide promised benefits in violation of MCL 445.903(1)(c); violating state and federal statutes, and; failing to disclose or misrepresenting a material fact in violation of MCL 445.903(1)(s),(bb), and (cc). The specific acts complained of were (1) that one of Shermeta's agents directed him to the court for a proof of service in one of the cases when one had not been filed, (2) that one of Shermeta's agents would not allow him an extension of time on which to answer the complaint in one case, and (3) that the process server hired by Shermeta in one of the cases yelled through Ponte's door that he was not getting away with it and that the person was calling the bar association.

As indicated in *Zine v Chrysler Corp*, 236 Mich App 261, 280-281; 600 NW2d 384 (1999), the failure to disclose or the misrepresentation of a material fact in MCL 445.903(1)(cc) refers to the transaction itself, i.e., the business conducted between the parties to the transaction. "Because subsection 3(1)(cc) refers to the failure to reveal information material to the transaction, it can be reasonably understood only as referring to information withheld during the negotiations and up to the time the transaction . . . is complete. Information that was not included in a disclosure made *after* the 'transaction' . . . was completed would not be material to that transaction." *Id.* at 280-281. As a result, a failure of disclosure or misrepresentation of a material fact that occurs only after the transaction had been completed is not actionable under subsection 3(1)(cc). *Id*. All of the actions alleged by Ponte against Shermeta occurred well after the transactions between Ponte and the banks were completed. They are thus not actionable under MCL 445.903(1)(cc). MCL 445.903(1)(bb) contains the same limiting language—that the representation must be "material to the transaction." Thus the alleged actions are also not actionable under MCL 445.903(1)(bb).

Similarly, MCL 445.903(1)(s) lists, as a violation of the Consumer Protection Act, the failure to "reveal a material fact . . . ." As indicated in *Zine*, "a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer's decision to enter into the transaction." 236 Mich App at 283. As a result, if the omission complained about comes to light after the transaction is completed, it is not a material fact and thus not actionable under subsection 3(1)(s). *Id*. at 283. Ponte has thus also failed to state a claim under MCL 445.903(1)(s).

MCL 445.903(1)(n), on the other hand, does not contain the same limiting language. *Zine* points out that subsection 3(1)(n) refers only to causing a party to the transaction to misunderstand the party's legal rights, not to representations affecting the transaction itself. "Because representations made both before and after the transaction has been completed could cause a party to the transaction to misunderstand the party's legal rights, subsection 3(1)(n) can reasonably be understood to refer to acts that occur before *and after* the transaction has been concluded." *Id*. at 281. That being said, the specific acts complained of—whether a proof of service was filed with the court, whether an extension to answer would be granted, and the actions of the process server—would not cause Ponte to misunderstand his legal rights. Ponte is, after all, a practicing attorney. Had a proof of service not been filed with the court, Ponte understood the implications of the same. And, whether a proof of service had been filed or not had no bearing with respect to his rights concerning the credit card transactions at issue.

Whether a courtesy extension would be granted him and the actions of the process server also had no bearing whatsoever on his legal rights or his understanding of the same. Ponte has failed to demonstrate a violation of MCL 445.903(1)(n) such that summary disposition was appropriate under MCR 2.116(C)(8).

Concerning Ponte's remaining claims under the Michigan Consumer Protection Act, that Shermeta failed to provide promised benefits in violation of MCL 445.903(1)(c) and violated state and federal statutes, Ponte has not clarified how his specific allegations fit within these categories and we see no correlation. Summary disposition was thus appropriate in Shermeta's favor on Ponte's claims of violations of the Michigan Consumer Protection Act.

III. Fair Debt Collection Practices Act

With respect to the Fair Debt Collection Practices Act, Ponte acknowledged that he agreed to withdraw this claim against Capital One and Citibank. On appeal, then, Ponte claims only that the trial court erred in determining that he failed to state a justicable claim of a violation of this Act as to Shermeta.

The Fair Debt Collection Practices Act, found at 15 USC § 1692 et seq., (FDCPA) sets forth as its intended purpose, "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 USC § 1692(e). Shermeta does not deny that it is, in fact, a debt collector, as defined in the FDCPA and it is thus subject to the FDCPA.[1]

In his third-party complaint against Shermeta, Ponte alleged that Shermeta violated the FDCPA by: attempting to collect on a debt or portion thereof that is not owed, 15 USC 1692f(1); continuing to attempt to collect on a debt it knew or should have known was disputed, 15 USC 1692g(b); using unfair or unconscionable means to collect a debt, 15 USC 1692f(1) (only as to Capital One in docket no. 308161); requiring the debt to be disputed in writing, 15 USC 1692g(3) (only as to Capital One in docket no. 308161); falsely, deceptively or misleadingly representing the character, amount and legal status of the debt, 15 USC 1692e (2)(A); falsely representing or implying the consumer committed any crime or other conduct in order to disgrace him, 15 USC 1692e (7) (only as to Capital One in docket no. 308161); harass, oppress and abuse the consumer, 15 USC 1692d (only as to Capital One in docket no. 308161); falsely representing or implying the sale or transfer of debt subjected him to liability for payment of the amounts claimed, 15 USC 1692e (6)(A); reporting or threatening to report debt on his credit history when they knew or should've known it was in dispute, 15 USC 1692e (8); falsely representing or implying that the debt had been sold or transferred to an innocent purchaser for

[1] "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 USC § 1692a(6).

value, 15 USC 1629e(12). These allegations are listed in precisely this list form in all cases, with no more specific details. The specific allegations against Shermeta are found in the general allegations sections of the complaints and pertain only to the service of the complaints on Ponte, the proof of service with respect to a complaint, and the process server's statements when serving one of the complaints.

Ponte provided no evidence and no specificity to support allegations that would fall within any of the categories of the FDCPA listed in his third-party complaint. On appeal, Ponte specifically claimed that his allegations against Shermeta, pertaining to its service upon him and its direction to him to seek a proof of service that was not filed in the trial court, falsely or deceptively represented the character, amount or legal status of the debt, in violation of 15 USC 1692e(2)(A). Assuming that Shermeta did, in fact, direct Ponte to the trial court to search for a not-yet filed proof of service, Ponte fails to explain how this misrepresented the legal status of his debt. The legal status of the debt was that it was unpaid, (Ponte at no time denied incurring the debt or failing to pay it) and that a lawsuit had been filed against Ponte to attempt to collect on the same. Whether a proof of service could yet be found with the trial court has no bearing on these issues. The fact of the matter is that Ponte did receive the complaint and did answer it. If, as Ponte claimed, he was forced to race to answer the complaint because he was unsure how much time he had to file an answer to avoid a potential default, he could—and did—file an amended answer to correct any deficiencies he felt may have been present by virtue of his rushed answer.

The only other violations of the FDCPA Ponte raises on appeal are Shermeta's hiring of Plunkett Cooney as its counsel and Shermeta's removal of four of the cases to federal court. Ponte contends that Plunkett Cooney had represented him at one point in time in another matter and that Shermeta's hiring of that law firm amounted to oppression under 15 USC 1692d. Ponte has provided no law in support of this contention aside from the Michigan Rules of Professional Conduct. Ponte has not specified what information Plunkett Cooney used or would use against him or would reveal against him, or even what type of matter Plunkett Cooney formerly represented him in. This matter is a lawsuit concerning an attempt to collect a credit card debt that Ponte admits he incurred, and Ponte has not suggested that Plunkett Cooney has or would reveal information relating to their prior representation of him to Ponte's disadvantage. Having failed to adequately specify or support an allegation of oppression stemming from the hiring of Plunkett Cooney as a violation of the FDCPA, Ponte has waived review of this issue because a party "may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000).

MCR 2.116(G)(4) specifically precludes Ponte, as the non-moving party, from simply relying on the allegations set forth in his complaint to oppose Shermeta's properly supported motion for summary disposition. MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must by affidavits or as otherwise provided in this rule, set forth

> specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Ponte having failed to set forth specific facts for trial on this issue, summary disposition was appropriately granted in favor of Shermeta.

IV. Truth in Lending Act

Ponte next asserts that he sufficiently alleged that Capital One violated the Truth in Lending Act such that summary disposition in favor of Capital One on Ponte's claim against it was inappropriate. We disagree.

The stated purpose of Truth in Lending Act, 15 USC 1601 *et seq*., ("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." To that end, the Act sets forth rules and regulations that must be followed by creditors concerning matters of disclosures and disputes over billings. For example, 15 USC 1632(a) requires that "[t]he terms 'annual percentage rate' and 'finance charge' shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor."

In all of his counter-complaints, Ponte alleged that Capital One violated the TILA by failing to provide accurate and clear and conspicuous disclosures concerning rate change information and late fees and failing to properly or accurately disclose the annual percentage rate (APR) and the terms and conditions under which Ponte was obligated. On appeal, however, Ponte only contends that on two of his accounts, (those addressed in docket no.'s 308159 and 307664) despite his prompt and timely payments, Capital One doubled his APR and then failed to respond in writing to his written protests in violation of 15 USC 1666(a)(1)(A).

15 USC 1666(a) provides that if a creditor, within sixty days of having sent a credit statement to an obligor, receives a written notice from the obligor wherein the obligor indicates the belief that the statement contains a billing error, the creditor must, within thirty days, send written acknowledgment of receipt of the notice and either

> **(i)** make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or
>
> **(ii)** send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to

> the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.
>
> After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error. [15 USC 1666(a)(3)(B)]

For the purpose of the above section, a "billing error" consists of any of the following:

> **(1)** A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.
>
> **(2)** A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.
>
> **(3)** A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.
>
> **(4)** The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.
>
> **(5)** A computation error or similar error of an accounting nature of the creditor on a statement.
>
> **(6)** Failure to transmit the statement required under section 1637(b) of this title to the last address of the obligor which has been disclosed to the creditor, unless that address was furnished less than twenty days before the end of the billing cycle for which the statement is required.
>
> **(7)** Any other error described in regulations of the Bureau.[15 USC 1666(b)]

Assuming, without deciding, that Ponte's claim of a change of interest rate without his permission could be construed as a "billing error" under the definition set forth in the TILA, summary disposition would nonetheless be appropriate in Capital One's favor on this claim. In docket no. 308159 (concerning the account ending in 5741) the exhibits establish that Ponte had a variable interest, as the rate applicable to purchases varied from month to month. For example, the interest rate was 10.91% in July 2006, 11.25% in August 2006, and 6.27% in February 2009. Ponte's May 2009 bill shows an interest rate of 16.9% APR, at which point he stopped paying the bill. Thus, it is questionable whether, at any time, Capital One arbitrarily "doubled" his interest rate as Ponte claimed. In any event, on June 8, 2009, Ponte sent a letter to Capital One regarding this account protesting the new interest rate, indicating that he gave no permission to

change it to that and was not given an opportunity to refuse the rate. On June 17, 2009, Capital One responded to Ponte that the deadline for declining the changes to his account was 8:00 p.m. on April 17, 2009, and that since they did not receive his request prior to that date, the terms of his account would change as explained in the written notification he had received regarding the account.

In docket no. 307664 (concerning the account ending in 7651) the documentation provided begins with a July 2004 bill showing a balance of $889.53 and no interest due on the account for that month or for many months after. When interest did begin being charged, it, too, varied a monthly basis throughout the years from 9.1% and reaching as high as 12.59% before reaching 17.9% on his May-June 2009 bill. On June 12, 2009, Ponte sent a letter to Capital One regarding the account indicating that he had not given permission for his APR to change to 17.9% and was not given the opportunity to refuse the rate. Capital One responded to the letter on June 25, 2009, stating, "[u]nfortunately, changes in the interest-rate environment or other business circumstances may require us to increase rates, even for fixed rates accounts in good standing."

As indicated above, Capital One provided documentary evidence establishing that it did respond to Ponte's written protests regarding the changes in his interest rates, explaining why his interest rates changed. And, after doing so, Capital One had no further obligation under 15 USC 1666(a) if Ponte continued to make substantially the same allegation with respect to the increased interest rate. See 15 USC 1666(a)(3)(B). As a result, Capital One was entitled to summary disposition in its favor on Ponte's claim of violations of the TILA.

V. Affirmative Defenses

Ponte next claims that he stated valid defenses of impossibility or impracticability of performance such that summary disposition in favor of Capital One and Citibank on their complaints against him should have been denied. We disagree.

"When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). If the defenses are "'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery,'" then summary disposition under this rule is proper. *Lepp v Cheboygan Area Sch*, 190 Mich App 726, 730; 476 NW2d 506 (1991), quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990).

The doctrine of impossibility may extinguish a party's liability under a contract if performance of the party's promise becomes objectively impossible. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). To determine the application of the defense of impossibility, one must examine "'whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract."' *Bissell v L W Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967), quoting 84 ALR2d 12, § 9, p 51. The doctrine of impossibility is based on the facts of each case, and the circumstances excuse performance only

to the extent to which performance is impossible. *Id*. at 286. Absolute impossibility is not required; however, "there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts*, 275 Mich App at 74 (internal quotation marks and citations omitted). While a supervening event's lack of foreseeability may produce an impossibility sufficient to extinguish liability, *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 110; 404 NW2d 711 (1987), under Michigan law "[s]ubsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations.]" *Chase v Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928). The burden rests on a defendant to establish a contractual defense such as impossibility or impracticability. See *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005)(indicating that to avoid enforcement of a contract, a party has to establish a traditional contractual defense).

Ponte contends that his judgment of divorce, which assigned him all of the marital debt including the credit card debt at issue, was precisely the type of unforeseeable extreme and unreasonable expense that rendered his performance of his contractual duties under the credit card agreements impracticable, if not impossible. However, Ponte appealed his judgment of divorce to this Court, and a panel of this Court ultimately found the assignment of all marital debt to Ponte inequitable and therefore vacated that portion of the judgment and remanded to the trial court for entry of an amended judgment of divorce assigning 50% of the marital debt to each party, minus any credit card debt incurred for the payment of each party's attorney fees. *Ponte v Ponte*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 274667).

Notably, in that opinion, this Court noted that the trial court's determination of marital real estate assets valued at $753,000, which were to be sold and the profits of which were to be evenly divided between the parties, was proper. Thus, Ponte stood to receive approximately $376,500 as his share once the real estate was sold. Ponte also had retirement accounts valued at approximately $192,715 (half of which was later distributed to his ex-wife). In that opinion, a panel of this Court further noted that Ponte and his wife's outstanding debt consisted primarily of credit card debt and totaled approximately $150,000.00. Though the trial court initially erroneously assigned to total of this debt to Ponte, this Court found no error in the trial court's determination that the parties previously lived on Ponte's income as an attorney and his manipulation of credit cards. It appears that Ponte's ex-wife was not employed and was quite ill. Thus, Ponte incurred the debt with no expectation of his ex-wife's assistance in paying the monies back either if they remained married or if they divorced. The circumstances remained exactly the same at the time he was expected to repay the debt as when he initially incurred the debt. The divorce judgment really played no part in, let alone rendered, his performance of his contractual duties under the credit card agreements impracticable or impossible. At most, the divorce marginally made his repayment of the debts more difficult, burdensome, or expensive, which did not operate to relieve him of his contractual obligations. See *Chase*, 241 Mich at 484.

The assertion of an affirmative defense must include the facts supporting the defense and the party asserting an affirmative defense has the burden of providing evidence to support the defense. MCR 2.111(F)(3); *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). Ponte established no unforeseen circumstance that seriously impacted his ability to repay the debt incurred, as is his

burden. And, he has provided no information concerning his current finances. The trial court thus did not err in granting summary disposition pursuant to MCR 2.116(C)(9) concerning Ponte's defenses of impossibility and impracticability.

Given the above, Ponte's argument that this Court should reassign the matter to a different judge need not be considered. Ponte did not move for disqualification of the trial court judge or raise a claim of judicial bias below, nor, on appeal, does he assert that reversal is required *because of* judicial bias. Rather, Ponte asserts that, on reversal, remand to a new judge is essential. Because this Court determines that reversal in unnecessary, remand to a new judge is likewise unnecessary.

Affirmed.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens