

IN THE COURT OF APPEALS OF IOWA

No. 1-556 / 11-0148
Filed October 5, 2011

GEMINI CAPITAL GROUP, L.L.C.,
Plaintiff-Appellee,

vs.

JANA FOLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano,
Judge.

A consumer appeals the district court's ruling that Gemini Capital Group's
notice of right to cure complied with provisions of the Iowa Consumer Credit
Code. **REVERSED.**

Theodore F. Sporer of Sporer & Flanagan, P.L.L.C., Des Moines, for
appellant.

Cherie L. Johnson and Curtis G. McCormick of Neiman, Stone &
McCormick, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ.

VOGEL, P.J.

Jana Foley appeals the district court's ruling ordering her to pay the balance of a credit card account acquired by Gemini Capital Group, L.L.C. from Chase Visa. Foley alleges Gemini failed to comply with provisions of the Iowa Consumer Credit Code by demanding the total, accelerated balance, and that Gemini's purported notice of right to cure did not comply with the mandatory content requirements of the Iowa Consumer Credit Code. We agree with Foley and reverse.

I. Background Facts and Proceedings

Gemini Capital Group, L.L.C. ("Gemini") is the holder of a Chase Visa credit card account ("the account"), acquired from Chase in a sale and assignment in April 2009. As of September 8, 2007—when Chase still owned the account—Foley owed \$5158.67 on the account.¹ Chase had not served Foley with a notice to cure, nor accelerated nor demanded payment in full of the account at that point.

On August 6, 2009, Gemini's counsel sent Foley a letter advising her that she had defaulted on her account obligations, the original creditor (Chase) had closed her account, and the default could be cured by paying the account balance of \$6890.55 before August 27, 2009. Foley did not cure the default and on September 24, 2009, Gemini commenced litigation, seeking a judgment against Foley of the account balance.

¹ This balance was comprised of a previous balance of \$4990.75, a late fee of \$39.00, and finance charges of \$128.92. The past due amount totaled \$1403 and the minimum payment amount was \$3080.67.

The matter went to trial on August 3, 2010. The district court found Gemini complied with Iowa Code chapter 537 and ordered judgment against Foley in the amount of \$5158.67, plus interest at the rate of 19.990% from September 30, 2007, and the costs of the action. On November 1, 2010, Foley moved to amend and enlarge the findings and/or substitute a judgment of dismissal; Gemini responded. The district court denied Foley's motion. Foley appeals.

II. Standard of Review

On appeal, Foley asserts the notice of cure sent by Gemini did not comply with the content requirements of the Iowa Consumer Credit Code. Our scope of review is for correction of errors at law. Iowa R. App. P. 6.907; *Midwest Recovery Servs. v. Wolfe*, 463 N.W.2d 73, 74 (Iowa 1990). The district court's findings are binding if supported by substantial evidence. *Id.* "In interpreting statutes, we give words their ordinary meaning within the context of the provision at issue and interpret that provision consistent with the entire statute of which it is part. *Capital One Bank (USA) v. Denboer*, 791 N.W.2d 264, 270 (Iowa Ct. App. 2010).

III. Analysis

A. Total Amount Due

Foley contends that by demanding her to pay the total, accelerated balance due on the account, without providing her the opportunity to pay only the past due payments as of the date of the notice in order to cure the default, the purported notice does not comply with Iowa Code sections 537.5109, 537.5110, and 537.5111 (2009). Gemini responds by stating that it did not accelerate the

balance under Iowa Code section 537.5110(4)(c) by demanding the full amount due plus accrued interest pursuant to the account contract. Gemini specifically asserts the amount of \$6890.55 was calculated by “simply continuing the same policy and practice as Chase, allowable by statutory law and by the parties’ contract.”

A notice of right to cure a default must contain “a statement of the *total payment, including an itemization of any delinquency or deferral charges*, or other performance necessary to cure the alleged default.” Iowa Code § 537.5111(1) (emphasis added). While the term “total payment” “is not defined in the Iowa Code, the terms “delinquency charges” and “deferral charges” are defined under Iowa Code sections 537.2502 and 537.2503, respectively. See Iowa Code § 537.2502(4) (stating delinquency charges, with respect to open-end credit, may be contracted for by the parties “on any payment not paid in full when due, as originally scheduled or as deferred, in an amount up to fifteen dollars”); Iowa Code § 537.2503 (defining “deferral charges”).

Gemini states that as of the date it mailed the letter to Foley—August 6, 2009—“the entire amount claimed in Gemini’s petition was due and owing.” In its letter to Foley, Gemini listed, “Account Balance: \$6890.55” but failed to provide an itemization of any delinquency or deferral charges as required under Iowa law. See Iowa Code § 537.5111(1). Under the terms of the Cardholder Agreement, Gemini would impose a “late payment fee/charge” for failure to make a payment by the minimum payment date.² It also had the discretion, as

² This late payment fee/charge qualifies as a delinquency charge as defined under Iowa Code section 537.2502(4).

permitted by law, to cancel the account, require immediate payment of the unpaid balance, or require an interest payment of 2% per month if the account was deemed six or more billing cycles past due. Gemini specifically stated on appeal “[t]he final and prior monthly statements of the account clearly indicate that Chase, pursuant to the terms of the parties’ contract, was attempting to collect 2% of the New Balance, the past due amount and the amount in excess of Foley’s credit line each month.”

Because Gemini was attempting to collect these “delinquency fees” as defined under the Iowa Code, application of these fees to the “total payment” amount asserted in a notice of cure required “an itemization” under Iowa Code section 537.5111(1).³ Because no itemization was included in the purported notice of cure, Gemini did not comply with the requirements of the Iowa Code, and the obligation of the consumer is therefore not enforceable. See Iowa Code § 537.5110(1).

B. Statutory Requirements

Foley also contends that even if the purported notice was sent in a timely manner, it is still “statutorily deficient because it lacks both the mandatory statutory language and specifically denies [Foley] the right to cure and reinstate her account.” Gemini maintains it complied with the requirements of Iowa Code section 537.5111.

³ With respect to the payment due, and unlike Iowa’s Consumer Credit Code, the Uniform Consumer Credit Code only requires the notice of right to cure to include “the amount of payment and date by which payment must be made to cure the default.” Unif. Consumer Credit Code § 5.110(2) (1974). Iowa’s itemization requirement has been present in section 537.5111 since enactment of the Iowa Consumer Credit Code in 1974. See S.F. 1405, 65th Gen. Assemb., Reg. Sess. (Iowa 1974).

1. Mandatory Language

Iowa Code section 537.5111 states:

1. The notice of right to cure shall be in writing and shall conspicuously state the name, address, and telephone number of the creditor to which payment is to be made, a brief identification of the credit transaction and of the consumer’s right to cure the default, a statement of the nature of the right to cure the default, a statement of the nature of the alleged default, a statement of the total payment, including an itemization of any delinquency or deferral charges, or other performance necessary to cure the alleged default, and the exact date by which the amount must be paid or performance tendered.

2. Except as provided in subsection 4, a notice in substantially the following form complies with this section:

.....
(name, address, and telephone number of creditor)
.....
(account number, if any)
.....
(brief identification of credit transaction)

You are now in default on this credit transaction. You have a right to correct this default until (date). If you do so, you may continue with the contract as though you did not default. Your default consists of

.....
(describe default alleged)

Correction of the default: Before , (date)

.....
(describe the acts necessary for cure)

If you do not correct your default by the date stated above, we may exercise rights against you under the law.

If you default again in the next year, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone promptly.

.....
(the creditor)

Foley argues the language in Iowa Code section 537.5111(2) is “mandatory.” The statute states that, “a notice in substantially the following form complies with this section.” Iowa Code § 537.5111(2). Our supreme court has

held that a bank's failure to include its telephone number, as required under Iowa Code section 537.5111, did not render its notice prejudicial to the consumer. See *Citizens First Nat'l Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980) (stressing, "[b]y our holding here we do not, however, condone the utilization by creditors of 'notices' which differ in any substantial degree from the format provided by section 537.5111(2)"). The court referenced an official comment to the Uniform Consumer Credit Code, which corresponds with section 537.5111 of the Iowa Code, stating, "This notice is calculated to give the consumer enough information to understand his predicament and to encourage him to take appropriate steps to alleviate it." *Id.* The court found that although the telephone number was missing,

Hoyt's own evidence shows that he was in regular contact with the bank both prior and subsequent to the letter of December 9, 1975; this amply demonstrate[d] that he knew how to reach the bank. In light of these circumstances, the absence of the bank's telephone number in the letter could not have prejudiced Hoyt.

Id.

Our review of the letter sent to Foley reveals (1) there is no "right to cure" language in the letter—it merely states "you *may* 'cure' the default by paying the account balance shown above or making acceptable arrangements to do so" (emphasis added) and (2) the statement of total payment does not include an itemization of any delinquency or deferral charges. See Iowa Code § 537.5111(1) (enumerating the requisite information for a notice of right to cure). While *Hoyt* indicates that our courts will examine the notice to determine whether, if in the absence of certain information, the consumer still has sufficient information to understand his predicament and take the steps necessary to

remedy it, we find the notice provided by Gemini did not substantially comply with the statute. *Id.*

Because two of the underlying purposes of the Iowa Consumer Credit Code are to “[f]urther consumer understanding of the terms of credit transactions” and “[p]rotect consumers against unfair practices by some suppliers, solicitors or collectors of consumer credit so that consumers may obtain credit at reasonable cost,” we find that disclosure of the total amount of payment, which includes an itemization of delinquency or deferral charges, is required in order to further the purposes of the Iowa Consumer Credit Code. Iowa Code § 537.1102(2)(c), (d). By providing consumers with an itemization of the fees assessed, consumers will have a greater understanding of how the “total amount” articulated in the notice was calculated, which in turn will protect consumers from unfair practices by collectors.

2. Right to Cure

Foley argues the notice does not comply with Iowa Code sections 537.5110 and 537.5111 because it “specifically denies Foley the right to cure and reinstate her account.” Gemini agrees Foley did not have a right to cure as contemplated by the legislature in Iowa Code section 537.5110(4)(c) because Foley’s rights could not be restored by virtue of the fact that the account had

been “closed, charged-off, sold, and assigned by Chase.”⁴ Iowa Code section 537.5110(3) states,

A consumer has a right to cure the default unless, in other than an insurance premium loan transaction, the creditor has given the consumer a proper notice of right to cure with respect to a prior default which occurred within three hundred sixty-five days of the present default, or the consumer has voluntarily surrendered possession of goods that are collateral and the creditor has accepted them in full satisfaction of any debt owing on the transaction in default.

While the Cardmember Agreement permitted Gemini, as the successor to the Agreement, to cancel Foley’s credit privileges and require the unpaid balance be immediately paid,⁵ Gemini was still required to comply with the requirements of Iowa Code section 537.5111(1). Iowa Code § 537.5110(1) (“Notwithstanding any term or agreement to the contrary, the obligation of a consumer in a consumer credit transaction is enforceable by a creditor only after compliance with this

⁴ It is important to note that Iowa Code section 537.5110(4)(c) is premised with the statement “[i]f the consumer has a right to cure a default,” which indicates the section only applies if the consumer first has a right to cure the default as determined under Iowa Code section 537.5110(3). (Emphasis added). Despite its purchasing of an account that was rendered uncollectible by virtue of Chase’s premature acceleration and closing of the account, Gemini cannot bypass the requirement under Iowa Code section 537.5110(2) which requires

if the consumer has a right to cure the default, [the creditor] shall give the consumer the notice of right to cure provided in section 537.5111 before commencing any legal action in any court on an obligation of the consumer and before repossessing collateral.

Therefore, Gemini as successor to Chase cannot rely upon Chase’s action of closing and accelerating the account balance to excuse its own failure to comply with the provisions of the Iowa Consumer Credit Code.

⁵ The “Cardmember Agreement” between Foley and Gemini—as a successor of Chase—states:

21. Default and Collection Costs. If you do not make a payment when it is due, or if you do not follow the terms of this Agreement, we may, as permitted by law: 1) cancel your credit privileges and require you to pay the unpaid balance immediately; 2) require you to pay interest at the rate of two percent (2%) a month on the unpaid balance when we deem your Account to be six or more billing cycles past due; and 3) require you to pay reasonable attorney’s fees and any court costs in the collection of any amounts you owe under this Agreement.

section.”). In addition, there was no evidence presented that proper notice had been given to Foley in the year preceding the August 2009 letter. Therefore, a right to cure still existed under Iowa Code section 537.5110(3) and Gemini was required to comply with the terms of Iowa Consumer Credit Code, including section 537.5110(4)(c), which permits cure of default by

tendering either the amount of all unpaid installments due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges, or the amount stated in the notice of right to cure, whichever is less, or by tendering any performance necessary to cure any default other than nonpayment of amounts due, which is described in the notice of right to cure.

Recognizing that similar to Iowa Code section 537.5111(1), section 537.5110(4)(c) contemplates one manner of cure being the addition of delinquency and deferral charges to the unaccelerated balance, we find it even more appropriate for an itemization of these delinquency and deferral charges to be included in the notice of right to cure.

Having determined that Foley did in fact have a right to cure after default and that Gemini failed to meet the requirements of Iowa Code sections 537.5110 and 537.5111, we reverse.

REVERSED.