

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:
MELISSA KAY RUSSELL

CASE NO. 09-54114

DEBTOR

CHAPTER 13

MELISSA KAY RUSSELL

PLAINTIFF

v.

ADVERSARY NO. 10-5043

VALUED SERVICES OF KENTUCKY, LLC,
DBA FIRST AMERICAN CASH ADVANCE

DEFENDANT

**VALUED SERVICES OF KENTUCKY, LLC'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant, Valued Services of Kentucky, LLC, d/b/a First American Cash Advance ("Valued Services"), by counsel, submits the following Proposed Statement of Facts To Which There Is No Genuine Issue and Conclusions of Law:

STATEMENT OF FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. On December 29, 2009, Debtor, Melissa K. Russell ("Debtor"), filed her Chapter 13 bankruptcy petition in the United States Bankruptcy Court, Eastern District of Kentucky, Lexington Division.

2. On January 19, 2010, Valued Services filed an unsecured claim in the amount of \$499.97 in Debtor's bankruptcy case for services performed.

3. On May 4, 2010, the Debtor filed this adversary proceeding objecting to Valued Services' proof of claim and seeking damages in excess of \$1,499.99 on the grounds that Valued Services entered into certain deferred deposit transactions with the Debtor that allegedly violated KRS 286.9-100(15). The Debtor also contends that the service fee charged in connection with

the deferred transactions constitute usurious interest in violation of KRS 360.010 and KRS 360.020.

4. Specifically, the Debtor claims that thirteen deferred deposit transactions between her and Valued Services, violate KRS 286.9-100(15), which provides that “[a] licensee or its affiliates shall not for a fee renew, rollover, or otherwise consolidate a deferred deposit transaction for a customer.” The Debtor also alleges that the service fee paid by her in connection with the deferred deposit transactions (other than the last) violated the Commonwealth’s usury laws.

5. Valued Services and the Debtor have filed cross motions for summary judgment. The issues have been fully briefed, and the Court has heard oral arguments on the motions.

6. Valued Services is a Georgia limited liability company and a licensee of the Kentucky Office of Financial Institutions. [Affidavit of Cindy Hannah at ¶ 1; KRS 286.9-020.] It is regulated by the Office pursuant to subtitle 9 of Chapter 286 of the Kentucky Revised Statutes. [KRS 286.9-100; KRS 286.9-110.] Valued Services offers its customers a number of financial services, one of which is known in Kentucky as a “deferred deposit transaction.” [Affidavit of Cindy Hannah at ¶ 5; KRS 286.9-010(4).] The deferred deposit transaction is a small, short-term cash advance.

7. The Office of Financial Institutions is the regulatory and administrative body given authority to promulgate regulations, investigate complaints, and audit Valued Services. [KRS 286.9-070-090; KRS 286.9-104-110.] The Office of Financial Institutions has regularly audited Valued Services and has never cited Valued Services for a “renewal” or “rollover” violation of KRS 286.9-100(15). [Affidavit of Cindy Hannah at ¶ 6.]

8. The Debtor was a customer of Valued Services throughout 2009. [Affidavit of Cindy Hannah at ¶¶ 7-13; Exhibit A.]

9. On February 2, 2009, the Debtor executed and delivered a Customer Agreement to Valued Services (the “February Customer Agreement”). [Affidavit of Cindy Hannah at ¶ 7.] Under the terms of the February Customer Agreement, Valued Services provided the Debtor with \$425 in immediate cash. [*Id.*] In return, the Debtor issued Valued Services a personal check in the amount of \$499.97. Valued Services agreed to hold the check for 30 days and not cash it if on or before March 2, 2009 the principal amount of the deferred deposit, plus the service fee of \$74.97, was paid in full. [*Id.*] On February 28, 2009, the Debtor paid Valued Services \$499.97 in cash and Valued Services subsequently returned the Debtor’s personal check. [Affidavit of Cindy Hannah at ¶ 8.]

10. On February, 28, 2009, the Debtor executed and delivered to Valued Services a new Customer Agreement for a new deferred deposit transaction in the amount of \$425 with the same terms and conditions as the prior transaction. [Affidavit of Cindy Hannah at ¶ 9.]

11. Between February 2, 2009 and December 4, 2009, the Debtor executed 13 Customer Agreements with Valued Services in the amount of \$425.00. [Affidavit of Cindy Hannah at ¶ 11; Exhibit A.] On each occasion, except for the last when she defaulted, the Debtor paid the amount of the deferred deposit and the service fee in full by cash prior to entering into another transaction with Valued Services. [*Id.*] Only then did the Debtor enter into a new Customer Agreement. [*Id.*] With each successive transaction, the debtor provided a new post-dated check and Valued Services paid the Debtor immediate cash. [*Id.*]

12. The thirteenth and last transaction between the Debtor and Valued Services occurred on December 4, 2009. Valued Services agreed to hold the Debtor’s check for 30 days

and not cash it if on or before January 4, 2010 the principal amount of the deferred deposit, plus the service fee of \$74.97, was paid in full. [Affidavit of Cindy Hannah at ¶ 9.] The Debtor failed to satisfy this transaction. *Id.*

CONCLUSIONS OF LAW

Claimed Violation of KRS 286.9-100(15)

1. A deferred deposit transaction is defined under Kentucky law as “for consideration, accepting a check and holding the check for a period of time prior to deposit or presentment in accordance to an agreement with or any representation made to the maker of the check, whether express or implied.” KRS 286.9-010(4).

2. A business that engages in deferred deposit transactions must obtain a license. KRS 286.9-020. The Office of Financial Institutions is given authority to promulgate regulations, investigate complaints, and audit businesses in this industry. KRS 286.9-070. Businesses are required to prepare annual reports and fully comply with all recordkeeping requirements. KRS 286.9-074.

3. A licensee may enter into a deferred deposit transaction with a customer with a face value up to \$500. KRS 286.9-100(10).

4. KRS 286.9-100(1) provides that “[a]ny fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest....”

5. KRS 286.9-100(15) provides that “[a] licensee or its affiliate shall not for a fee renew, rollover, or otherwise consolidate a deferred deposit transaction for a customer.” The phrase, “or otherwise consolidate a deferred deposit transaction for a customer” immediately following the terms “renew” and “rollover” indicates that the statute prohibits transactions where

the proceeds of a second transaction are used to pay off the earlier transaction. That did not occur here.

6. Valued Services has never been cited for a violation of KRS 286.9-100 in connection with successive transactions. The absence of a citation for violation of the statute suggests that the Office of Financial Institutions does not construe KRS 286.9-100 to prohibit successive deferred deposit transactions such as those the Debtor engaged in with Valued Services. Although not determinative, such evidence is a persuasive indication that Valued Services did not violate the statute in its dealings with the Debtor.

7. The terms “renew” and “rollover” are not defined under KRS 286.9-100. Nevertheless, giving the terms their ordinary meanings as required by Kentucky law, Valued Services did not renew or rollover its transactions with the Debtor. Valued Services did not extend the period of a prior transaction for the payment of a fee; nor did the Debtor use the proceeds of the subsequent transaction to pay off the prior transaction. Rather, each prior transaction was closed out by the Debtor’s payment *in cash* of the full amount due under the prior deferred deposit agreement. Only then did Valued Services enter into a new deferred deposit transaction with Debtor. Once the prior transaction was closed out, Debtor was free to enter into a new agreement with a different financial institution or not enter into a new transaction at all. By no stretch of the imagination can such a transaction be deemed a renewal or rollover.

8. In a prior instructive decision, *Miller v. HLT Check Exchange*, 215 BR 970 (E.D. Ky. 1997), this Court noted that a “renewal” charge had been paid when the plaintiff was “unable to make good on the check at the end of the original two week period.” *Id.* at 972; *See also McKensie Check Advance v. Betts*, 928 So. 2d 1204 (Fla. 2006) *citing* Fla Stat. 560.402(8)

("rollover" defined as "the termination or extension of an existing deferred presentment agreement by the payment of any additional fee and the continued holding of the check, or the substitution of a new check drawn by the drawer pursuant to a new deferred presentment agreement.") Both decisions underscore the fact that a renewal or rollover does not occur where the prior transaction is closed out, as occurred here, before the subsequent transaction.

9. Contrary to Debtor's argument, KRS 286.9-100 does not prohibit successive lending by a licensee. Other than limiting customers from having more than \$500 outstanding at one time, the statute does not address successive transactions. If the General Assembly had intended to prohibit successive transactions, it would have expressly so provided, or required a moratorium period between the termination of a prior transaction and the initiation of a successive transaction. It did not. Debtor's construction of the statute provides no principled or readily ascertainable basis for a financial institution to determine when any successive transaction would constitute a prohibited renewal or rollover.

10. Under the well-established rule of statutory construction, *expressio unius est exclusio alterius*, it is presumed that the Kentucky General Assembly intended to omit a prohibition against successive transactions when it clearly could have included one but did not. *See, e.g., Burgin v. Forbes*, 169 S.W. 2d 321, 325 (Ky. 1943) ("the construction of the statute... is governed by the legal maxim... *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another."). This Court will not construe the statute to prohibit successive transactions, as opposed to rollovers or renewals, when the General Assembly declined to do so.

11. Further, when the words of a statute "are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given

effect as written.” *White v. Check Holders, Inc.*, 996 S.W.2d 496, 497 (Ky. 1999). Valued Services’ construction of KRS 286.9-100(15) to permit successive lending where the prior transaction is closed out prior to the initiation of the subsequent transaction is consistent with the plain meaning of the legislative language.

12. KRS 286.9-100 does not prohibit the form of successive transactions that occurred between the Debtor and Valued Services. The successive Customer Agreements between the Debtor and Valued Services are valid under Kentucky law and did not violate KRS 286.9-100.

Claimed Violation of KRS 360.010

13. KRS 360.010 establishes the “legal rate of interest” for loans.

14. KRS 286.9-100(1) authorizes deferred deposit service businesses such as Valued Services to charge a fee for entering into a deferred deposit transaction. The statute also caps the amount of the fee that may be charged and requires that the fee be disclosed in writing. KRS 286.9-100(1). Finally, the statute expressly characterizes the fee as a “service fee and not interest.” *Id.*

15. Under the plain language of the statute, the payment of \$74.97 by the Debtor was a service fee and not interest. As a result, the KRS 360.010 and KRS 360.020 are inapplicable to the Debtor’s transactions with Valued Services.

16. KRS 286.9-100(1) is applicable to the amounts paid by Debtor without regard to whether the Debtor’s deferred deposit transactions with Valued Services violated KRS 286.9-100(15) (which they did not.)

17. Debtor’s transactions with Valued Services that are the subject of her claims did not violate KRS 360.010 or KRS 360.020.

18. The Debtor's Motion for Summary Judgment is DENIED. Although there is no genuine issue of material fact, Debtor is not entitled to judgment as a matter of law for the reasons set forth above.

19. There being no genuine issue of material fact, and Valued Services being entitled to judgment as matter of law, Valued Services' Motion for Summary Judgment is GRANTED and the Debtor's complaint is dismissed with prejudice.

Respectfully submitted,

/s/ Valorie D. Smith

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COUNSEL FOR VALUED SERVICES OF
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CASH ADVANCE

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served the 26th day of August, 2010, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures upon all parties in the electronic filing system in the case, by electronic mail and/or first class mail.

Copies to:

Valorie D. Smith

Addison Parker

Katherine Sanford

Elizabeth Lee Thompson

/s/ Valorie D. Smith

Valorie D. Smith