

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	
)	
OLA IVEY)	Chapter 13 Case
)	Number <u>95-10392</u>
)	
Debtor)	
)	
_____)	
OLA IVEY)	FILED
)	at 10 O'clock & 35 min. A.M.
Plaintiff)	Date: 1-31-97
)	
vs.)	Adversary Proceeding
)	Number <u>95-01094A</u>
HEILIG-MEYERS FURNITURE CO.)	
)	
Defendant)	
)	

ORDER

Ola Ivey (hereinafter "Debtor") brings this adversary proceeding against Heilig-Meyers Furniture Company (hereinafter "Heilig-Meyers") alleging that Heilig-Meyers violated the Georgia Retail Installment and Home Solicitation Sales Act (O.C.G.A. §10-1-1 et. seq.) (hereinafter "Sales Act") the Georgia Unfair and Deceptive Practices Act (O.C.G.A. §10-1-370 et. seq.) (hereinafter "Deceptive Practices Act"), and the Georgia Unfair Business Practices Act (O.C.G.A. §10-1-390 et. seq.) (hereinafter "Business Practices Act"). Heilig-Meyers moves for Summary Judgment, alleging that no

issues of fact remain and that it is entitled to summary judgment as a matter of law. The motion is denied.

The Debtor's original complaint asserted a claim under the Federal Truth in Lending Act (15 U.S.C. §1601 et. seq.) (hereinafter "TILA") and a violation of the Sales Act. Heilig-Meyers moved for dismissal of the complaint or in the alternative for summary judgment. I granted this motion in part, affirming Heilig-Meyers' disclosure of the insurance premium in the sales contract, but leaving intact the Debtor's claim that Heilig-Meyers did not purchase valid non-filing insurance and that the transaction violated the Sales Act. I also granted the Debtor leave to amend her complaint to allege a violation of the Deceptive Practices Act and the Business Practices Act. Heilig-Meyers presents three arguments for entering judgment against Debtor's remaining claims; 1) that Heilig-Meyers actually used the \$5.00 charge to pay premiums of a valid policy of non-filing insurance; 2) that the Sales Act affords no grounds for relief to the Debtor; and 3) that the Deceptive Practices Act and the Business Practices Act exempt Heilig-Meyers from liability.

Under Federal Rule of Civil Procedure 56 (applicable to bankruptcy cases under Federal Rule of Bankruptcy Procedure 7056), this Court will grant summary judgment only if "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. 56(c). The

moving party has the burden of establishing its right of summary judgment. See, Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

Heilig-Meyers submits with its motion witness affidavits averring that Heilig-Meyers paid to Voyager Insurance Company the non-filing insurance premium charged to the Debtor. The witnesses further aver that the premium purchased genuine non-filing insurance and did not create a bad debt pool as alleged by the Debtor. In her response brief, the Debtor submits the affidavit of Daniel E. Alton which contradicts Heilig-Meyers' witness averments. In its reply brief, Heilig-Meyers argues that the affidavit submitted by the Debtor is less credible than those affidavits submitted by Heilig-Meyers, and that Heilig-Meyers is therefore entitled to summary judgment. This argument ignores my order on Heilig-Meyer's previous motion which specified that whether or not Heilig-Meyers purchased the insurance constituted a question of fact not properly addressed in a motion for summary judgment. Ivey v. Heilig-Meyers Furniture Co. (In re Ivey), Ch. 13 Case No. 95-10392, Adv. No. 95-1094, slip op. at 4 (May 6, 1996). The conflicting affidavits raise material issues of fact which cannot be resolved on a motion for summary judgment. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255,

106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) (The court should not make credibility determinations, weigh the evidence or draw legitimate inferences from the facts in favor of the moving party when ruling upon a motion for summary judgment.)

The Debtor's Sales Act claim is based upon Heilig-Meyer's failure to provide the Debtor with a copy of the insurance contract allegedly purchased by Heilig-Meyers, as required by O.C.G.A. §10-1-3(g)¹. Heilig-Meyers argues that the Debtor was not the insured under the insurance contract, and the Act therefore does not require that Heilig-Meyers provide the Debtor a copy of the insurance contract. However, a plain reading of the statute does not mandate the narrow interpretation urged by Heilig-Meyers. Furthermore, this issue was conclusively decided in the Leverett decision, a case cited in Heilig-Meyers' own brief as binding authority upon this

¹O.C.G.A. §10-1-3(g) provides:

(g) The seller under any retail installment contract shall, within 30 days after execution of the contract, deliver or mail or cause to be delivered or mailed to the buyer at his aforesaid address any policy or policies of insurance the seller has agreed to purchase in connection therewith or in lieu thereof a certificate or certificates of such insurance. The amount, if any, included for insurance shall not exceed the applicable premiums chargeable in accordance with the rates filed with the Insurance Department; if any such insurance is canceled, unearned insurance premium refund received by the holder shall be credited to the final maturing installment of the contract except to the extent applied toward the payment for similar insurance protecting the interests of the seller and the holder or either of them. Nothing in this article shall impair or abrogate the right of a buyer to procure insurance from an agent and company of his own selection, as provided by the insurance laws of this state; and nothing contained in this article shall modify, alter, or repeal any of the insurance laws of this state.

court. Leverett v. Heilig Meyers, No. 194-158 (S.D. Ga., Aug. 20, 1995); Wright v. Transamerica Fin. Svc. (In Re Wright), 144 B.R. 943 (Bankr. S.D. Ga. 1992) (Under 28 U.S.C. §151, the bankruptcy court is bound by decisions of the district court of which the bankruptcy court is a unit.) In Leverett, the District Court of the Southern District of Georgia, Augusta Division, adopted the Magistrate Judge's Report and Recommendation in a motion to dismiss an identical claim, which report refused to dismiss the plaintiff's claim under O.C.G.A. §10-1-3(g) because the statute required Heilig-Meyers to provide to the plaintiff a copy of the insurance contract. Id. at 13. This interpretation of O.C.G.A. §10-1-3(g) is not, as Heilig-Meyers asserts, "absurd." This provision was enacted within the Sales Act which is designed to protect consumers from unfair and deceptive sales practices. The Georgia Legislature obviously intended for creditors such as Heilig-Meyers to provide the consumers with evidence that the required non-filing insurance premium was actually paid to an insurance carrier and was not, as the Debtor asserts in this case, simply retained by the creditor or paid into a bad debt pool.

Finally, Heilig-Meyers argues that the Debtor's Business Practices Act claim should be dismissed because Heilig-Meyers is exempt from liability under O.C.G.A. §10-1-396². Heilig-Meyers

²10-1-396 provides:
Nothing in this part shall apply to:

argues that because its non-filing arrangement complies with the TILA and its supporting regulations, it is exempt from liability under O.C.G.A. §10-1-396. However, this argument rests upon the factual assumption that Heilig-Meyers actually purchased valid non-filing insurance. As stated in my previous order and above in this order, this issue is one of fact not properly addressed in a motion for summary judgment³.

It is therefore ORDERED that Heilig-Meyers' Motion for Summary Judgment is hereby DENIED.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 31st day of January, 1997.

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- (1) Actions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States;
 - (2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station in the publication or dissemination of an advertisement of or for another person, when the publisher, owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, or did not have a direct financial interest in the sale or distribution of the advertised product or service.

³Heilig-Meyers also seeks to limit its liability under the Business Practices Act by demonstrating that it offered to return to the Debtor her insurance fee. However, issues of fact regarding the reasonableness of the tender in relation to the Debtor's damages remain. See, O.C.G.A. §10-1-399(b).