

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

KIRK FREEMAN,
Plaintiff,

vs.

KEY BANK USA, N. A.,
Defendant.

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CIVIL ACTION H-06-0898

ORDER AND RECOMMENDATION

Before the court are defendant Key Bank's¹ motion to dismiss and for a more definite statement (Dkt. 9), as well as plaintiff Kirk Freeman's motion for leave to amend his original complaint. (Dkt. 12).

Freeman's complaint alleges that the defendant has committed at least 68 violations of the Truth in Lending Act ("TILA") and the Fair Credit Billing Act ("FCBA"). Freeman also claims the defendant has not fulfilled obligations under 12 C.F.R. § 226.13 and 15 U.S.C. § 1666, *et seq.* Freeman seeks an award of statutory damages, costs, attorney fees, an order requiring the defendant to correct negative entries made to credit reporting businesses, reopening of the plaintiff's account and further relief as the court may deem just and proper. Defendant filed an answer containing a motion to dismiss, a motion for a more definite statement and a counterclaim.

Defendant avers the complaint does not state a claim upon which relief can be granted under Rule 12(b)(6) because the facts alleged do not amount to a violation of TILA or

¹ Defendant alleges its proper name to be Citibank USA, National Association. (Dkt. 9).

FCBA. Defendant also argues that neither statute provides for “statutory damages” in cases such as the one at hand.

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is viewed with disfavor. *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004) (citing *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)). The complaint must be liberally construed in favor of the plaintiff and all well-pleaded facts must be taken as true. *Id.* Hence, a claim can be dismissed only if the plaintiff is not entitled to relief under any set of facts or any possible theory of recovery that he could prove consistent with the allegations in his complaint. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 348 (5th Cir. 2002).

In making this determination, the court may not look beyond the pleadings, including any attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The court should “not strain to find inferences favorable to the plaintiff.” *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)). The plaintiff’s complaint must contain allegations of every material point necessary to sustain recovery. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Statements that merely create a suspicion that the plaintiff may have a right of action do not foreclose a motion to dismiss. *Id.* Furthermore, legal conclusions, conclusory allegations, and unwarranted deductions of fact do not suffice to prevent dismissal. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362 (5th Cir. 2003).

Plaintiff's original complaint (Dkt. 1) may fairly be described as terse, and almost fact-free. Paragraphs 2 and 3 of plaintiff's original complaint contain the only factual statements in the entire document; the remainder of the complaint consists of legal conclusions and unsubstantiated allegations of misconduct. Although the requirements of notice pleading are not onerous, conclusory allegations and unwarranted deductions of fact are not enough to survive a motion to dismiss. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992) (citing *Elliott v. Fofas*, 867 F.2d 877, 881 (5th Cir. 1989)). Conclusory allegations may not be substituted for specific facts. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

The bare facts alleged in the complaint are that the plaintiff opened a charge account with the defendant, that plaintiff gave notice of a billing error on April 12, 2005, and that defendant in some unspecified way violated the FCBA. Plaintiff further alleges 68 violations of TILA and FCBA, without offering further insight how these were exactly committed. Based on these pleadings, it cannot be said that plaintiff has satisfied even the liberal pleading requirements of the federal rules.

Consequently, it is recommended that defendant's motion to dismiss be GRANTED. Because it cannot be determined at this point whether plaintiff could rectify the deficiencies of his complaint by repleading, the court orders that plaintiff's motion for leave to amend be GRANTED, and that plaintiff be permitted to file such amended complaint within twenty

(20) days from the date of this order. Finally, defendant's motion for more definite statement is DENIED as moot.

The parties have ten days from service of this Order and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on August 9, 2006.



Stephen Wm Smith
United States Magistrate Judge