

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ARLANDUS HARVEY,)
)
 Plaintiff,)
)
 vs.) No. 03-2721-MLV
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendant.)

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

This action involves an insurance coverage and breach of contract dispute. Plaintiff Arlandus Harvey filed a complaint on September 23, 2003, against his automobile insurance carrier, defendant Allstate Insurance Company ("Allstate"), alleging common law fraud, breach of contract, violation of Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §§ 47-18-101, *et seq.* violation of 42 U.S.C. § 1981, and bad faith failure to pay in violation of Tennessee Code Annotated § 56-7-105. In the complaint, Harvey averred that Allstate refused to pay his insurance claim and canceled his insurance policy after receiving notice that Harvey's car was allegedly stolen.

Now before the court is the January 26, 2004 motion of Allstate pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment on Harvey's Tennessee

Consumer Protection Act and 42 U.S.C. § 1981 claims. The motion seeks partial summary judgment on three grounds. First, Allstate asserts that Harvey's claim for the alleged violation of the TCPA is procedurally barred by the one-year statute of limitations as set forth in Tennessee Code Annotated § 47-18-110. Second, Allstate claims that the TCPA claim is barred as a matter of substantive law by the five-year statute of repose also set forth in Tennessee Code Annotated § 47-18-110. As to the alleged violation of 42 U.S.C. § 1981 in Harvey's complaint, Allstate contends that the § 1981 claim is procedurally barred by the four-year statute of limitations set forth in 28 U.S.C. § 1658, as made applicable to § 1981 claims by *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 514 (6th Cir. 2003).

The motion was referred to the United States Magistrate Judge for report and recommendation. For the reasons that follow, it is recommended that the defendant's motion be granted in part and denied in part.

UNDISPUTED FACTS

The following facts are undisputed. The plaintiff, Arlandus Harvey, alleges that his vehicle was stolen on December 9, 1996, from a Wal-Mart parking lot in Collierville, Tennessee. (Def.'s Mem. of Law in Supp. of Mot. for Partial Summ. J. at 1.) Harvey's vehicle was later found on December 15, 1996, in burnt condition.

(*Id.*) Harvey notified his Allstate agent of the loss, and Allstate admittedly received notice of the claim. (*Id.* at 2.) On February 10, 1997, Allstate denied Harvey's claim on the basis that the loss was not accidental because it believed that no theft had occurred, that exclusions under the policy applied, and that Harvey breached the Sworn Proof of Loss. (*Id.*)

Harvey originally filed a lawsuit for denial of his claim by Allstate in the Circuit Court of Shelby County, Tennessee, on November 21, 1997. (Def.'s Statement of Undisputed Facts ¶ 1.) In his original state court complaint, Harvey alleged breach of contract and bad faith denial of his claim. Harvey did not allege violation of the TCPA or 42 U.S.C. § 1981, nor did he later amend his state court action to add those causes of action. (*Id.* at 1-2.) An order of non-suit was entered in Harvey's state court lawsuit on October 7, 2002. (*Id.* at 2.)

Harvey filed another complaint against Allstate in the United States District Court for the Western District of Tennessee on September 23, 2003. During the time period between his non-suit and the instigation of the federal action, Harvey and Allstate had no contact or communication, either directly or through counsel, regarding Harvey's claim or any other substantive matter. (*Id.*) In his federal lawsuit, Harvey has added additional causes of action for common law fraud, violation of the TCPA, and violation

of 42 U.S.C. § 1981 that were not alleged in the original state suit. (*Id.* at 3.)

ANALYSIS

Allstate contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law as to Harvey's claims for violation of the TCPA and 42 U.S.C. § 1981 because those claims are time barred by the pertinent statutes of limitations and statutes of repose for each claim. In response, Harvey asserts that its TCPA and 42 U.S.C. § 1981 claims are not barred because they relate back to the date of the original filing of the complaint on November 21, 1997 pursuant to Rule 15 of the Federal Rules of Civil Procedure as an amendment adding a cause of action arising out of the same transaction and occurrence.

A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith" if the pleadings, discovery materials, and affidavits on file "show that 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. P. 56(c). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, but only to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient

evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). All evidence, facts, and "any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 882 (6th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Furthermore, entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *Standard Fire Ins. Co.*, 972 S.W.2d at 5; see also (where the plaintiff has alleged a violation of the TCPA, federal courts).

B. Plaintiff's Tennessee Consumer Protection Act Claim

First, Allstate contends that the addition of Harvey's Tennessee Consumer Protection Act claim in the federal complaint is barred by the statute of limitations for that Act as found in Tennessee Code Annotated § 47-18-110. Where the plaintiff has alleged a violation of the TCPA, federal courts "must apply the procedural law, including statutes of limitations, of the forum

state. . ." *Mackey v. Judy's Foods, Inc.*, 867 F.2d 325, 328 (6th Cir. 1989). Section 47-18-110 provides in pertinent part that "[a]ny action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice" Tenn. Code Ann. § 47-18-110.

Allstate asserts that when this statute of limitations is applied to the case at hand, Harvey's TCPA claim is barred because he did not allege a violation of the TCPA in the complaint filed in state court on November 21, 1997, which was almost six years ago. Furthermore, Allstate indicates that the alleged theft of Harvey's vehicle occurred almost seven years ago and that the denial of Harvey's claim occurred on February 10, 1997. Allstate contends that even if the date of the filing of the state complaint is taken as the date from which to measure the running of the statute of limitations for the TCPA, the one year period would have expired on November 21, 1998. Consequently, Allstate argues that Harvey's claim for the alleged violation of the TCPA is barred.

While it is true that Harvey did not allege a violation of the TCPA in his state complaint filed almost six years ago, Harvey's claim for a violation of the TCPA is not barred by the applicable statute of limitations. In its analysis of the timeliness of Harvey's TCPA claim, Allstate fails to consider the Tennessee Savings Statute, which can be found at Tennessee Code Annotated §

28-1-105. The savings statute allows a one year period for the refiling of a lawsuit following its dismissal other than upon the merits. Tenn. Code Ann. § 28-1-105. Although it has not addressed the application of § 28-1-105 to the TCPA claim, Allstate has argued the point that a violation of the TCPA claim was not alleged in the original state complaint. This court finds, however, that Harvey's failure to include the TCPA claim does not render the savings statute inapplicable. This precise issue has been considered by the Sixth Circuit in *Moore v. Fields*, 464 F.2d 549, 550 (6th Cir. 1972), and by the United States District Court for the Eastern District of Tennessee in *Bailey v. Harris*, 377 F. Supp. 401, 403 (E.D. Tenn. 1974).

In *Bailey v. Harris*, the plaintiff timely filed a lawsuit in state court and subsequently took a non-suit on August 23, 1973. 377 F. Supp. at 403. The plaintiff then re-filed her lawsuit in federal court on April 29, 1974, with the addition of an averment for a violation of § 1983 of the Federal Civil Rights Act. *Id.* The defendants challenged the plaintiff's civil rights claim on the basis that the additional claim was barred because it was not filed within the applicable one year limitations period. *Id.* The defendants further asserted that the savings statute was inapplicable to the second lawsuit because a federal civil rights action was not the same cause of action as the former lawsuit in

the state court. *Id.* Relying on the Sixth Circuit's decision in *Moore v. Fields*, the district court found that the savings statute did apply to the new claim asserted in the federal action because the plaintiff's former lawsuit and present lawsuit were substantially identical in their averments, and thus, the civil rights claim would not be barred by the statute of limitations. *Id.* at 403-04. The court noted that the "purpose (of the savings statute) is satisfied if the dismissed action gave the defendant fair notice of the nature and extent of plaintiff's claim asserted against him." *Id.* at 403 (quoting *Moore*, 464 F.2d at 550).

In the present case, the court is faced with a very similar situation. Harvey's former lawsuit and the present lawsuit are substantially identical in their averments other than that the present lawsuit adds the averment of a violation of the TCPA to the existing bad faith failure to pay and breach of contract claims. When Harvey filed his state claim, his cause of action and all other claims arising out of Allstate's alleged failure to pay Harvey's insurance claim were "saved" for the period of one year from the date the order of non-suit was entered on October 7, 2002. Therefore, Harvey had until October 7, 2003 to file another complaint, and he did so on September 23, 2003.

Next, Allstate argues that even if Harvey's TCPA claim is not barred by the one-year statute of limitations, the five-year

statute of repose contained in Tennessee Code Annotated § 47-18-110 bars the TCPA action as a matter of law. Section 47-18-110 provides that:

[a]ny action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action be brought more than five (5) years after the date of the consumer transaction giving rise to the claim for relief.

Tenn. Code Ann. § 47-18-110. A "consumer transaction" is defined in the Code as "the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated."

Tenn. Code Ann. § 47-18-103(11). The defendant claims that even if the "consumer transaction giving rise to the claim of relief" occurred when the claim was denied, that date was almost six years ago and falls outside of the five-year statute of repose period.

This court agrees. While a statute of limitation procedurally "limits the time in which a potential plaintiff may pursue his remedy in the courts," statutes of repose are "meant to be 'a substantive definition of rights.'" *Myers v. Hayes Int'l Corp.*, 701 F. Supp. 618, 624 (M.D. Tenn. 1988). Essentially, a statute of repose terminates liability by limiting the time during which a cause of action may accrue. As such, Tennessee's Savings Statute

does not operate to extend the time in which Allstate can be held liable for violation of the TCPA after the five-year statute of repose expires. See *Brent v. Town of Greeneville*, 309 S.W.2d 121, 122-23 (Tenn. 1958); accord *Breneman v. Cincinnati, N.O. & T.P. Ry.*, 346 S.W.2d 273, 276 (Tenn. Ct. App. 1961) (noting that "the saving statute . . . applies only to a statute of limitations which relates to the remedy"). Accordingly, the defendant's motion for partial summary judgment as to Harvey's allegation of a violation of the Tennessee Consumer Protection Act is granted on the basis that any such claim is barred by the statute of repose as set forth in Tennessee Code Annotated § 47-18-110.

C. Plaintiff's 42 U.S.C. § 1981 Claim

In its final argument for partial summary judgment, Allstate contends that Harvey's 42 U.S.C. § 1981 claim is barred by the four-year statute of limitations set forth in 28 U.S.C. § 1658, as made applicable to § 1981 claims by *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 514 (6th Cir. 2003). 28 U.S.C. § 1658 provides "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." Allstate asserts that this four year statute of limitations acts as a bar to Harvey's 42 U.S.C. § 1981 claim because the claim was not alleged in the

original state lawsuit and because more than four years has passed since the cause of action accrued.

As this court noted above in its analysis of Harvey's Tennessee Consumer Protection Act claim, the defendant has ignored the savings statute in Tennessee, which preserves for a period of one year the plaintiff's opportunity to refile an action following a non-suit. See Tenn. Code Ann. § 28-1-105. Thus, Harvey's 42 U.S.C. § 1981 claim is not barred by the four-year statute of limitations. Furthermore, the court is unaware of, and the defendant's have not brought to the court's attention, any statute of repose limiting the time in which a plaintiff can bring an action for violation of 42 U.S.C. § 1981. Accordingly, this court recommends that the defendant's motion for partial summary judgment be denied as to plaintiff's 42 U.S.C. § 1981 claim.

CONCLUSION

For the reasons stated above, it is recommended that defendant's motion for partial summary judgment be granted as to plaintiff's claims arising under the Tennessee Consumer Protection Act and denied as to plaintiff's claims arising under 42 U.S.C. § 1981.

Respectfully submitted this 23rd day of August, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.