

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61852-CIV-ZLOCH

PROFESSIONAL VENDING SERVICES, INC.,

Plaintiff,

vs.

**FINAL ORDER OF DISMISSAL**

FIRESTONE FINANCIAL CORP.,

Defendant.

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THIS MATTER is before the Court upon Defendant Firestone Financial, LLC's Motion To Dismiss Plaintiff's Amended Complaint For Damages With Prejudice (DE 21) and Defendant Firestone Financial, LLC's Motion For Sanctions Against Professional Vending Services, Inc. Pursuant To Fed. R. Civ. P. 11 (DE 29). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

By the instant Motion To Dismiss (DE 21), Defendant argues that the above-styled cause is barred by Florida's Banking Statute Of Frauds, Florida Statute § 687.0304, and must therefore be dismissed. Indeed, Defendant believes the law is so well-settled on this point that Plaintiff's Amended Complaint (DE 17) is frivolous. Defendant has therefore moved for sanctions pursuant to Federal Rule of Civil Procedure 11 as well. See DE 29.

**I. Background**

Plaintiff initiated the above-styled cause with the filing of

its initial Complaint (DE 1). The pertinent general allegations of Plaintiff's initial Complaint (DE 1) are as follows: In December 2014, Plaintiff contacted Defendant to apply for a \$750,000.00 loan to assist in financing Plaintiff's purchase of a vending company. Thereafter, Defendant advised Plaintiff that its loan had been approved and authorized in the amount of \$750,000.00. Upon this representation, Plaintiff placed a \$150,000.00 non-refundable deposit towards the purchase of the vending company. In January 2015, when Plaintiff intended to close on its purchase, Defendant provided loan closing documents that reflected a loan in the amount of \$301,250.70. The purchase and sale of the vending company ultimately fell through. Plaintiff contends that the sale's collapse was "a direct result of [Defendant's] actions and breach of its oral agreement to fund \$750,000.00. . . ."

The initial Complaint (DE 1) asserted one count for breach of oral contract and one count for negligent misrepresentation, both pursuant to Florida law. Shortly after being served with Plaintiff's initial Complaint (DE 1), Defendant's counsel informed Plaintiff's counsel that Plaintiff's claims were barred by Florida's Banking Statute of Frauds. In turn, Plaintiff filed its Amended Complaint (DE 17).

The material general allegations of the Amended Complaint (DE 17) are identical to those set forth above. Plaintiff's Amended

Complaint (DE 17) substitutes a claim for promissory estoppel in place of the breach of oral contract claim and alters some of the allegations in Plaintiff's negligent misrepresentation claim. Defendant now moves to dismiss Plaintiff's Amended Complaint (DE 17), arguing that both of the claims therein are barred by Florida's Banking Statute of Frauds. See DE 21. After filing Defendant's Motion To Dismiss (DE 21), Defendant's counsel advised Plaintiff's counsel that the claims in Plaintiff's Amended Complaint (DE 17) fail for the same reasons as those in the initial Complaint (DE 1). Defendant's counsel notified Plaintiff's counsel of its intention to move for sanctions. Plaintiff did not dismiss the case and Defendant now moves for sanctions pursuant to Federal Rule of Civil Procedure 11 as well. See DE 29.

#### II. Standard On A Motion To Dismiss

Under Fed. R. Civ. P. 8(a), a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Supreme Court has explained that Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Therefore, in order to defeat a

motion to dismiss, a complaint must allege facts which render its legal claims facially plausible. Bell Atlantic v. Twombly, 550 U.S. 544 (2007). Facial plausibility is achieved when the district court can reasonably infer from the facts that the defendant is liable for the alleged wrongdoing. Iqbal, 129 S. Ct. at 1949.

### III. Analysis

Florida law precludes claims by borrowers against lenders based on oral lending agreements. Section 687.0304, Florida Statutes—or Florida's Banking Statute of Frauds—provides that a "debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." Fla. Stat. § 687.0304(2) (2015). A credit agreement is "an agreement to lend or forebear repayment of money, goods, or things, to otherwise extend credit, or to make any other financial accommodation." Fla. Stat. § 687.0304(1)(a). The statute is designed to "protect lenders from liability for actions or statements a lender might make in the context of counseling or negotiating with the borrower which the borrower construes as an agreement, the subsequent violation of which is actionable against the lender." Brenowitz v. Centr. Nat. Bank, 597 So. 2d 340, 342 (Fla. Dist. Ct. App. 1992).

This statute unambiguously bars any contract action based on

an alleged oral credit agreement. Puff 'N Stuff of Winter Park, Inc. v. Bell, 683 So. 2d 1176, 1177 (Fla. Dist. Ct. App. 1996). For that reason, the claim for breach of oral contract contained in Plaintiff's initial Complaint (DE 1) would have failed as a matter of law. But courts have also interpreted Florida's Banking Statute of Frauds to preclude other claims that are premised on oral promises to lend, including claims for promissory estoppel and negligent misrepresentation. See Dixon v. Countrywide Home Loans, Inc., 710 F. Supp. 2d 1325, 1330 (S.D. Fla. 2010) (negligent misrepresentation); Mark Andrew of Palm Beaches, Ltd. v. GMAC Commercial Mortg. Corp., 265 F. Supp. 2d 366, 382 (S.D.N.Y. 2003) (applying Florida law) (promissory estoppel and negligent misrepresentation); University Creek Associates II, Ltd. v. Boston American Financial Group, Inc., 100 F. Supp. 2d 1345, 1351 (S.D. Fla. 2000) (promissory estoppel). These decisions are in line with the protections courts have placed to support Florida's general Statute of Frauds.

Florida law prohibits a party from asserting promissory estoppel in place of a claim that would otherwise be barred by the Statute of Frauds. Coral Way Properties, Ltd. v. Roses, 565 So. 2d 372, 374 (Fla. Dist. Ct. App. 1990) (quoting Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777 (Fla. 1937)). This prohibition prevents parties from circumventing the Statute of

Frauds by way of a judicially created doctrine. Tanenbaum, 190 So. 2d at 779. And this rationale applies with equal force to Florida's Banking Statute of Frauds. Mark Andrew, 265 F. Supp. 2d at 382.

Florida law also precludes plaintiffs from recovering on tort claims that arise out of the same conduct and representations that form the basis of an oral contract that would be barred by the Statute of Frauds. Bankers Trust v. Basciano, 960 So. 2d 773, 778 (Fla. Dist. Ct. App. 2007) (the Statute of Frauds bars claims "premised on the same conduct and representations that were insufficient to form a contract and are merely derivative of the unsuccessful claim"). Thus, to the extent an oral credit agreement would be barred by Florida's Banking Statute of Frauds, so too is a claim for negligent misrepresentation that flows from that alleged oral agreement. Mark Andrew, 265 F. Supp. 2d at 382.

The claims set forth in Plaintiff's Amended Complaint (DE 17) are barred by Florida's Banking Statute of Frauds. Taken together, the allegations in the Amended Complaint (DE 17) claim that Defendant made an oral agreement to lend to Plaintiff a different amount than Defendant's loan closing documents ultimately reflected. This agreement to lend is, by definition, a "credit agreement" within the ambit of § 687.0304. Plaintiff's claims for negligent misrepresentation and promissory estoppel flow from that

oral agreement, which is unenforceable under Florida's Banking Statute of Frauds. These claims are barred and must be dismissed. As for Defendant's Rule 11 Motion (DE 29), the Court finds that sanctions are not warranted and will deny said Motion.

Finally, the Court notes that while leave is generally given when the Court dismisses a complaint for failure to state a claim, the Court finds that leave to amend is not appropriate under the unique circumstances of this case. Plaintiff had ample opportunity to amend its Complaint to state a claim for relief. Indeed, when Defendant first notified Plaintiff that its claims were barred by Florida's Banking Statute of Frauds, Plaintiff amended its initial Complaint (DE 1). See DE 17. Defendant moved to dismiss Plaintiff's Amended Complaint (DE 17) for failure to state a claim and advised Plaintiff that its new claims were also barred. At this juncture, Plaintiff still had the opportunity to file a Second Amended Complaint, alleging claims cognizable by law, but it failed to do so. Plaintiff is therefore not prejudiced by this dismissal, which the Court notes is without prejudice. Plaintiff's failure to amend when it had the opportunity to do so warrants this result.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** as follows:

1. Defendant Firestone Financial, LLC's Motion For Sanctions Against Professional Vending Services, Inc. Pursuant To Fed. R.

Civ. P. 11 (DE 29) be and the same is hereby **DENIED**;

2. Defendant Firestone Financial, LLC's Motion To Dismiss Plaintiff's Amended Complaint For Damages With Prejudice (DE 21) be and the same is hereby **GRANTED**;

3. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff's Amended Complaint (DE 17) be and the same is hereby **DISMISSED** without prejudice; and

4. To the extent not otherwise disposed of herein, all pending motions are **DENIED** as moot.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 29<sup>th</sup> day of April, 2016.

  
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WILLIAM J. ZLOCH  
United States District Judge

Copies furnished:

All Counsel of Record