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United States Court of Appeals
Tenth Circuit

July 21, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RADONNA MATCHETT,

Plaintiff - Appellant,

v.

BSI FINANCIAL SERVICES,

Defendant - Appellee.

No. 21-4142
(D.C. No. 2:21-CV-00211-DAK)
(D. Utah)

ORDER AND JUDGMENT*

Before **CARSON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **ROSSMAN**, Circuit Judge.

This appeal marks the second time we have considered whether Utah law allows mortgagors to sue under the Utah Consumer Sales Practices Act ("UCSPA") when mortgage servicers charge them improper fees. The first time, in Berneike v. CitiMortgage, Inc., 708 F.3d 1141, 1149–50 (10th Cir. 2013), we held that they cannot. This time, because that holding remains good law, stare decisis requires the same result.

Plaintiff Radonna Matchett appeals the district court's dismissal of her UCSPA and breach-of-contract claims alleging that Defendant BSI Financial Services

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

improperly charged her certain fees. She also asks us to certify two questions concerning the UCSPA's scope to the Utah Supreme Court. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal of Plaintiff's claims and deny her request for certification.

I.

In June 2008, Plaintiff obtained a residential mortgage loan.[1] As part of that process, Plaintiff signed two mortgage documents—a promissory note memorializing the loan's terms and a deed of trust securing the loan against the real property Plaintiff purchased with the loan's proceeds. Defendant services Plaintiff's mortgage. A mortgage servicer receives the borrower's periodic payments due under the loan and passes those payments on to the loan's owner. See 12 CFR § 1024.2(b).

The Parties' dispute focuses on certain fees Defendant charged Plaintiff to make her mortgage payments over the phone. Seven times between September 2017 and April 2018, Plaintiff tried to pay her mortgage online, but failed because of an error with Defendant's online system. Each time, Defendant's error forced Plaintiff to make her payments over the phone.[2] And each time she paid Defendant over the

[1] Because this appeal arises from the district court's grant of Defendant's motion to dismiss, we take the factual allegations in Plaintiff's complaint as true.

[2] The district court relied on Plaintiff's account statements to conclude that Plaintiff had five payment options—mail, online, telephone, automatic bank payment, or Western Union. Those account statements are dated years after Plaintiff's operative factual allegations. Because Plaintiff did not refer to or rely on those statements in her complaint, we ignore them when reviewing the district court's

phone, Defendant charged her a $20 "convenience" fee—an amount between ten and fifty times more than Defendant's actual cost of taking a phone payment.

Three years later, Plaintiff sued Defendant in Utah state court alleging that Defendant violated the UCSPA and breached the mortgage documents by charging her those $20 fees.[3] While Plaintiff's case was pending, Defendant allegedly began adding the legal fees it incurred defending Plaintiff's action to the balance of her mortgage. So Plaintiff amended her complaint to assert a claim under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"). After Plaintiff amended her complaint to assert a federal claim, Defendant removed the case to the United States District Court for the District of Utah.

Before the district court, Defendant moved to dismiss Plaintiff's UCSPA and breach-of-contract claims. After considering briefing and holding a hearing, the district court granted Defendant's motion and dismissed both claims with prejudice. As for Plaintiff's UCSPA claims, the district court reasoned Plaintiff could not state a plausible claim because the UCSPA does not regulate mortgage loans or mortgage servicers. The district court also concluded that even if the UCSPA applied to mortgage servicers, Defendant's alleged conduct does not plausibly violate the

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grant of Defendant's motion to dismiss. See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384–85 (10th Cir. 1997).

[3] Plaintiff also asserted a UCSPA claim on behalf of a putative class, an unjust enrichment claim, and a claim for injunctive relief. We limit our discussion to Plaintiff's individual UCSPA and breach-of-contract claims because Plaintiff voluntarily withdrew her claim for injunctive relief and does not appeal the district court's dismissal of her other claims.

UCSPA. As for Plaintiff's breach-of-contract claim, the district court held that she failed to plausibly allege that Defendant breached the mortgage documents. Lastly, ten days after the court's ruling, the Parties agreed to dismiss Plaintiff's FDCPA claim.

After the stipulated dismissal of her federal claim, Plaintiff moved the district court to allow her to amend her complaint and refile her state-law claims in Utah state court. Plaintiff also asked the district court to certify two questions of state law—whether the UCSPA applies to mortgages and mortgage servicers, and whether Defendant's alleged conduct could violate its terms—to the Utah Supreme Court. The district court denied both requests in a final memorandum decision and order.

Plaintiff timely appealed. She contends the district court erred either by granting Defendant's motion to dismiss or by denying her request to amend her complaint. She also asks us to certify her UCSPA questions to the Utah Supreme Court.

II.

We turn first to Plaintiff's motion asking us to certify her UCSPA questions to the Utah Supreme Court. We allow parties to submit independent requests for the certification of state-law questions alongside their first merits brief. See Pino v. United States, 507 F.3d 1233, 1235 (10th Cir. 2007); 10th Cir. R. 27.4. And although we review a district court's denial of a motion to certify for an abuse of discretion, see Society of Lloyd's v. Reinhart, 402 F.3d 982, 1001 (10th Cir. 2005), we exercise

our own independent discretion de novo when a party asks us to certify a question to a state high court directly. See Pino, 507 F.3d at 1235–36.

But we do not exercise that discretion lightly. See Colony Ins. Co. v. Burke, 698 F.3d 1222, 1235–36 (10th Cir. 2012). Congress did not create diversity jurisdiction for the convenience of the federal courts. See Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943). When a party properly invokes that jurisdiction, we ordinarily answer the state-law questions necessary to render judgment. See Colony Ins., 698 F.3d at 1235 (citing Copier ex rel. Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 838 (10th Cir.1998)). As a result, we will certify only state-law questions that are both "unsettled and dispositive." Kan. Jud. Rev. v. Stout, 519 F.3d 1107, 1119 (10th Cir. 2008) (quoting Anaconda Mins. Co. v. Stoller Chem. Co., 990 F.2d 1175, 1177 (10th Cir. 1993)).

Plaintiff's proposed question fails those minimum criteria. Plaintiff asks us to certify whether the Utah Mortgage Lending and Services Act ("MLSA"), Utah Code Ann. § 70D-2-101 et seq., preempts all UCSPA claims against mortgage servicers. But as we discuss in section IV, even if the MLSA does not preempt all UCSPA claims against mortgage servicers, our precedent forecloses Plaintiff's particular UCSPA claim. See Berneike v. CitiMortgage, Inc., 708 F.3d 1141, 1149–50 (10th Cir. 2013). And because Berneike governs Plaintiff's UCSPA claim, Plaintiff's state-law question is neither unsettled nor dispositive. Accordingly, we deny her motion for certification.

III.

Moving to the merits of Plaintiff's appeal, she first asserts that the district court erred by granting Defendant's motion to dismiss her UCSPA claim for the failure to state a claim. We review de novo the district court's grant of Defendant's motion. Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo., 771 F.3d 697, 700 (10th Cir. 2014).

Plaintiff argues the district court should not have dismissed her claims because the Utah Supreme Court would allow her to assert a UCSPA claim against her mortgage servicer. Defendant responds that we have already held that the Utah Supreme Court bars UCSPA claims based on mortgage servicing in Berneike, 708 F.3d at 1149–50. Because we agree with Defendant that Berneike controls, we affirm the dismissal of Plaintiff's UCSPA claim.

In Berneike, a homeowner asserted UCSPA claims against her mortgage servicer for alleged overcharges and improper fees. Berneike, 708 F.3d at 1143. The district court dismissed her claims. Id. at 1149. And we affirmed, interpreting the Utah Supreme Court's decision in Carlie v. Morgan, 922 P.2d 1 (Utah 1996), to bar UCSPA claims when the complained-of conduct is governed by other, more specific law. Id. at 1149–50. In Carlie, the Utah Supreme Court concluded that the Utah Fit Premises Act—which provides specific remedies to residential tenants whose rental units become uninhabitable because of health and safety violations—precludes residential tenants from bringing UCSPA claims based on those violations. See Carlie, 922 P.2d at 6. So, by analogy, the Berneike panel held that because the

MLSA specifically regulates mortgage servicing, the Utah Supreme Court would similarly disallow UCSPA claims based on wrongful conduct in the mortgage-servicing context. Berneike, 708 F.3d at 1150.

Thus, Plaintiff cannot state a UCSPA claim against Defendant. Just as in Berneike, Plaintiff alleges that Defendant, her mortgage servicer, charged her improper fees while servicing her mortgage. While Plaintiff vigorously contends that the Utah Supreme Court would only disallow UCSPA claims under Carlie when the other, more specific law provides a *remedy* for the defendant's alleged conduct, the Berneike panel's broad reading of Carlie forecloses her argument.[4] Because we are bound by Berneike's holding that the Utah Supreme Court forbids UCSPA claims by a mortgagor against a mortgage servicer based on allegedly wrongful overcharges and fees, we affirm the dismissal of Plaintiff's UCSPA claim.

IV.

Plaintiff next appeals the district court's decision to dismiss her breach-of-contract claim for the failure to state a claim upon which relief can be granted. As before, we review the district court's ruling de novo. Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo., 771 F.3d 697, 700 (10th Cir. 2014). To state a breach-of-contract claim under Utah law, Plaintiff must plausibly allege: (1) a

[4] As part of her argument, Plaintiff suggests that we should reverse Berneike. But one panel of this Court cannot overturn another panel. United States v. C.D., 848 F.3d 1286, 1289 n.2 (10th Cir. 2017). Absent an intervening decision from the United States Supreme Court, the Utah Supreme Court, or this Court en banc, Berneike remains good law.

contract, (2) performance by the party seeking recovery, (3) a breach by the other party, and (4) damages. Daz Mgmt., LLC v. Honnen Equip. Co., 508 P.3d 84, 91 n.26 (Utah 2022) (citing Richards v. Cook, 314 P.3d 1040, 1043 (Utah Ct. App. 2013)).

Plaintiff's only breach allegation reads: "to the extent Defendant's conduct is governed by the mortgage agreement, Defendant breached the agreement by charging fees which are not allowed under the mortgage agreement." Appellant's App. at 40. Defendant responds that Plaintiff cannot point to any provision in the mortgage documents, or any other contract, that prohibits it from offering an optional payment service and then charging for the use of that service.

We agree with Defendant. The only language in the mortgage documents that arguably applies to the pay-by-phone fees states: "the absence of express authority in this Security Instrument to charge a specific fee to [Plaintiff] shall not be construed as a prohibition on the charging of such fee." Appellant's App. at 77. Even if we do as Plaintiff asks and construe that language to apply only to default fees, the Parties' mortgage documents do not prohibit Defendant from later offering an optional service for an added price. And although Plaintiff correctly argues that Defendant cannot unilaterally add fees to her mortgage, Plaintiff admitted to the district court that she could have mailed her payment to Defendant to avoid paying the phone fees. See Appellant's App. at 107. Because Plaintiff failed to state a breach-of-contract claim under Utah law, we affirm the dismissal of her claim.

V.

Plaintiff lastly appeals the district court's denial of her Rule 59(e) motion asking the court to reconsider her prior request for leave to amend her complaint.[5] Relief under Rule 59(e) is not appropriate unless the movant demonstrates (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). We review the denial of a Rule 59(e) motion for an abuse of discretion. Carolina Cas. Ins. Co. v. Burlington Ins. Co., 951 F.3d 1199 (10th Cir. 2020).

Plaintiff does not attempt to meet this standard in her opening brief. In her reply, Plaintiff contends the district court's conclusion that allowing her to file an amended complaint would be futile was clear "error" and that "it does not appear that the 10th Circuit even requires the normal justification for a Rule 59(e) motion when considering whether to allow leave to amend." But by advancing this position for the first time in her reply, she has waived her Rule 59(e) argument. See, e.g., Stump v.

[5] Before the district court dismissed her claims, Plaintiff included only a generic request in her response to Defendant's motion to dismiss, asking the district court to dismiss her claims without prejudice so that she could remedy any deficiencies found by the district court. Appellant's App. at 112. But merely including a request to amend in opposition to a motion to dismiss is not a permissible substitute for filing a proper written motion for leave to amend. See, e.g., Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 986 (10th Cir. 2010). For that reason, we affirm the district court's decision to dismiss Matchett's claims with prejudice.

Gates, 211 F.3d 527, 533 (10th Cir. 2000) (explaining why we have this rule). We affirm the district court's denial of Plaintiff's motion to reconsider accordingly.

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge