E-FILED
4/25/2022 1:17 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

DEBRA HARVILLE, on behalf of herself and those similarly situated,	)	
Plaintiffs,	)	**Case No. 21-1163-BC**
v.	)	**JURY DEMAND**
PINNACLE BANK, a Tennessee corporation	)	
Defendant.	)	

ORDER

This matter came to be heard on April 12, 2022, upon the motion of Defendant Pinnacle Bank to dismiss Plaintiff Debra Harville's Amended Complaint for failure to state a claim pursuant to Tenn. R. Civ. P. 12.02(6). Having reviewed the pleadings and relevant caselaw, and having considered the argument of counsel, the Court is ready to rule.

Background

This is a putative class action brought by Plaintiff Debra Harville alleging that Pinnacle Bank had a practice of collecting and failing to refund unearned fees from Guaranteed Asset Protection Finance Agreement Addendums ("GAP Addendum") in breach of its contracts with automobile purchasers or lessees. Am. Compl. ¶ 1. A GAP Addendum attaches to a financing agreement to purchase a car and provides that if a total loss occurs, and the insurance payout is insufficient to pay off the remaining loan or lease balance, the creditor on the finance agreement agrees to waive the difference in exchange for the GAP fee the owner or lessee paid under the addendum. Am. Compl. ¶ 16.

In 2014, Plaintiff purchased a used car from Global Motorsports, Inc. ("Dealer"), along with a GAP Addendum for $835. The Dealer then sold and assigned the finance agreement with

the GAP Addendum to Pinnacle Bank. The GAP Addendum is attached to Pinnacle Bank's Motion to Dismiss.[1] Plaintiff alleges that she paid off her car's financing agreement early, and that Pinnacle Bank was required to automatically refund her the portion of the GAP fee corresponding to the remainder of the original loan term, which Pinnacle Bank failed to do. Am. Compl. ¶ 2. She alleges that this practice of retaining the unearned fees related to GAP Addendums when the underlying automobile loan or lease is paid off early constitutes a breach of contract and breach of the implied covenant of good faith and fair dealing. Am. Compl. ¶ 6. Plaintiff purports to represent two separate classes, including a nationwide class and a Tennessee subclass, which includes those persons who entered into a finance agreement with a GAP Addendum that were assigned to Pinnacle Bank and whose finance agreements terminated before the end of the loan or lease term but did not receive a refund of unearned GAP fees. Am. Compl. ¶¶ 47-48. Notably, Plaintiff expressly excludes from these classes "any persons who cancelled a GAP Waiver Addendum." Id. ¶ 51.

Plaintiff's GAP Addendum provides in relevant part:

> COVERAGE
>
> IN THE EVENT OF AN EARLY TERMINATION OF THE FINANCE AGREEMENT RESULTING FROM A TOTAL LOSS OF THE COVERED VEHICLE, YOU ARE RESPONSIBLE FOR ANY AMOUNT OWED TO THE DEALER AND ASSIGNEE; HOWEVER, THE DEALER AND ASSIGNEE AGREE TO CANCEL A PORTION OF THIS AMOUNT WHILE THIS ADDENDUM IS IN EFFECT . . . THIS ADDENDUM TERMINATES UPON (1) REFINANCING THE VEHICLE FINANCE AGREEMENT OR (2) WHEN THE ORIGINAL FINANCE AGREEMENT IS PAID IN FULL, WHICHEVER OCCURS FIRST.

[1] Plaintiff did not attach the GAP Addendum to either the original Complaint or the Amended Complaint as required by Tenn. R. Civ. P. 10.03. Defendant's attachment of the GAP Addendum to its motion does not convert the motion to dismiss to a motion for summary judgment. *Belton v. City of Memphis*, No. W2015-01785-COA-R3-CV, 2016 WL 2754407, at *4 (Tenn. Ct. App. May 10, 2016).

CANCELLATION

> To cancel this Addendum, You must provide the Administrator or Dealer with a written cancellation request. The effective date of the cancellation will be the date the written notice is received by Administrator or Dealer. If the cancellation request is received within sixty (60) days from the Effective Date of the Addendum and no Waiver Benefit has been provided, then You will receive a full refund; after sixty (60) days, all refunds will be calculated pro-rata, less a twenty-five ($25) dollar processing fee, unless otherwise required by applicable state law. However, in the event a Waiver Benefit has been provided, this Addendum will be deemed as fully earned, and no refund will be due or paid. Any refund due under the Addendum will be payable to the Assignee unless You provide the Administrator with written documentation from Assignee stating the Finance Agreement has been paid in full. . . . .
>
> ACCEPTANCE OF GAP FINANCE AGREEMENT ADDENDUM
>
> I (BUYER), WHOSE SIGNATURE APPEARS BELOW, ACKNOWLEDGE THAT THE INFORMATION CONTAINED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE. I HAVE READ THE FRONT AND BACK OF THIS GAP FINANCE AGREEMENT ADDENDUM IN ITS ENTIRETY. I UNDERSTAND THAT A CANCELLATION REQUESTED WITHIN SIXTY (60) DAYS OF PURCHASE IS ELIGIBLE FOR A FULL REFUND. I ALSO UNDERSTAND THAT A CANCELLATION REQUEST RECEIVED AFTER SIXTY (60) DAYS OF PURCHASE WILL BE REFUNDED PRO-RATA AND IS SUBJECT TO A CANCELLATION FEE, UNLESS OTHERWISE REQUIRED BY APPLICABLE LAW. . . .

Plaintiff brings a claim for breach of contract and, alternatively, unjust enrichment. Defendant's motion to dismiss alleges that Plaintiff has failed to state a claim upon which relief can be granted based upon the plain terms of the applicable contract and should therefore be dismissed.

Standard of Review

Defendant's motion to dismiss pursuant to Rule 12.02(6) is governed by well-established provisions of Tennessee law. The resolution of a motion to dismiss "is determined by an examination of the pleadings alone." *Webb v. Nashville Area Habitat for Humanity, Inc.,* 346 S.W.3d 422, 426 (Tenn. 2011). A defendant seeking a motion to dismiss "admits the truth of all

of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to state a cause of action." *Id.* (quoting *Freeman*, 172 S.W.3d at 516). Courts considering a motion to dismiss "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (quoting *Trau-Med of Am., Inc. v. AllState Ins. Co.,* 71 S.W.3d 691, 696 (Tenn. 2002). A motion to dismiss may be granted only "when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Collum v. McCool,* 432 S.W.3d 829, 832 (Tenn. 2013).

Analysis

Plaintiff alleges that Pinnacle Bank breached its contractual duties under the GAP Addendum by failing to automatically refund the unearned GAP fees after the GAP Addendum terminated through the early payoff of her loan. Am. Compl. ¶ 38. In the alternative, Plaintiff contends that Pinnacle Bank would be unjustly enriched if not forced to return the prorated GAP fees after termination of the GAP Addendum. Defendant contends that Plaintiff's claims fail as a matter of law because the plain language of the GAP Addendum does not entitle her to any refund, nor has Pinnacle Bank received any benefit that would support an unjust enrichment claim.

Breach of Contract[2]

Defendant contends that Plaintiff cannot allege a breach of contract claim because the terms of the GAP Addendum are clear and unambiguous, relying on the language set forth in the

[2] In Count I of the Amended Complaint, Plaintiff alleges breach of contract, including breach of the covenant of good faith and fair dealing. Under Tennessee law, it is "firmly established that the implied covenant of good faith and fair dealing is imposed in the performance and enforcement of every contract." *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *7 (Tenn. Ct. App. July 12, 2017) (citing *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 668 (Tenn. 2013)). A claim based on the implied covenant of good faith and fair dealing is not a stand-alone claim, but rather, it is part of an overall breach of contract claim. *Jones v. LeMoyne-Owen Coll.*, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)).

Cancellation section which requires written notification to obtain a refund. In response, Plaintiff contends that the Cancellation section does not control because the Plaintiff *terminated* her GAP Addendum by paying off the loan early. Since there is no similar provision related to terminations, Plaintiff contends she is entitled to an automatic refund, alleging that the GAP Addendum "does not state that unearned portion of the purchase price of GAP [Addendum] will not be refunded." Am. Compl. ¶ 3.

The elements of a breach of contract claim are: (1) the existence of an enforceable contract; (2) nonperformance amounting to a breach of the contract; and (3) damages caused by the breach of contract. *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). "A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties." *Cooper v. Patel*, 578 S.W.3d 40, 47 (Tenn. Ct. App. 2018) (quoting *Crye-Leike, Inc. v. Carver*, 415 S.W.3d 808, 816 (Tenn. Ct. App. 2011)). "When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting it and enforcing it as written." *Id*. (quoting *Crye-Leike*, 415 S.W.3d at 816). "In such a case, the contract is interpreted according to its plain terms as written, and the language used is taken in its 'plain, ordinary, and popular sense.'" *Id*. (quoting *Crye-Leike*, 415 S.W.3d at 816). The court, in arriving at the intention of the parties to a contract, does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992) (citing *Petty v. Sloan*, 277 S.W.2d 355 (Tenn. 1955); *Sutton v. First Nat'l Bank of Crossville,* 620 S.W.2d 526 (Tenn. Ct. App. 1981)). All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made,

to avoid repugnancy between the several provisions of a single contract. *Id*. (citing *Bank of Commerce & Trust Co. v. Northwestern Nat'l. Life Ins. Co.*, 26 S.W.2d 135 (Tenn. 1930)).

Defendant argues that Plaintiff is not entitled to a refund because she did not provide written notification pursuant to the GAP Addendum and that termination of the GAP Addendum by paying the loan off early does not entitle Plaintiff to an automatic refund. While Plaintiff attempts to distinguish between cancellation and termination and that the notification provision only relates to a cancellation of the finance agreement, Defendant points to *Herrera v. Wells Fargo Bank, N.A.*, No. SACV 18-332 JVS (MRWx), 2020 WL 5802421 (C.D. Cal. Sept. 1, 2020), which analyzed the refund language set forth in various GAP Addendum contracts and addressed this issue. In *Herrera*, the Central District Court of California reviewed different GAP Addendum contracts on a motion to dismiss brought by the assignee Wells Fargo Bank. That court found that some contracts created a meaningful distinction between an early payoff and voluntary cancellation of the contract, while others did not make such a distinction:

> Other contracts mention refunds only in the context of cancellation and do not include any provisions discussing refunds when the contract "ends" or "terminates" because of early payoff. . . . Plaintiffs argue that these contracts do not make it "plainly evident or intuitive to a customer that a provision requiring notice of a cancellation would equally apply to an automatic termination, Opp'n to Mot. to Dismiss at 21 (internal citation omitted). But these contracts outline no refund situation related to automatic termination. The only section of the contract that tells the customer about a refund is the section on "cancellation" that includes the written refund request provisions. If a customer were looking for a way to get a refund, the natural reading of the contract would be to assume early payoff amounts to a "cancellation" and therefore to send a written refund request. There is no alternative category of "termination" or "ending" that more specifically describes their payoff situation. Consequently, the Court believes it would be plainly evident or intuitive that a customer with this contract who was seeking a refund would first have to send a written refund request.

Id. at *5. The *Herrera* court found that the above-mentioned contracts included a written refund request provision as a condition precedent to obtaining a refund. *Id*. The Court dismissed for failure

to state a claim the contract claims of those plaintiffs with contracts that only mentioned refunds in the context of cancellation by not alleging compliance with a condition precedent. *Id*. at *7.

While the Court notes that the *Herrera* case is not binding, the Court does find it persuasive, considering that it squarely addresses the issue presented here. Much like the plaintiffs in *Herrera*, Plaintiff in this case contends that the Cancellation section requiring written notice to obtain a refund does not apply to terminations of finance agreements that occur because of an early payoff, and that such early payoff triggers a contractual obligation for Pinnacle Bank to refund the unearned GAP fees. *See Herrera*, 2020 WL 5802421, at *3-4. As the Court stated above, when interpreting a contract, the court is to discover the intention of the parties from a consideration of the whole contract. *Rainey*, 836 S.W.2d at 119. The Cancellation section of the GAP Addendum at issue provides in relevant part, "Any refund due under the Addendum will be payable to the Assignee unless You provide the Administrator with written documentation from Assignee stating the Finance Agreement has been paid in full," which notifies the buyer that to obtain a refund, some sort of written documentation is required indicating that the finance agreement has been paid in full. Taking into consideration the entire contract, including this provision requiring written notification upon cancellation, the Court finds that the contract is clear and unambiguous and sets forth a condition precedent requiring written notification to obtain a refund. Plaintiff does not allege that she submitted a written refund request; instead, she alleges that her refund should have been automatic without any notice due upon termination. Since Plaintiff has failed to allege compliance with a condition precedent, the contract claims are dismissed for failure to state a claim.

Unjust Enrichment

Alternatively, Plaintiff brings a claim for unjust enrichment. Unjust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist. *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998) (citing *Paschall's Inc. v. Dozier*, 407 S.W.2d 150, 154–55 (Tenn. 1966)). Courts will impose a contractual obligation under an unjust enrichment theory when: (1) there is no contract between the parties or a contract has become unenforceable or invalid; and (2) the defendant will be unjustly enriched absent a quasi-contractual obligation. *Id.* (citing *Paschall's Inc.*, 407 S.W.2d at 154–55). Since there is a valid and enforceable contract, Plaintiff's claim for unjust enrichment fails as a matter of law.

Conclusion

Based on the foregoing, the Court finds that Plaintiff has failed to state a claim for breach of contract or unjust enrichment. Therefore, the Court GRANTS Defendant's Motion to Dismiss, and all of Plaintiff's claims are hereby DISMISSED with prejudice.

Costs are taxed to Plaintiff.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

J. Ross Pepper, Esq.
Elizabeth A. Alexander, Esq.
Pepper Law, PLC
201 4th Ave. N. #1550
Nashville, TN 37219
rpepper@pepperlawplc.com
balexander@pepperlawplc.com

Scott Edelsberg, Esq.
Chris Gold, Esq.
Edelsberg Law, P.A.
20900 NE 30th Ave. #417
Aventua, FL 33180
scott@edelsberglaw.com
chris@edelsberglaw.com

Jeffrey Ostrow, Esq.
Jonathan M. Streisfeld, Esq.
Kopelowitz Ostrow Ferguson Weiselberg Gilbert
One West Las Olas Blvd., Suite 500
Ft. Lauderdale, FL 33301
ostrow@kolawyers.com
streisfeld@kolawyers.com

Andrew J. Shamis, Esq.
Shamis & Gentile, P.A.
14 NE 1st Ave., Suite 705
Miami, FL 33132
ashamis@shamisgentile.com

Anthony J. McFarland, Esq.
Jeff H. Gibson, Esq.
Sara K. Morgan, Esq.
Bass Berry & Sims PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
amcfarland@bassberry.com
jgibson@bassberry.com
sara.morgan@bassberry.com

RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

4-25-22
Date