STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TILLMAN INDUSTRIAL PROPERTIES, LLC; and ROOSEVELT TILLMAN,

Plaintiffs,

vs.

MERCANTILE BANK MORTGAGE COMPANY, LLC; and MERCANTILE BANK CORPORATION,

Defendants.
_____/

Case No. 13-08428-CZB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Years ago, Plaintiffs Tillman Industrial Properties, LLC, and Roosevelt Tillman (collectively, "Tillman") initiated this action against Defendants Mercantile Bank Mortgage Company, LLC, and Mercantile Bank Corporation (collectively, "Mercantile") alleging, *inter alia*, intentional race-based lending discrimination under the Fair Housing Act ("FHA"), 42 USC 3605 and 3613, and the Equal Credit Opportunity Act ("ECOA"), 15 USC 1691. After years of discovery and then 17 days of trial, the Court has no doubt that Roosevelt Tillman is convinced that he was the victim of discrimination based upon his race. The Court is also certain that Mercantile resolutely believes that it never acted with racial animus in dealing with Tillman. No matter how confident both sides may be, they cannot both be correct. The Court paid close attention throughout the lengthy trial and then painstakingly reviewed all of the evidence adduced at trial. The Court's careful analysis of the record leads to two ineluctable conclusions. First, Mercantile made life very difficult for Tillman. Second, Mercantile did not intentionally discriminate against Tillman because of his race.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of "a written opinion." See MCR 2.517(A)(2) & (3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

Plaintiff Tillman had a longstanding banking relationship with Defendant Mercantile. That relationship was formed in 2005, when Mercantile loaned $1.2 million to Plaintiff Tillman Industrial Properties, LLC ("TIP").[1] See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 2). Then, in 2006, Mercantile loaned an additional $50,000 to TIP. Id. In those early years, the relationship between the parties seemed cordial and mutually beneficial. But when the 2008 recession began to take hold, the relationship started to sour. Tillman contends that Mercantile "instituted a policy that was both intentionally discriminatory and discriminatory in effect" by "call[ing] the loans on most, if not all, of the minority owned businesses it had recently targeted" for its business development. See Second Amended Complaint, ¶¶ 14-15. Tillman claims that "Mercantile executed this plan by taking a zero tolerance approach to its minority borrowers," such as Tillman, "while allowing white borrowers in similar circumstances greater opportunities to catch up on missed payments or re-finance." Id., ¶ 16. That allegation serves as the central thesis for Tillman's claim of intentional discrimination.

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[1] The Court has chosen to limn the history of the banking relationship between the parties by relying primarily upon the affidavit of Traci Courter, which was admitted into evidence at trial as Plaintiffs' Exhibit 7. Although Courter was the employee of Defendant Mercantile who dealt with Plaintiff Roosevelt Tillman during the most contentious period of the relationship, the plaintiffs – rather than the defendants – moved to admit her affidavit into evidence. The affidavit is especially helpful because it provides a detailed, chronological description of how the two sides interacted with one another over the course of their relationship.

Plaintiff Tillman's payment of the total balance on the loans from Defendant Mercantile was due on April 5, 2010, but Tillman missed that deadline. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 2). Mercantile offered Tillman a forbearance agreement in March 2010, see Defendants' Exhibit K3, but Tillman refused the offer. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 2). Mercantile decided to consolidate the loans and extend the repayment deadline for several months, setting a new repayment deadline in October 2010 and then extending it to December 2010. Id. In December 2010, while Plaintiff Roosevelt Tillman was in the midst of divorce proceedings and in need of a new home, Mercantile loaned an additional $200,000 to Plaintiff TIP to furnish the money Tillman lacked to buy a home at 1611 Beard Drive in Grand Rapids.[2] Id. (Affidavit of Traci Courter, ¶ 3). That loan was consolidated with the earlier loans, and Mercantile set a due date in February 2011. Id. Tillman obtained the additional $200,000 loan with the hope of selling a building that TIP owned at 630 S. Division, but the "anticipated sale fell through in early 2011." Id. (Affidavit of Traci Courter, ¶ 4). Both the $200,000 loan for the home at 1611 Beard Drive and the failed effort to sell the building at 630 S. Division figure prominently in Tillman's theory of discrimination.

Although Plaintiff Tillman did not repay the loans in February 2011, Defendant Mercantile chose to extend the loans throughout 2011, and the two sides ultimately agreed upon a payment date of April 10, 2012. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 5). On March 21, 2012, well before the payment date, Mercantile offered Tillman a refinancing plan that included "interest only payments on all loans for 6 months," see Defendants' Exhibit O4, but Tillman "did not accept this offer." See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 6). Therefore, on March 30, 2012,

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[2] Plaintiff Roosevelt Tillman purportedly obtained $250,000 from other sources, but he still needed $200,000 from Defendant Mercantile to purchase the house at 1611 Beard Drive. That loan was made to Defendant TIP, but the home ultimately belonged to Roosevelt Tillman.

Tillman's main contact at Mercantile – Andrew Miedema – wrote to Traci Courter to inform her that Plaintiff Roosevelt Tillman's "world is crumbling and he doesn't have the cash flow to keep it afloat. Even the plan we're proposing is only delaying what appears to be an imminent collapse. He needs a miracle." See Plaintiffs' Exhibit 40. Three days later, on April 2, 2012, Mercantile sent a demand letter to Roosevelt Tillman listing Tillman's financial obligations to the bank. See Plaintiffs' Exhibit 41. After the April 10, 2012, repayment date passed without repayment, Traci Courter and Richard Boman from Mercantile's Risk Asset Group "met with Mr. Tillman on April 20, 2012, to determine if he had a viable plan to repay the loan." See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 7). Courter and Boman concluded that "Mr. Tillman had no plan to resolve TIP's default[,]" so Courter "informed Mr. Tillman that Mercantile intended to move forward with foreclosure and collection of the loan." Id. Courter suggested that Tillman "use the time inherent in the foreclosure process to find a way to refinance the mortgaged property or to redeem from foreclosure." Id. Beyond that, however, Mercantile chose to stop assisting Tillman in any way.

In the fullness of time, Defendant Mercantile proceeded with foreclosure, made full credit bids on two of Defendant TIP's properties that were foreclosed,[3] and obtained both of the properties because it was the highest bidder. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 8). As that process unfolded, Traci Courter sent an e-mail to Plaintiff Roosevelt Tillman about bounced checks, which prompted Tillman to respond: "You are boxing me into a corner not sure why you are doing all of this. Why are you taking my home from my family?"[4] See Plaintiffs' Exhibit 43. In her reply

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[3] As our Supreme Court has explained, full credit bids are "credit bids in the full amount of the unpaid principal and interest plus foreclosure costs[.]" Bank of America, NA v First American Title Ins Co, 499 Mich 74, 81-82 (2016).

[4] The reference to the home presumably meant the house at 1611 Beard Drive.

to Tillman's comment about having his home taken away from his family, Courter spelled out the position of Mercantile concerning Tillman's obligations to the bank:

> You were offered a forbearance period to allow you time to refinance and/or sell the properties voluntarily. That offer was not accepted. Therefore, the Bank has had to take matters into its own hands to liquidate assets and repay the defaulted loans. Given that the combined value of all the collateral is less than the amount owed, all collateral must be liquidated. That being said, however, there is inherent time in the foreclosure process to allow you to redeem the properties by refinancing them, doing a sale/leaseback or by raising funds through other means (i.e. outside investors). Therefore, you may want to seek traditional residential financing for your home. Mercantile would certainly consider releasing its mortgage and stopping the foreclosure if it received market value through a refinance. With respect to other properties, I would suggest that the tenants or the buyers under the respective land contracts seek their own traditional financing to buy the individual properties outright. Again, Mercantile would consider releasing its mortgage in exchange for full market value of the property.

See Plaintiffs' Exhibit 43. As Courter's response makes clear, Tillman was only permitted to keep his home at 1611 Beard Drive by providing Mercantile with "market value through a refinance." Id. Moreover, because all of Tillman's Mercantile loans were cross-collateralized, Tillman basically had no opportunity to salvage any individual parcel of property without taking steps to pay off all of his Mercantile loans. As Mercantile put it: "Given that the combined value of all the collateral is less than the amount owed, all collateral must be liquidated." Id.

As a result of Defendant Mercantile's action in initiating foreclosure proceedings, Plaintiff Tillman lost its real estate holdings, including the MedBio building at 630 S. Division, see Plaintiffs' Exhibit 14, and Plaintiff Roosevelt Tillman's home at 1611 Beard Drive. See Plaintiffs' Exhibit 16. In fact, this case traces its origin to a lawsuit by Mercantile in the 63rd District Court for possession of the house at 1611 Beard Drive. Tillman filed a counterclaim in that case that was removed to the 17th Circuit Court and evolved into the case that the parties tried to the bench for 17 days.

On December 7, 2013, Plaintiff Tillman filed a "first amended class action complaint" that included four counts. Then, on December 20, 2013, Tillman filed a "second amended class action complaint" that restated the original four claims. On June 2, 2014, the Court issued an opinion that granted summary disposition to Defendant Mercantile on the third and fourth counts, but left the first and second counts in place. Then, on April 21, 2020, the Court issued a 12-page opinion awarding Mercantile summary disposition on the remaining claim for disparate impact, but denying summary disposition to Mercantile on Tillman's claim for relief on a theory of disparate treatment under the FHA and the ECOA. The conclusion of that opinion explained that "the Court shall deny summary disposition under MCR 2.116(C)(10) to both sides on Plaintiff Tillman's disparate-treatment claim in Count One that rests upon circumstantial evidence of intentional discrimination." The Court went on to state that "[t]hat specific theory – and only that theory – shall be taken up at a bench trial." As it turned out, the bench trial of that single claim took 17 days to complete. Now, having developed a comprehensive trial record, the Court must finally resolve Tillman's disparate-treatment claim that rests upon the FHA and the ECOA.

II. Conclusions of Law

Plaintiff Tillman's one remaining claim presents a disparate-treatment theory, which requires proof by a preponderance of evidence "'that the defendant had a discriminatory intent or motive[.]'" See Texas Dep't of Housing and Community Affairs v Inclusive Communities Project, Inc, 135 S Ct 2507, 2513 (2015). Specifically, Count One presents a claim for intentional discrimination in lending under the FHA, 42 USC 3605 and 3613, and the ECOA, 15 USC 1691(a)(1). The FHA forbids an "entity whose business includes engaging in residential real estate-related transactions to

discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, . . . or national origin[,]"[5] see 42 USC 3605(a), and the ECOA states that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, [or] national origin[.]" See 15 USC 1691(a)(1). To establish intentional discrimination under those statutes, Plaintiff Tillman may cite direct evidence of racial animus or rely upon circumstantial evidence. Direct evidence of intentional discrimination ordinarily involves a "smoking gun as it were," see Gohl v Livonia Public Schools, 836 F3d 672, 683 (6th Cir 2016), which "'does not require the fact finder to draw any inferences to reach the conclusion that unlawful discrimination was at least a motivating factor.'" Id. The Court, however, has already decided at the summary disposition stage that no such evidence exists.

Despite the lack of direct evidence of intentional discrimination, Plaintiff Tillman may rely upon circumstantial evidence to support a claim of disparate treatment. See Gohl, 836 F3d at 682. That approach rests upon a familiar burden-shifting analysis. First, Tillman must make a prima facie case. To do so under the FHA, the plaintiffs must prove "that (1) they were a member of a protected class; (2) they attempted to engage in a 'real estate-related transaction' with [the defendants] and met all relevant qualifications for doing so; (3) [the defendants] refused to transact business with [them] despite their qualifications; and (4) the defendants continued to engage in that type of transaction with other parties with similar qualifications." See Michigan Protection and Advocacy Service, Inc v Babin, 18 F3d 337, 346 (6th Cir 1994). Tillman can make a prima facie case under the ECOA by

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[5] The term "residential real estate-related transactions" includes "[t]he making or purchasing of loans or providing other financial assistance – for purchasing, constructing, improving, repairing, or maintaining a dwelling; or secured by residential real estate" as well as "[t]he selling, brokering, or appraising of residential real property." See 42 USC 3605(b). Plaintiff Roosevelt Tillman's home at 1611 Beard Drive seems to constitute residential real property.

proving "that: (1) he is a member of a protected class; (2) he applied for and was qualified for a loan; (3) the loan application was rejected despite his . . . qualifications; and (4) the lender continued to approve loans for applicants with qualifications similar to those of the plaintiff." Hood v Midwest Savings Bank, 95 Fed Appx 768 (6th Cir 2004). In other words, the two statutory schemes Tillman cites require evidence that Tillman was a member of a protected class, that Tillman tried to engage in a transaction with Defendant Mercantile, that Mercantile refused to engage in the transaction with Tillman, and that Mercantile continued to engage in such transactions with others with qualifications similar to those of Tillman. If Tillman "satisfies those obligations, the burden shifts [to Mercantile] to offer a 'legitimate, nondiscriminatory' reason for its actions." Gohl, 836 F3d at 683. Finally, if Mercantile offers a nondiscriminatory reason for its actions, "the burden shifts back to [Tillman] to establish that [Mercantile]'s proffered reason is merely a pretext for unlawful discrimination." Id.

The Court's analysis of Plaintiff Tillman's circumstantial proof must begin by considering whether Tillman has made a prima facie case.[6] Without question, Plaintiff Tillman is a member of a protected class. He is African-American, and he is the sole owner of his business, so the Court can fairly characterize his business as African-American-owned. Next, Tillman attempted to engage in a transaction with Defendant Mercantile when he sought refinancing of lending obligations he owed to Mercantile.[7] Next, Mercantile refused to engage in the transaction with Tillman by rebuffing his

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[6] Defendant Mercantile insists that the burden-shifting analysis including a prima facie case applies only to pretrial motions, not to trials. Mercantile's approach conflates the three-step burden-shifting analysis into a simple determination of discrimination at the third step of the burden-shifting process. In doing so, Mercantile muddies the process of identifying and then analyzing comparators who are not the same race as the plaintiff. "The comparator requirement is the be all and end all of the circumstantial evidence test" for disparate treatment. Gohl, 836 F3d at 683.

[7] The intentional-discrimination claim cannot rest on Defendant Mercantile's refusal to offer forbearance, which Mercantile offered to Tillman twice. See Defendants' Exhibits K3 & O4.

attempt to refinance and initiating foreclosure proceedings to recover the outstanding obligations on the Tillman loans. Therefore, Tillman's satisfaction of his threshold obligation turns upon whether Mercantile enabled its white borrowers to obtain refinancing at the same time that it refused to enter into such a transaction with Tillman. Michigan Protection and Advocacy Service, 18 F3d at 346. The Court shall answer that important question first, and then the Court shall turn to consideration of Mercantile's proffered non-discriminatory reason for its treatment of Tillman.

A. Consideration of Comparators.

The challenge for Plaintiff Tillman is to identify similarly situated white borrowers who were permitted to refinance in the same sort of circumstances Tillman presented to Defendant Mercantile. After all, "[t]he comparator requirement is the be all and end all of the circumstantial evidence test" for disparate treatment. Gohl, 836 F3d at 683. Indeed, "[i]f there are no comparators, there is no way to deploy it." Id. Tillman offered evidence at trial from several alleged comparators: David Budd; Bruce Helder; and David Organek and Todd Oosting on behalf of the Victory Club. The Court shall give separate consideration to the treatment of each purported comparator *vis-a-vis* Tillman. What Tillman must show is "that a 'comparable non-protected person was treated better.'" Id.

1. Plaintiff Tillman's Circumstances

The Court shall begin its analysis of comparators by describing Plaintiff Tillman's situation. Tillman failed to pay off existing loans to Defendant Mercantile by the original deadline of April 5, 2010. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 2). Prior to that deadline, Mercantile offered Tillman a forbearance agreement, see Defendants' Exhibit K3, but Tillman refused the offer. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 2). Nonetheless, Mercantile chose to extend

the repayment deadline twice in 2010. Id. As the extended expiration date was approaching in 2010, Plaintiff Roosevelt Tillman needed $200,000 to buy a new home, so Mercantile loaned that money to Plaintiff TIP and extended the payment deadline to February 2011. See id. (Affidavit of Traci Courter, ¶ 3). When Tillman failed to repay the loan in February 2011, Mercantile extended the loan throughout 2011 and "agreed to a new repayment date of April 10, 2012." See id. (Affidavit of Traci Courter, ¶ 5). On March 21, 2012, with the April 2012 repayment date looming, Mercantile offered Tillman a "refinancing plan" that included "interest only payments on all loans for 6 months" and permitted Roosevelt Tillman not "to list [his] house [at 1611 Beard Drive] for sale as long as loan payments remain current[.]" See Defendants' Exhibit O4. Tillman rejected that plan, see Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 6), so Mercantile demanded repayment of the loan in full. See Plaintiffs' Exhibit 41. After that, Mercantile's Risk Asset Group (often called "the red group") dealt with Tillman. Id. On April 20, 2012, Traci Courter and Richard Boman from the Risk Asset Group met with Roosevelt Tillman, who had "no plan to resolve TIP's default." Id. (Affidavit of Traci Courter, ¶ 7). Thus, Courter "informed Mr. Tillman that Mercantile intended to move forward with foreclosure and collection of the loan." Id. During the collection process that began two years after Tillman missed the original payment deadline of April 5, 2010, Mercantile would not permit Tillman to split off payments to save the house at 1611 Beard Drive because all the loans were cross-collateralized, see Plaintiffs' Exhibit 43, so Tillman's properties were all lost to foreclosure.

2. David Budd's Circumstances

On June 21, 2021, the Court heard testimony from David Budd, the owner of two companies – Production Solutions and Budd Properties – that dealt with Defendant Mercantile. See Trial Tr

(6/21/21) at 5. In April 2008, Budd's Mercantile account was transferred to the Risk Asset Group. Id. at 5-6. Budd received a demand letter from Mercantile on April 23, 2008, see Plaintiffs' Exhibit 5,[8] which told him to pay the balances due on his loans by May 2, 2008, or Mercantile would pursue all of its legal remedies. See Plaintiffs' Exhibit 5. To keep operating his businesses, Budd and his companies had to cure their default, see Trial Tr (6/21/21) at 33-34, which they managed to do, id. at 34, 37, so Mercantile did not immediately begin collection actions. Id. at 10. In 2009, Mercantile sued Budd and his companies, which yielded a settlement agreement Budd signed on February 10, 2009. See Plaintiffs' Exhibit 5. The settlement agreement required monthly payments to Mercantile, id. (settlement agreement, § 4), and it left Budd in control of his companies if he made the monthly payments. See Trial Tr (6/21/21) at 14-15. But in September 2009, Mercantile instructed Budd to close his businesses,[9] id. at 22, and the Barry County Circuit Court entered a consent judgment for nearly $1.4 million against Budd and his companies. See Defendants' Exhibit L. On November 19, 2009, that court appointed a receiver to take control of the property of Budd and his companies, see Defendants' Exhibit M, so the receiver took the property and sold it.[10] See Trial Tr (6/21/21) at 22. Budd's assets were cross-collateralized, see id. at 24, so he lost everything to foreclosure except one piece of equipment that Mercantile let him buy for a release price. Id. at 24. Budd was forced into personal bankruptcy by Mercantile's effort to collect on his personal guaranty. Id. at 40, 43.

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[8] Plaintiffs' Exhibit 5 consists of two documents: a "settlement agreement" and the demand letter dated April 23, 2008.

[9] Budd testified that he was surprised by that directive because he was making the payments required of him and he "thought we were coming out of it" and "we were in good standing" at that point. See Trial Tr (6/21/21) at 25-26.

[10] "On August 26, 2010, the Barry County Circuit Court entered an order granting Receiver's Motion to Sell Real Property[,]" see Plaintiffs' Exhibit 49, thereby allowing the sale to proceed.

3. Bruce Helder's Circumstances

Bruce Helder, who owned Bara Technologies, Inc., and Venture Property Management, LLC, testified on June 17, 2021, about his relationship with Defendant Mercantile. At the inception of that relationship, Helder dealt with loan manager Ray Duimstra. In 2013, Traci Courter of Mercantile's Risk Asset Group took over Helder's loan file. See Trial Tr (6/17/21) at 8. On July 9, 2013, Courter advised Helder in writing that, "[g]iven the inter-related nature of Bara and Venture and the cross-collateralization and cross-default clauses contained in the loan documents," Mercantile was treating all of the promissory notes of the two companies as in default. See Plaintiffs' Exhibit 47. Mercantile demanded immediate payment in full and "placed a collateral hold on the deposit accounts of Bara and Venture[.]" Id. As Helder explained, "all of our bank accounts were frozen, so we couldn't pay our vendors" and "we couldn't pay our employees that day[,]" so he "laid off all of our employees" because Courter "shut us down." See Trial Tr (6/17/21) at 9. Helder and his companies sought some temporary relief in the Kent County Circuit Court, but that court dissolved its temporary restraining order on August 16, 2013. See Defendants' Exhibit R8. Ten days later, on August 26, 2013, Helder entered into a forbearance agreement with Mercantile, see Defendants' Exhibit T8, which prompted Mercantile to hold off on foreclosure. In time, Helder paid Mercantile "every dime they were owed" including "[i]interest, penalties, [and] legal fees[.]" Id. Helder could pay off Mercantile because he "had a substantial amount of very expensive computer-controlled equipment in our business and we sold that off and used those funds to pay off" Mercantile. Id. As Helder explained, "[w]hen you're out of business, the only thing you can do is sell off the equipment to pay off the loans, and that's what we did." Id. at 16. Venture also owned a building where Bara was the tenant, and Helder "was able to refinance that building with another bank" to finish paying off Mercantile. Id. at 18.

4. Victory Club's Circumstances

The relationship between Defendant Mercantile and the Victory Club was described by Todd Oosting (who testified on July 7, 2021) and David Organek (who testified on June 23, 2021). Both men were owners of Victory Club Investors, LLC, which bought property with Mercantile loans and leased the property to a restaurant run by Victory Club, LLC. The restaurant was required to pay rent to Victory Club Investors, LLC, which would use that money to pay off the loans from Mercantile. See Trial Tr (6/23/21) at 17. When the restaurant fell on hard times, it stopped paying its rent, which cut off the flow of cash that Victory Club Investors, LLC, could use to pay off Mercantile. Id. at 17. That caused Victory Club Investors, LLC, to default on its loan obligations to Mercantile. Id. When the default occurred, Richard Boman of the Risk Asset Group took over the loan file for Mercantile, see id. at 6, which offered to allow Victory Club Investors, LLC, to make interest-only payments for several months in exchange for a security interest in all of the equipment in the restaurant owned by Victory Club, LLC. Id. at 7, 16. But Victory Club Investors, LLC, rejected that offer, id. at 7-8, so Mercantile filed suit and obtained a court-ordered receiver to take control of Victory Club Investors, LLC.[11] Id. at 18. As a result of that collection lawsuit filed by Mercantile, Todd Oosting had to pay $200,000 to Mercantile on a personal guaranty, see Trial Tr (7/7/21) at 25-26, and David Organek

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[11] The timing of those events is, at best, murky because the witnesses' memories had faded and neither Plaintiff Tillman nor Defendant Mercantile introduced documents that provided useful information about when the events occurred. Todd Oosting explained that "I think in '08 or '09, the Organeks told the landlords that they were having a hard time with the restaurant and couldn't pay the rent." See Trial Tr (7/7/21) at 11. As luck would have it, though, the Court handled the case that Mercantile filed against the Victory Club investors, so the Court indicated that it would take judicial notice of the documents from that case file, see id. at 23-24, and counsel for Tillman welcomed that approach. Id. at 31-32. The documents from the file reveal that Mercantile filed suit against Victory Club Investors, LLC, Victory Club, LLC, and some of their principals on November 26, 2012. See Mercantile Bank of Michigan v Victory Club Investors, LLC, 17th Circuit Court Case No 12-10905-CRB. The Court appointed a receiver on December 21, 2012.

and his wife were forced into personal bankruptcy because of his obligations on a personal guaranty. See Trial Tr (6/23/21) at 17.

5. Comparison of Comparators

A comparison of Plaintiff Tillman to the three cited comparators reveals that no comparator "'was treated better'" than Tillman. Gohl, 836 F3d at 683. First, Bruce Helder cannot be regarded as a comparator because he and his companies entered into a forbearance agreement with Mercantile, see Defendants' Exhibit T8, whereas Tillman decided to reject Mercantile's offers of a forbearance agreement. See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶¶ 2 & 6); Defendants' Exhibits K3 & O4. Thus, the fact that Mercantile held off on foreclosure of Helder's property was a function of his forbearance agreement, not his race. In contrast, David Budd and the Victory Club should be regarded as comparators because they – like Tillman – refused to sign a forbearance agreement with Mercantile. But Budd and the Victory Club received the same rough treatment from Mercantile that Tillman suffered.

After receiving a demand letter from Defendant Mercantile in 2008, Budd cured his default, thereby forestalling Mercantile's collection efforts. See Trial Tr (6/21/21) at 33-34. In comparison, Plaintiff Tillman did not cure the default, so Mercantile proceeded with collection efforts. Even after Budd fended off Mercantile and then entered into a settlement agreement on February 10, 2009, see Plaintiffs' Exhibit 5, Mercantile came after Budd and his companies just a few months later, forcing Budd to shut down his business in September 2009, see Trial Tr (6/21/21) at 22, obtaining a consent judgment for nearly $1.4 million, see Defendants' Exhibit L, obtaining a receiver to control Budd's companies, see Defendants' Exhibit M, and driving Budd into personal bankruptcy. See Trial Tr

(6/21/21) at 40, 43. The story was the same for the Victory Club. In short order, Mercantile declared a default by Victory Club Investors, LLC, offered a forbearance agreement that the principals chose to reject, see Trial Tr (6/23/21) at 7-8, 16, filed suit against the Victory Club and had a receiver put in place to take control of the Victory Club, see id. at 18, obtained payment in full of $200,000 from Todd Oosting, see Trial Tr (7/7/21) at 25-26, and forced David Organek and his wife into personal bankruptcy. See Trial Tr (6/23/21) at 17. In comparison, Plaintiff Roosevelt Tillman was not forced into personal bankruptcy, so he did not suffer the most severe adverse consequences that were visited upon David Budd and the Victory Club investors.

Plaintiff Tillman relies upon two consequences that purportedly were not visited upon any of the comparators: (1) Tillman lost the personal residence at 1611 Beard Drive; and (2) Tillman was not afforded an opportunity to solve the financial problems with Defendant Mercantile by selling the building at 630 S. Division that Plaintiff TIP owned. Neither of these arguments convinces the Court that any comparator "'was treated better'" than Tillman. Gohl, 836 F3d at 683. As an initial matter, Tillman was able to purchase the home at 1611 Beard Drive only because Mercantile provided a loan in the amount of $200,000 to TIP after Tillman repeatedly missed payment deadlines in 2010. See Plaintiffs' Exhibit 7, Affidavit of Traci Courter, ¶¶ 2-3). That loan came with a price, which included cross-collateralization to tie the payment obligations for the home at 1611 Beard Drive to the other obligations Tillman owed to Mercantile.[12] Moreover, Tillman advised Mercantile that the repayment

[12] Because cross-collateralization was the *sine qua non* of the $200,000 loan agreement, see Plaintiffs' Exhibit 15 (noting cross-collateralization), the Court finds no merit in Plaintiff Tillman's theory that he was mistreated by Defendant Mercantile when it refused to split off the home at 1611 Beard Drive in the collection process and allow Plaintiff Roosevelt Tillman to keep the home simply by paying off the outstanding balance on the future advance mortgage on 1611 Beard Drive. Traci Courter explained to Roosevelt Tilllman that he could keep the home at 1611 Beard Drive only by providing Mercantile with "market value through a refinance." See Plaintiffs' Exhibit 43.

of the loan would be completed by selling the property at 630 S. Division, but that "sale fell through in early 2011." Id. (Affidavit of Traci Courter, ¶ 4). Thus, foreclosure on the home at 1611 Beard Drive and the failed attempt to sell the property at 630 S. Division were not the results of Mercantile singling out Tillman on the basis of race. Instead, the record reveals that Mercantile gave Tillman the opportunity to sell the property at 630 S. Division, but the sale fell through.[13] And the record also reveals that Tillman chose to cross-collateralize the home at 1611 Beard Drive in order to obtain the $200,000 loan needed to buy the home, see Plaintiffs' Exhibit 15, but Tillman thereafter was unable to make the payments owed to Mercantile. No comparator was afforded the opportunity to take out additional loans from Mercantile after the bank declared a default, and no comparator was given the chance to sell its own property to address loan obligations to Mercantile. In the cases of David Budd and Victory Club, Mercantile obtained a court-appointed receiver to take control of their property in order to dispose of it.[14] See Defendants' Exhibit M; Trial Tr (6/23/21) at 18.[15] Hence, the Court

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[13] Plaintiff Tillman complains that he was denied the chance sell 630 S. Division years later. The property was the subject of a foreclosure sale on October 10, 2012, see Plaintiffs' Exhibit 14, when Mercantile bought the property with a full credit bid of $1,026,943.31. Id. (Sheriff's Deed on Mortgage Sale). On January 15, 2013, within the six-month redemption period, Plaintiff Roosevelt Tillman reached out to Traci Courter of Mercantile to propose a sale of 630 S. Division to the United States Postal Service. See Plaintiffs' Exhibit 8. On May 30, 2013, after the six-month redemption period expired, Mercantile entered into an "Option to Purchase Agreement" with the Postal Service. See Plaintiffs' Exhibits 9-10. By that time, Tillman no longer had any legal interest in the property.

[14] Plaintiff Roosevelt Tillman draws a distinction between himself and David Budd because Tillman claims that Budd did not lose his personal residence. But the record reveals that Defendant Mercantile did not have a first-priority mortgage on Budd's house, see Trial Tr (6/21/21) at 43, and Budd's house was included in Budd's personal bankruptcy, see id., whereas Tillman agreed to cross-collateralize the home at 1611 Beard Drive in exchange for a $200,000 loan from Mercantile.

[15] David Organek testified about the appointment of a receiver, and the Court subsequently confirmed that fact by reviewing the "Order Appointing Receiver of Victory Club Investors, LLC and Victory Club, LLC" entered on December 21, 2012, in Mercantile Bank of Michigan v Victory Club Investors, LLC, 17th Cir Ct Case No 12-10905-CRB.

concludes that Tillman has failed to identify a comparator that "'was treated better'" by Mercantile, see Gohl, 836 F3d at 683, so Tillman has not established a prima facie case of intentional race-based discrimination at the first step of the burden-shifting analysis.

B. Proffered Non-Discriminatory Reasons for Mercantile's Actions.

Even if Plaintiff Tillman had presented a prima facie case of intentional race discrimination, the Court would have to allow Defendant Mercantile the opportunity to provide a non-discriminatory reason for its actions, and then Tillman would have to prove that that reason was merely a pretext. See Hazle v Ford Motor Co, 464 Mich 456, 476 (2001). Traci Courter explained Mercantile's non-discriminatory reason for its collection action against Tillman as follows: "The bank took collection action simply because [Plaintiff] TIP was in default, TIP had not agreed to a forbearance agreement, and Mr. Tillman had no viable plan to repay what TIP had borrowed." See Plaintiffs' Exhibit 7 (Affidavit of Traci Courter, ¶ 9). At trial, Mercantile augmented its non-discriminatory explanation with evidence that Tillman was chronically late in making payments, see Defendants' Exhibits E5, R2, W2, Y2, Z2, T3, M4, D5, F5, G5-Z5, A6-J6, S6-U6, X6-Z6, regularly overdrew bank accounts with Mercantile, see Defendants' Exhibits N2-Q2, S2-V2, X2, B3, S3, failed to pay property taxes on parcels that secured loan obligations to Mercantile, see Defendants' Exhibits B7-E7, G7, K7, L7, cut off communications with Mercantile in March 2012, see Defendants' Exhibit A7, and completely stopped making all payments to Mercantile.

Because Defendant Mercantile has provided a non-discriminatory reason for the actions that it took against Plaintiff Tillman, the burden falls to Tillman to "demonstrate that the evidence in this case would permit the [Court as the trier of fact] to find that defendants' explanation was a pretext

for race discrimination." Hazle, 464 Mich at 476. Tillman has made no such showing in this case. Tillman offered no evidence to refute, contradict, or even explain the mountain of evidence showing myriad violations of each and every obligation of a commercial borrower, including late payments, overdrawn accounts, delinquent property taxes, and eventually complete lack of communication and refusal to make any payments whatsoever on the outstanding loan obligations. Beyond that, Plaintiff Tillman was unable to furnish meaningful evidence of racial animus on the part of Mercantile. The opening statement for Tillman promised evidence of racial slurs uttered by Mercantile employees, but no such evidence of that type of ugly behavior was presented.

Plaintiff Tillman offered a collection of e-mails to prove racial animus. The most offensive e-mail that contained despicable racist language was sent to Justin Karl, an employee of Defendant Mercantile, see Plaintiffs' Exhibit 34, but Karl did not send that e-mail on to anyone else, much less to anybody at Mercantile. Another e-mail that was received and forwarded by Mercantile employee Charles Christmas entitled "Top Ten List of America's Stupidity" included an entry challenging the existence of racial discrimination in light of the presence of many African-Americans in positions of authority in the federal government and referred to a greater percentage of "federal entitlements go[ing] to black Americans" than "to whites[.]" See Plaintiffs' Exhibit 33. But no evidence linked Christmas or any recipient of the forwarded e-mail to anyone at Mercantile who had anything to do with Plaintiff Roosevelt Tillman or the Tillman loans. Beyond those two e-mails received by Karl and Chrismas, Tillman presented several e-mails in which high-level Mercantile executives shared their thoughts about efforts to "lend more $ to black people," see Plaintiffs' Exhibit 31, and included negative comments about Mercantile board member Don Williams – a prominent African-American

in the Grand Rapids community.[16] See Plaintiffs' Exhibit 32. Without question, Mercantile reached out to minority communities in Grand Rapids to offer banking services primarily through Mercantile employee Patricia Julien, a former vice-president of commercial lending who testified at great length about Mercantile's minority outreach efforts.[17] Julien described Roosevelt Tillman as a customer of Mercantile who was honest about how things were going in his businesses, but who needed a good accountant. In addition, Sonali Allen – Mercantile's chief compliance and community development officer since 2005 – testified about Mercantile's sterling record under the Community Reinvestment Act and its community outreach efforts.

Plaintiff Tillman called a significant number of Mercantile employees as adverse witnesses, but not a single one of those witnesses provided any testimony or other evidence to support the claim that Mercantile discriminated against its customers on the basis of race in offering or administering commercial loans. Had Tillman delivered on even a small fraction of the promises of evidence made in the opening statement, the Court would readily find intentional discrimination. But the record that was developed at trial bears no resemblance to what Tillman promised to present. Accordingly, the Court concludes that Mercantile's non-discriminatory explanation for its actions concerning Tillman is not a pretext for racial discrimination.[18]

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[16] Don Williams testified at trial that he served on the Mercantile board "since the beginning" of the bank, that he retired from the board at the age of 77 to great fanfare, and that thereafter he was hired by Mercantile to serve as a consultant.

[17] Patricia Julien testified that she left Mercantile before the recession started in 2008 because "it was time to go" due to health reasons.

[18] At trial, Defendant Mercantile asked rhetorically whether it was simply supposed to permit Plaintiff Tillman to keep all of the money that the bank provided, including the $200,000 it loaned to fund the purchase of the house at 1611 Beard Drive in exchange for cross-collateralization of the home. But that seems to be the proposed solution underlying Tillman's claim of pretext.

III. Verdict

For all of the reasons stated in the Court's findings of fact and conclusions of law, the Court renders a verdict in favor of Defendant Mercantile and against Plaintiff Tillman on Tillman's claim of intentional race-based discrimination. The record does not establish that a comparator was treated better than Tillman, nor does the record demonstrate that Mercantile's non-discriminatory reason for its treatment of Tillman was a mere pretext to cover racial discrimination.[19]

IT IS SO ORDERED.

Dated: April 14, 2022

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[19] The Court invites Defendant Mercantile to submit a proposed judgment under the so-called seven-day rule, see MCR 2.602(B)(3), that memorializes the verdict and closes the case.