United States District Court,
S.D. Florida.
Shadrach LEWIS, an individual, Plaintiff,
v.
MARINOSCI LAW GROUP, P.C., a Florida Professional Corporation, Defendant.

No. 13–61676–CIV.
Oct. 29, 2013.

ORDER DENYING MOTION TO DISMISS

WILLIAM P. DIMITROULEAS, District Judge.

***1** THIS CAUSE is before the Court upon Defendant Marinosci Law Group, P.C. ("Defendant")'s Motion to Dismiss Complaint [DE 8], filed herein on September 9, 2013. The Court has carefully considered the Motion, Plaintiff Shadrach Lewis ("Plaintiff")'s Response [DE 9], notes that no Reply was timely filed, and is otherwise fully advised in the premises.

I. BACKGROUND

This action arises from a state court mortgage foreclosure action. The following facts are according to Plaintiff's Complaint, the allegations of which the Court regards as true for the purposes of the Motion to Dismiss:

Plaintiff is a natural person and resident of Broward County, Florida. *See* [DE 1] at ¶ 3. Defendant is a corporations and citizen of the State of Florida. ¶ 4. Defendant is a debt collector who regularly collects or attempts to collect debts for other parties and regularly uses the mail and telephone in the collection of consumer debt. ¶¶ 5–6. At all times material to the allegations of this Complaint, Defendant was acting as a debt collector with respect to the collection of Plaintiff's alleged debt. ¶ 7. On or about November 15, 2012, Defendant caused to be served upon Plaintiff the state court complaint and summons in the mortgage foreclosure action. *See* [DE 1] at ¶¶ 10–12. Also attached to the state court complaint was a "Notice" titled as follows:

Notice Required by Fair Debt Collection Practices Act

This Notice is required by the Fair Debt Collection Practices Act (the "Act"), 15 U.S.C. §§ 1692 et seq., as amended.

See [DE 1] at ¶ 13. Paragraph number 3 of the Notice states:

The debt described in the attached Complaint and evidenced by the copy of the

attached mortgage note will be assumed to be valid by the creditor's attorney, unless the debtor, within 30 days after receipt of this notice, disputes, in writing, the validity of the debt or some portion of it.

See [DE 1] at ¶ 14.

Plaintiff filed the instant action on August 5, 2013, alleging that Defendant's Notice violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* ("FDCPA"). Specifically, Plaintiff claims a violation of 15 U.S.C. § 1692e, 1692e(10).

II. DISCUSSION

1. Motion to Dismiss Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss will be granted if the plaintiff fails to state a claim for which relief can be granted. According to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a claimant must only state "a short and plain statement of the claim showing that the pleader is entitled to relief." When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint. *See Aschroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664.

2. Motion to Dismiss

***2** On September 9, 2013, Defendant filed the instant Motion to Dismiss. Defendant argues that the Complaint should be dismissed on procedural grounds because, even if it had legal merit, it should have been filed as a compulsory counterclaim in the state court action.

Additionally, regarding the merits of Plaintiff's Complaint, Defendant asserts that Plaintiff has failed to state a claim upon which relief can be granted. To prevail on a claim under the FDCPA, the plaintiff must prove that: "(1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA." *Kaplan v. Assetcare, Inc.*, 88 F.Supp.2d 1355, 1360–61 (S.D.Fla.2000) (internal citations omitted). In particular, Defendant argues that (1) foreclosing on a security interest is not debt collection activity under the FDCPA; (2)

that legal pleadings and related papers cannot be treated as a "communication" under the FDCPA; and (3) Plaintiff's FDCPA claims are barred as a matter of law pursuant to Florida's litigation privilege. Following a brief background discussion of the FDCPA, the Court will address each of Defendant's arguments.

a. FDCPA

Congress established the FDCPA to "eliminate abusive debt collection practices." 15 U.S.C. § 1692. The FDCPA restricts communications from debt collectors to consumers in many different ways. *See e.g.,* 15 U.S.C. § 1692d (prohibiting harassing or abusive conduct in connection with the collection of a debt). Notably, "[t]he FDCPA establishes a strict liability standard; a consumer need not show [an] intentional violation of the Act by a debt collector to be entitled to damages." *Castro v. A.R.S. Nat'l Servs., Inc.*, 2000 WL 264310, *2 (S.D.N.Y. Mar.8, 2000) (citing *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2nd Cir.1996)). A single violation of the Act is sufficient to subject a debt collector to liability under the Act. *Id.* When a court evaluates whether language is deceptive under the FDCPA, it applies an objective standard to the language's tendency " 'to mislead the least sophisticated' " consumer, in order to give effect to the FDCPA's purpose of protecting consumers. *Jeter v. Credit Bureau*, 760 F.2d 1168, 1175 (11th Cir.1985) (quoting *Wright v. Credit Bureau of Ga., Inc.*, 548 F.Supp. 591, 599 (N.D.Ga.1982)). Courts may assume, however, that the least sophisticated consumer will "possess a rudimentary amount of information about the world" and will not make "unreasonable misinterpretations." *Rivera v. Amalgamated Debt Collection Servs.*, 462 F.Supp.2d 1223, 1227 (S.D.Fla.2006) (quotations omitted).

b. Compulsory Counterclaim

Defendant argues that Plaintiff's claim is subject to dismissal because it should have been filed as compulsory counterclaim in the related foreclosure action in state court. The Court disagrees. The Federal Rules of Civil Procedure (the "Rules") dictate whether Plaintiff's claim constitutes a compulsory counterclaim. *See* *Rotenberg v. MLG, P.A.*, No. 13–cv–22624–UU, 2013 WL 5664886, at *3 (S.D.Fla. Oct.17, 2013). Pursuant to Rule 14, claims against third parties are never compulsory. *Id.* Because Defendant is not a party to the state court action, Plaintiff's instant claim against Defendant would have been a third-party claim if brought in that action. Consequently, Defendant's argument fails.

c. Debt Collection Activity

***3** Defendant argues that foreclosing on a security interest is not debt collection activity under the FDCPA. In support of its position, Defendant relies on *Warren v. Countrywide Home Loans, Inc.*, 342 Fed. Appx. 458, 460 (11th Cir.009) (determining

that “the act of foreclosing on a security interest is not debt collection activity for the purposes of the FDCPA.”). However, “the holding in *Warren* has subsequently been called into question” by the Eleventh Circuit's later opinions in *Birster v. American Home Mortg., Servicing, Inc.*, 481 F. App'x 579, 583 n. 2 (11th Cir.2012) and *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir.2012). *See Santiago v. EverBank*, 2013 WL 1176074 (N.D.Ala. Mar.19, 2013).

Despite Defendant's protest to the contrary, “a communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest.” *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir.2012); *Birster v. Am. Home Mortgage Servicing, Inc.*, 481 F. App'x 579, 583 (11th Cir.2012) (“[A]n entity can both enforce a security interest and collect a debt.”); *see also Rotenberg*, 2013 WL 5664886 (holding that a defendant law firm was engaged in debt collection activity under the FDCPA when it sent an allegedly deceptive notice to the plaintiff along with a mortgage foreclosure complaint). Accordingly, Plaintiff has sufficiently alleged that Defendant was engaged in debt collection activity under the FDCPA when it provided the allegedly false, deceptive, or misleading Notice to Plaintiff.

d. False, deceptive or misleading under 15 U.S.C. § 1692e

In his Complaint, Plaintiff alleges Defendant's Notice attached to the state court mortgage foreclosure complaint violated 15 U.S.C. § 1692e as the statement was false, deceptive, or misleading. The subsections of 15 U.S.C. § 1692e are a non-exhaustive list of examples of the type of conduct prohibited by the FDCPA. Plaintiff alleges a violation of § 1692e, generally, as well as § 1692e(10), in particular, which subsection states as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
>
> 15 U.S.C. § 1692e(10).

In the instant Motion, Defendant does not dispute that the representations in Paragraph number 3 of the Notice was “false, deceptive, or misleading.” Nonetheless, the Court will analyze this issue, as it is the crux of whether Plaintiff sufficiently states a

claim.

Plaintiff alleges that Paragraph number 3 of the Notice constitutes a "false, deceptive, or misleading representation" because it incorrectly suggests that a consumer must file a written response within thirty (30) days. *See* [DE 1] at ¶ 21. Plaintiff explains that such a representation is "false, deceptive, or misleading" because "[t]o many consumers this Notice would overshadow the time frame necessary to file a response with the Court as explained in the Summons. Should a consumer wait until the thirtieth day to file a response, they will already be in default in accordance with the Summons." *See* [DE 1] at ¶ 21. Additionally, or in the alternative, Plaintiff alleges that this Notice would be deceptive to the least sophisticated consumer with respect to their rights as both a consumer and a litigant because "[m]any consumers believe that they need to file a written response to the Notice with the Court as directed by the Summons. This response from a consumer is then deemed an Answer. Once a consumer has filed an Answer, they have waived many of their legal rights and defenses, including but not limited to: (1) the right to contest service of process; (2) the right to seek a more definite statement; and (3) the right to file a motion to dismiss." *See* [DE 1] at ¶ 22.

***4** Based on the foregoing explanation of how this provision could easily mislead the least sophisticated consumer, Paragraph number 3 of the Notice could be found to be "false, deceptive, or misleading ." Thus, such representations could be the kind of conduct that was intended to be covered by § 1692e(10) or more generally, § 1692e. Hence, the Court finds that Plaintiff has sufficiently alleged that Defendant's Notice was false, deceptive or misleading in violation of § 1692e, 1692e(10).

e. "Communication" Under 15 U.S.C. 1692

Defendant argues that legal pleadings and related papers cannot be treated as a "communication" under the FDCPA. This argument is inapposite. Plaintiff has brought a claim under § 1692e, which "creates liability for deceptive 'representations or means,' not deceptive 'first communications.' " *Rotenberg,* 2013 WL 5664886, at *2. Indeed, unlike other portions of § 1692, subsection 1692e does not refer to, define, or otherwise require any "communication." *See* 15 U.S.C.A. § 1692e. Rather, as stated above, a plaintiff need only establish that the defendant used a "false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* Therefore, the definitions and exceptions relating to a "communication"—or to whether a "legal pleading" may constitute an "initial communication"—under §§ 1692a(2), c(b), g(a), and/or g(d) are inapplicable to Plaintiff's claim. Similarly, the holdings in *Vega v. McKay,* 351 F.3d 1334, 1337 (11th Cir.2003), and *Acosta v. Campbell,* 309 F. App'x 315, 320–21 (11th Cir.2009), have no bearing on claims under § 1692e. *Rotenberg,* 2013 WL

5664886, at *2–3 (distinguishing *Vega* and *Acosta* in denying motion to dismiss claim brought under § 1692e).[FN1] Consequently, Defendant's arguments as to its legal pleadings and related papers fail.

> FN1. For the same reason, the holding in *Robb v. Rahi Real Estate Holdings LLC,* 2011 WL 2149941, at *6–7 (S.D.Fla. May 23, 2011), does not apply. In that case, the plaintiff did not limit his claims to § 1692e. Additionally, that order predated the Eleventh Circuit's rulings in *Birster* and *Reese.*

f. Florida's Litigation Privilege

Defendant argues that the litigation privilege in Florida bars Plaintiff's FDCPA claims as a matter of law. This argument fails. Florida's litigation privilege "does not bar federal claims." *See id.* at *4; *see also Pescatrice v. Orovitz,* 539 F.Supp.2d 1375, 1380 (S.D.Fla.2008); *Battle v. Gladstone Law Grp., P.A.,* 12–14458–CIV, 2013 WL 3297552, at *4 (S.D.Fla. June 28, 2013). Moreover, the Supreme Court, as well as various Circuit Courts, have held that the FDCPA applies to attorneys' debt-collection activity during litigation. *See Heintz v. Jenkins,* 514 U.S. 291, 299, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) ("[T]he FDCPA the applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation."); *Todd v. Weltman, Weinberg & Reis Co., L.P.A.,* 434 F.3d 432 (6th Cir.2006) *cert. denied* 549 U.S. 886, 127 S.Ct. 261, 166 L.Ed.2d 151 (Oct. 2, 2006); *Sayyed v. Wolpoff & Abramson,* 485 F.3d 226, 230 (4th Cir.2007). Defendant has neither acknowledged this authority nor offered any reason why Florida's litigation privilege would apply in this instance.

III. CONCLUSION

***5** Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss Complaint [DE 8] is **DENIED;**

2. Defendant shall file its Answer on or before November 11, 2013.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 28th day of October, 2013.