UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES CALLUM,

Plaintiff,

v. CASE NO.: 8:21-cv-5-SCB-AEP

NEW REZ, LLC d/b/a SHELLPOINT MORTGAGE SERVICING, *et al.*,

Defendant.
_____/

O R D E R

Before the Court is Defendant NewRez, LLC d/b/a Shellpoint Mortgage Servicing's Motion to Dismiss and Incorporated Memorandum of Law. (Doc. 35). Plaintiff, James Callum ("Callum"), filed a Response in Opposition. (Doc. 58). As explained below, the Motion is denied.

I. BACKGROUND AND STATEMENT OF FACTS

Callum executed and delivered an adjustable rate note to JP Morgan Chase Bank, N.A. in the principal amount of $360,000.00 on September 29, 2006, which was secured by a mortgage signed the same day encumbering property located in Pasco County, Florida. (*See* Doc. 5, Complaint, ¶ 43). Nationstar Mortgage LLC instituted an action to foreclose Callum's mortgage on August 9, 2017, alleging his failure to make the November 1, 2016 payment and all subsequent payments. (*Id.* at ¶¶ 45, 46). Defendant NewRez, LLC d/b/a Shellpoint

Mortgage Servicing ("Shellpoint") began servicing the loan in 2018 and substituted as party plaintiff in the foreclosure action as of February 19, 20219. (*Id.* at ¶ 51).

Callum entered into a consent and stipulation ("the Stipulation") to entry of final judgment of foreclosure on December 3, 2019, wherein Shellpoint agreed to waive its right to seek a deficiency judgment against Callum. (*Id.* at ¶ 52). The Sixth Judicial Circuit Court in Pasco County, Florida, entered final judgment of foreclosure in Shellpoint's favor on December 5, 2019, which included a memorialization of its deficiency waiver. (*Id.* at ¶ 53).

Callum alleges that after December 5, 2019, Shellpoint communicated with him via his counsel on various occasions in an attempt to collect on the deficiency. (*See id.* at ¶¶ 54, 57, 58, 62–64, 85, 86, 88). Callum also alleges that Shellpoint furnished inaccurate credit information to credit reporting agencies and used negative credit reporting as another debt collection tactic. (*Id.* at ¶¶ 98–100, 109–11).

On January 5, 2021, Callum filed a seven-count Complaint against Defendants Shellpoint and three credit reporting agencies ("CRAs"), Experian Information Solutions, Inc. ("Experian"), Equifax Information Services, LLC ("Equifax"), and Trans Union, LLC ("Trans Union"), based upon violations of the

Florida Consumer Collection Practices Act (the "FCCPA"), Chapter 559, Florida Statutes, and the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681. Callum has since settled his claims with Trans Union and Equifax and the Court dismissed those claims. (*See* Docs. 39, 40, 46, 47).

With respect to Shellpoint, Callum brings the following three counts: (1) violations of the FCCPA, specifically section 559.72(7), Florida Statutes, for attempting to collect a debt by means which can reasonably be expected to abuse or harass him as a debtor (Count I); (2) violations of the FCCPA, specifically section 559.72(9), for attempting to collect a debt that Shellpoint knew was not legitimate (Count II); and violations of the FCRA, specifically 15 U.S.C. § 1681s-2(b), for willfully and/or negligently publishing and/or furnishing inaccurate account information, failing to fully and properly investigate Callum's disputes, and failing to correctly report account information after investigating the disputes (Count VII).

On March 2, 2021, Shellpoint filed the instant Motion to Dismiss, arguing that Callum's claims against it should be dismissed because the Complaint fails to meet the basic pleading standards in Counts I, II and VII.

II. STANDARD FOR DISMISSAL

In deciding a motion to dismiss, the district court is required to view the complaint in the light most favorable to the plaintiff. *See Murphy v. Federal Deposit Ins. Corp.*, 208 F.3d 959, 962 (11th Cir. 2000) (citing *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999)). The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Instead, Rule 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (citation omitted). As such, a plaintiff is required to allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965 (citation omitted). While the Court must assume that all of the allegations in the complaint are true, dismissal is appropriate if the allegations do not "raise [the plaintiff's] right to relief above the speculative level." *Id.* (citation omitted). The standard on a Rule 12(b)(6) motion is not whether the plaintiff will ultimately prevail in his or her theories, but whether the allegations are sufficient to allow the plaintiff to conduct discovery in an attempt to prove the allegations. *See Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986).

III. DISCUSSION

Callum argues that Counts I and II of the Complaint should not be dismissed because: (i) the FCCPA claims are not based on credit reporting, but rather, on the amounts being reported in comparison to the statements; (ii) the FCCPA, by its express language, applies to alleged debtors; and (iii) binding precedent and the express language of the FCCPA require application of the least sophisticated consumer standard, not the attorney standard. As to Count VII, Callum argues that his FCRA claim should not be dismissed because the Complaint sufficiently alleges that: (i) the CRAs notified Shellpoint of Callum's disputes; (ii) Shellpoint failed to conduct a reasonable investigation into the disputes, which pursuant to caselaw may be determined to amount to no investigation at all; and (iii) Shellpoint's reckless disregard in failing to correct the credit reporting after two disputes constitutes willfulness. Upon consideration, the Court agrees with Callum.

A. Callum sufficiently alleges claims under the FCCPA in Counts I and II.

1. Callum's FCCPA claims are not based entirely on allegations of credit reporting.

Shellpoint requests that this Court dismiss Counts I and II of the Complaint on the basis that the FCCPA claims therein are based entirely on misreported credit

and are, therefore, preempted by the FCRA.[1] However, the Court observes that Counts I and II are not, in fact, premised entirely on allegations of credit reporting. Rather, Count I alleges that Shellpoint continued to communicate indirectly with Callum in an attempt to collect the debt by sending written communications to his counsel from December 2019 through November 2020, despite the fact that the Account was no longer enforceable against Callum. (Doc. 5, ¶¶ 98, 101). Count I further alleges that the "communications were made in an attempt to abuse and harass Plaintiff . . . [to] satisfy[y] the waived Debt." (*Id.* at ¶ 102). Count II incorporates all prior allegations of the Complaint. (*See* Doc. 5, p. 21). In light of these allegations, the FCCPA claims against Shellpoint in Counts I and II of the Complaint will not be dismissed for being preempted by the FCRA.

[1] Shellpoint cites *Arnold v. Capital One Servs.*, LLC, No. 8:17-CV-1416-T-33AEP, 2017 WL 4355625, at *2 (M.D. Fla. Oct. 2, 2017) ("This Court, as well as a majority of district courts in Florida, consistently hold that Section 1681t(b)(1)(F) preempts FCCPA claims to the extent that the challenged debt-collection activity is based on furnishing inaccurate information to credit reporting agencies."); *Davidson v. Capital One, N.A.*, No. 14–20478–CIV, 2014 WL 3767677, *5 (S.D. Fla. July 31, 2014) (finding "FCCPA claims based on reports to CRAs are preempted under the FCRA"); *Sylvester v. GE Capital Retail Bank*, No. 6:12-cv-341-ORL-31, 2012 WL 3522691, at *3 (M.D. Fla. Aug. 14, 2012) (dismissing FCCPA claim and holding that the FCRA preempted Florida debt collection claim that arose from bank's alleged failure to accurately report plaintiff's credit history); *Osborne v. Vericrest Fin., Inc.*, No. 8:11-cv-716-T-30-TBM, 2011 WL 1878227, at *2–3 (M.D. Fla. May 17, 2011) (dismissing FCCPA claims to extent allegations related to defendant's alleged disclosures to credit reporting agencies).

2. Callum sufficiently alleges that he is a debtor.

Shellpoint argues that Callum cannot claim that no debt exists while simultaneously claiming that he is a debtor who does not owe the alleged debt. The FCCPA, however, defines a "debtor" as "any natural person obligated or *allegedly obligated* to pay any debt." Fla. Stat. § 559.55(8) (emphasis added). Furthermore, in interpreting the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, the Eighth Circuit established that the FDCPA applies to debts that are discharged, mistakenly collected, paid or never owed. *Dunham v. Portfolio Recovery Assoc., LLC*, 663 F.3d 997 (8th Cir. 2011). The FCCPA provides that "[d]ue consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." Fla. Stat. § 559.77(5). For these reasons, the Court finds that Callum sufficiently alleges that he is a "debtor" in his FCCPA claims against Shellpoint (Counts I and II of the Complaint).

3. Shellpoint's indirect communications violate the FCCPA under the least sophisticated consumer standard.

Shellpoint argues that Callum's FCCPA claims should be dismissed because its communications to Callum were made indirectly through Callum's legal counsel. However, the Eleventh Circuit applies the "least sophisticated consumer"

standard, which requires that an FDCPA (and thus, and FCCPA) claim for abuse or harassment be viewed from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression or abuse. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985) (reversing the district court for applying the wrong standard of a "reasonable consumer"); *see also,* 15 U.S.C. § 1692d. Under the "least sophisticated consumer" standard," it is the finder-of-fact who ultimately determines whether communications constitute a violation of the FDCPA (or FCCPA). *Id.*

Furthermore, in applying the FDCPA, the Eleventh Circuit has held that the statutory text of the Act does not expressly or impliedly provide immunity for prohibited debt collection practices merely because those practices are directed at a consumer's attorney or third party. *Miljkovic v. Shafritz and Dinkin, P.A.*, 791 F.3d 1291, 1301 (11th Cir. 2015) (citing *Emory v. Nat'l Action Servs., Inc.*, 505 F.3d 769 (7th Cir. 2007) (not one of the three sections at issue here "designate[s] any class of persons, such as lawyers, who can be abused, misled, etc., by debt collectors with impunity."). In fact, five circuit courts have held that the FDCPA regulates communications from a debt collector to the consumer's lawyer. *Miljkovic*, 791 F.3d at1301; *Allen ex. Rel. Martin v. Lasalle Bank*, 629 F.3d 364 (3d Cir. 2011); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007);

Emory, 505 F.3d 769; *Dikeman v. Nat'l Educators, Inc.*, 81 F.3d 949 (10th Cir. 1996); *Accord, Bishop v. Ross Earle & Banon, P.A.*, 817 F.3d 1268 (11th Cir. 2016) ("We see no basis in the FDCPA to treat false statements made to lawyers differently from false statements made to consumers themselves"). In light of the foregoing, Callum's FCCPA claims in Counts I and II of the Complaint will not be dismissed on the basis that Shellpoint's communications to Callum were made indirectly through Callum's legal counsel.

B. Callum sufficiently alleges a claim under the FCRA in Count VII.

The FCRA imposes certain duties on furnishers of credit information, including a duty to "investigate and respond promptly to notices of consumer disputes" under 15 U.S.C. § 1681s-2(b). *Green v. RBS Nat. Bank*, 288 F. App'x 641, 642 (11th Cir. 2008). After receiving a dispute notice from a CRA, a furnisher is required to "conduct an investigation with respect to the disputed information" and "review all relevant information provided to it by the CRA." *Rambarran v. Bank of Am., N.A.*, 609 F. Supp. 2d 1253, 1257 (S.D. Fla. 2009) (quoting 15 U.S.C. § 1681s-2(b)(1)). The furnisher must conduct a "reasonable investigation," and the burden is on the plaintiff to show that the investigation was unreasonable. *Stroud v. Bank of Am.*, 886 F. Supp. 2d 1308, 1313-14 (S.D. Fla. 2012) (citing *Chiang v.*

Verizon New England Inc., 595 F.3d 26, 38 (1st Cir. 2010)); *see also,* 15 U.S.C. § 1681s-2(b)(1).

To state a claim under 15 U.S.C. § 1681s-2(b), Callum must plead: "(1) [he] notified a CRA of a dispute related to his credit information; (2) the CRA then notified the furnisher of the information about the dispute; and (3) the furnisher failed to fulfill the obligations enumerated in § 1681s-2(b)(1) [conduct a "reasonable investigation" and report back to the CRAs]." *Leones v. Rushmore Loan Mgmt. Servs., LLC*, No. 0:17-cv-61216, 2017 WL 6343622, at *2 (S.D. Fla. Dec. 11, 2017).

1. Callum sufficiently alleges that the credit reporting agencies notified Shellpoint.

Here, the Complaint sufficiently alleges that Callum submitted his first dispute to Experian, Equifax, TransUnion, and Innovis; the content of the dispute and enclosures thereto; that TransUnion confirmed receipt of the dispute; and that TransUnion, Experian and Equifax communicated and provided copies of Callum's dispute to Shellpoint. (Doc. 5, ¶¶ 65, 66, 67, 68). The Complaint further alleges that Innovis, TransUnion, and Experian responded to Callum's First Dispute. (*Id.*, ¶¶ 69, 70, 71). Similarly, TransUnion and Experian confirmed receipt of Callum's Second Dispute Letter. (*Id.*, ¶¶ 78, 81, 82). The Complaint provides the dates that Callum communicated his disputes and the dates that Shellpoint

acknowledged or responded to those disputes. (*Id.* at ¶¶ 65, 67, 69, 70).

Information that is inaccurate or that cannot be verified must be deleted by the CRA and the furnisher of the information is required to cease reporting the account. *See Hinkle v. Midland Credit Mgmt., Inc.*, 827 F. 1295, 1304 (11th Cir. 2016) (citing § 1681i(d); § 1681i(a)(5)(A)(l)). The instant Complaint alleges that Callum's account was updated, yet it was still being reported inaccurately. (*Id.*, ¶¶ 81, 82). Allegations that the defendant sent notice to a third party furnisher is all that is required to satisfy the liberal pleading requirements. *Campbell v. Equifax Info. Servs., LLC*, 2009 WL 302262 (S.D. Fla. 2009); *see also, Baker v. Midland Funding, LLC*, 2014 WL 2205674 (D. Ariz. 2014) (denying dismissal where the furnisher argued that the consumer failed to allege the date or content of notice); *Ginnan v. Guaranteed Rate, Inc.*, 2016 WL 302146 (N.D. Ill. 2016) (conclusory allegation that furnisher was put on notice by CRA and failed to meet its obligations were sufficient). For these reasons, the Court finds that any transmittal from the CRA that notified Shellpoint of Callum's dispute was sufficient to trigger Callum's duties under § 1681s-2(b). As such, Callum's FCRA claim in Count VII of the Complaint sufficiently alleges that the CRAs notified Shellpoint of Callum's dispute.

2. Callum sufficiently alleges that Shellpoint failed to conduct a reasonable investigation.

Shellpoint argues that Callum's FCRA clam in Count VII should be dismissed because the Complaint lacks allegations as to the date and content of Callum's dispute notices. (Doc. 35, p. 7). Shellpoint also argues that Count VII should be dismissed because it is unclear whether Callum "contends the investigation was unreasonable or Shellpoint failed to investigate." (*Id.*) Upon consideration, the Court disagrees with Shellpoint.

The Complaint alleges the content of the disputes (and the dispute letters are attached thereto) and alleges that Shellpoint communicated the results of its investigation. (*See* Doc. 5, ¶¶ 66, 74, 75; Exs. D, E). The Complaint also alleges that Shellpoint responded directly to Callum's disputes, still misreported Callum's account, and "failed to notate the Stipulation or that the Debt was no longer enforceable." (Doc. 5, ¶ 88). The Complaint further alleges, in Count VII, that Shellpoint "fail[ed] to fully and properly investigate [Callum's] disputes in failing to review all relevant information;" and that the investigation was not in good faith, not reasonable, and did not use all information reasonably available to Shellpoint. (Doc. 5, ¶¶ 147, 152-154).

Upon receipt of Callum's disputes regarding the reporting of the debt, Shellpoint was required to: (1) "conduct an investigation with respect to the

disputed information;" (2) "review all relevant information provided by the consumer reporting agency" in connection with the dispute; and (3) "report the results of the investigation to the credit reporting agency." 15 U.S.C. § 1681s2(b)(1)(A)–(C); *see also*, *Marchisio v. Carrington Mortg. Servs.*, LLC, 919 F. 3d 1288, 1301 (11th Cir. 2018). As such, it makes no difference whether Shellpoint merely verified the personally identifiable information of Callum or failed "to fully and properly investigate by using all information available to it," Shellpoint's conduct can still be considered a failure to constitute any meaningful investigation at all. *See Marchisio*, 919 F. 3d at 1302. For these reasons, the Court finds that Callum's FCRA claim in Count VII sufficiently alleges that Shellpoint failed to conduct a reasonable investigation.

C. Callum sufficiently alleges willfulness.

Shellpoint also seeks dismissal of the FCRA claim in Count VII due to Callum's failure "to plead any facts demonstrating willfulness by Shellpoint." (Doc. 25, p. 10). To state a claim for a willful violation under the FCRA, Callum must plead facts supporting a willful state of mind. *See, e.g., Jairam v. Franklin Collection Servs., Inc.*, No. 1:17-cv-1858241, 2018 WL 1858241, at *3 (N.D. Ga. Feb. 13, 2018) (finding an alleged willful violation subject to dismissal where the complaint contained no facts regarding the defendant's state of mind) (citing

Mnatsakanyan v. Goldsmith & Hull APC, No. 12-cv-4358, 2013 WL 10155707, at *7 (C.D. Cal. May 14, 213)). "Willfulness" encompasses not only "knowing" violations of the statute, but also those committed in "reckless disregard" of the statute's requirements. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 71 (2007).

Here, the Complaint alleges that Callum submitted two disputes to the CRAs, enclosing a copy of the Stipulation, and that Shellpoint not only responded to the CRAs that the information was verified and accurate, but it updated the balance owed and past due balance due without any reference to the Stipulation. (Doc. 5, ¶¶ 70, 71, 74, 81). A fact-finder could, therefore, find that Shellpoint's alleged failure to review the documents available amounted to "reckless disregard." As such, the Court finds that Callum sufficiently alleges conduct in his FCRA claim, Count VII, that gives rise to willfulness or an unjustifiably high risk of harm and, thus, the claim will not be dismissed.

IV. CONCLUSION

For the foregoing reasons, Shellpoint's Motion to Dismiss is due to be denied.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant NewRez, LLC d/b/a Shellpoint Mortgage Servicing's Motion to Dismiss (Doc. 35) is **DENIED**. Defendant is directed to file its Answer to the

Complaint on or before May 5, 2021.

DONE AND ORDERED at Tampa, Florida, this 28th day of April, 2021.

Susan C. Bucklew

SUSAN C. BUCKLEW
United States District Judge