UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALEXI RIVERA, Individually and on behalf of a class of persons similarly situated and YERIKA M. RIVERA, Individually and on behalf of a class of persons similarly situated,

Plaintiffs,

v. Case No. 3:17-cv-722-J-39JBT

SERVIS ONE, INC., a foreign corporation,

Defendant.
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ORDER

THIS CAUSE is before the Court on the Report and Recommendation (Doc. 75; Report) entered by the Honorable Joel B. Toomey, United States Magistrate Judge, Plaintiffs' Objections to the Magistrate's Report and Recommendation (Doc. 76; Objection), and Defendant's Memorandum of Law in Opposition to Plaintiffs' Objections (Doc. 79; Opposition). In the Report, the Magistrate Judge recommends that Plaintiffs' Motion for Class Certification and Incorporated Memorandum of Law (Doc. 55; Motion) be denied. Report at 18.

I. Background

On September 1, 2017, Plaintiffs Alexi Rivera and Yerika M. Rivera ("Plaintiffs") filed the Class Action Amended Complaint (Doc. 14) against Defendant Servis One, Inc. d/b/a BSI Financial Services ("Defendant"). Plaintiffs allege that Defendant attempted to collect mortgage debts from Plaintiffs and other individuals by sending them monthly

mortgage statements and placing calls to their cell phones using an automatic telephone dialing system and/or a prerecorded voice after the debts were discharged in bankruptcy. See generally Am. Compl. Plaintiffs allege the following claims against Defendant: **Count I** - violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq.; **Count II** - violation of the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. §§ 559.55 et seq.; **Count III** – relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02; and **Count IV** – violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §§ 227 et seq. See Am. Compl. ¶¶ 37-93.

Plaintiffs seek to certify classes for the FDCPA, FCCPA, and TCPA claims. See Motion at 6-7. Specifically, Plaintiffs seek certification for one FCCPA class with a FDCPA subclass, and a separate TCPA class. See id. at 8-9. Plaintiffs define the proposed FCCPA class as follows:

> All persons within the state of Florida who, within the two years prior to the filing of the initial Complaint in this action through the date that Notice issues to the Class: (a) had a residential mortgage loan serviced by [Defendant] after default; (b) received a Chapter 7 discharge of the mortgage debt serviced by [Defendant]; and (c) were subsequently sent a Mortgage Statement substantially the same form as Exhibit "A" which referenced payments due on the previously discharged mortgage debt.

Id. Plaintiffs define the proposed FDCPA subclass as those FCCPA class members falling within the above definition who received the subject mortgage statements within one year prior to the filing of the initial Complaint (Doc. 1). Id. at 9. Plaintiffs define the proposed TCPA class as follows:

> All persons in the United States who, within the four years prior to the filing of the initial Complaint in this matter through the date that Notice issues to the class,: (a) had a residential mortgage loan serviced by [Defendant] while in default; (b) received a Chapter 7 discharge of the mortgage debt serviced by [Defendant]; and (c) to whom Defendant,, subsequent to the discharge order, placed a non-emergency telephone call to their cellular telephone

> number using an automatic telephone dialing system and/or an artificial or prerecorded voice.

Id.

II. Standard of Review

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b). If no specific objections to findings of fact are filed, the district court is not required to conduct de novo review of those findings. See Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993); see also 28 U.S.C. § 636(b)(1). If, on the other hand, a party files an objection, the district judge must conduct a de novo review of the portions of a magistrate judge's report and recommendation to which the party objects. Kohser v. Protective Life Corp., 649 F. App'x 774, 777 (11th Cir. 2016); 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b)(3) (on dispositive matters, "the district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to"). The Court reviews de novo the Magistrate Judge's proposed findings of fact and legal conclusions to which Plaintiffs have objected. 28 U.S.C. § 636(b)(1).

III. Discussion

In the Report, the Magistrate Judge recommends that Plaintiffs failed to establish that the proposed classes are "adequately defined and clearly ascertainable," and that Plaintiffs failed to establish predominance under Rule 23(b)(3), Federal Rules of Civil Procedure ("Rule(s)"). Report at 5. Plaintiffs Object to the Magistrate Judge's findings and argue that the Court should grant Plaintiffs' Motion.

a. Whether the proposed classes were adequately defined and clearly ascertainable

The burden of establishing class certification under Rule 23 is on the plaintiff who seeks to certify the suit as a class action. Heaven v. Tr. Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997). As explained by the Eleventh Circuit, "to establish ascertainability, the plaintiff must propose an administratively feasible method by which class members can be identified." Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 947 (11th Cir. 2015) (unpublished). "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." Id. at 948.

In the Report, the Magistrate Judge recommends that Plaintiffs failed to propose an administratively feasible method by which class members can be identified because an individual account-by-account review of approximately 4,000 to 6,000 accounts would be required. See Report at 8-12. Account-by-account reviews and possibly public records searches would also be required for approximately 20,000 loans nationwide to ascertain the proposed TCPA class. See id. at 11. The Magistrate Judge explains that individuals like Plaintiffs "who had received a discharge but who were not identified in Defendant's records as having received a discharge, would not be included in the search results" for the proposed classes. See id. at 9 n.6. The Magistrate Judge finds that Plaintiffs' conclusory assertion that the proposed class members could be identified using Defendant's records is insufficient and the account-by-account review is not administratively feasible. See id. at 8-12.

Plaintiffs object to the Magistrate Judge's findings that the proposed classes are not ascertainable. See Obj. at 4-15. First, Plaintiffs argue that the Magistrate Judge completely ignored the method for ascertaining the proposed TCPA class. See id. 4-7. Plaintiffs also argue that it was error when the Magistrate Judge found that the FCCPA and FDCPA classes were not ascertainable because the class members were already identified and Plaintiffs properly self-identified themselves as members of the proposed 95-member class. See id. at 7-11. Plaintiffs state that the previously identified 95 members were prejudiced by the Magistrate Judge's finding that the class was not ascertainable. See id. at 13- 14 ("Where FDCPA damages are capped at $1000, no attorney is likely to touch any of these claims on an individual basis.").

Additionally, Plaintiffs argue that Defendant's inadequate recording keeping is not grounds to defeat class certification. See id. at 11-13. Plaintiffs contend that if the Report is adopted, "more mortgage loan servicers will adopt [Defendant's] model – make sure the records are not searchable, and avoid class actions." Id. at 12-13. Finally, Plaintiffs argue that the Court improperly relied on a case from this Court's Tampa Division with the same Defendant, McCamis v. Servis One, Inc., No. 8:16-CV-1130-T-30AEP, 2017 WL 589251, at *3 (M.D. Fla. Feb. 14, 2017), which involved post-discharge communications to discharged Chapter 7 and Chapter 13 borrowers represented by counsel. See id. at 14-15.

Defendant responds in opposition to Plaintiffs' objections and maintains that the Magistrate Judge properly found that Plaintiffs failed to meet their burden to establish that the proposed classes were ascertainable. See Opp. at 1. First, Defendant argues that the Magistrate Judge did not overlook or improperly apply the law regarding the proposed

TCPA class. See id. at 3-7. Defendant argues that to rely on Defendant's "database" is the same as relying on the "FiServ database" because the FiServ database is in fact Defendant's database. See id. at 3-6 (citing Doc. 55-6 (deposition testimony)). Regardless if the databases are in fact the same, Defendant explains that

> neither provides a means to search [Defendant's] records for accounts that were erroneously not coded for bankruptcy. And even as to those accounts properly coded for bankruptcy, each account would have to be reviewed individually to verify whether a specific telephone number called by [Defendant] is a cell phone, as is required for TCPA Class membership and TCPA liability.

Id. at 5.

Defendant also argues that the Magistrate Judge properly found that the proposed FCCPA class was not ascertainable even though Plaintiffs maintain that 95 borrowers received subject mortgage statement and a Chapter 7 discharge. See id. at 7-8. Defendant states that the Magistrate Judge properly found that "'Plaintiffs have failed to establish ascertainability because the only method they propose would not identify all class members.'" Id. at 7 (citing the Report at 9). Defendant argues that "[t]he very fact that [Defendant] is not able to identify other class members similar to Plaintiffs underscores precisely why Plaintiffs cannot establish the ascertainability of this class." Id.

Additionally, Defendant argues that Plaintiffs alleged objection regarding self-identified class members was not previously raised in their Motion and thus not considered by the Magistrate Judge. See id. 8-11. Despite Plaintiffs attempt to couch the new argument as an objection to the Report, Defendant argues that Plaintiffs still propose no "administratively feasible plan" and that Defendant "possesses no records reflecting which of its borrowers were miscoded for bankruptcy status" or "records concerning the residential or commercial use of properties securing the serviced loans." See id. at 10.

Defendant also contends that the Magistrate Judge did not find that Defendant's record keeping was inadequate but instead found that "there are no documents tracking accounts, like Plaintiffs, that are not coded for bankruptcy due to error despite [Defendant's] policies, procedures and record keeping." Id. at 11 (citing the Report at 10). In other words, Defendant maintains that "[t]here simply is no record keeping system that would effectively track the error that resulted in [Defendant's] communications with Plaintiffs after their discharge." Id. Defendant also argues that the Magistrate Judge properly considered the McCamis case primarily for the similar need for individual review of the files despite the differences between the filings under Chapter 7 and 13. See id. at 13. Finally, Defendant contends that no prejudice exists to the alleged 95 members because the FCCPA and the FDCPA entitle a prevailing plaintiff to recover attorneys' fees. See id. at 12 (citing Fla. Stat. § 559.77(2); 15 U.S.C§ 1692k (a)(3)).

As explained in the detailed Report by Magistrate Judge Toomey, Plaintiffs' proposed classes are not ascertainable. Plaintiffs propose the following methodology regarding the ascertainability issue:

> Persons who meet the proposed definition are identifiable through the tracking system used by [Defendant], which tracks all correspondence and also tracks calls made to debtor class members. Those records include the name and address for almost every individual who received a monthly statement or telephone call during the class period. For any putative class member whose name and address is not included in the [Defendant] source data, name and address information can be obtained through reports that can be run on third-party systems (like LEXIS) post certification.

See Motion at 8. Later in their Reply (Doc. 65 at 2), Plaintiffs elaborated that the proposed classes may be identified as follows:

> For each calendar year from June 22, 2015 to the present, the total number of individuals in Florida that (a) had or have a residential mortgage loan serviced by [Defendant] which [Defendant] acquired when in default; (b)

> were sent at least one Account Statement by [Defendant] in the substantially same form as the letter attached to Plaintiffs' Complaint as Exhibit A after receiving a Chapter 7 bankruptcy discharge of their mortgage debt; and (c) were identified in [Defendant's] records system as having received a Chapter 7 bankruptcy discharge.

After careful review, the Court finds that the Magistrate Judge properly considered this record and the law. The Magistrate Judge properly recommended to this Court that Plaintiffs' conclusory position to rely on Defendant's records is insufficient. See Report at 5-12. It is also not administratively feasible to conduct an account-by-account review of and/or public records searches for approximately 20,000 loans nationwide for the proposed TCPA class, and approximately 4,000-6,000 loans in Florida for the proposed FCCPA and the FDCPA classes. The Court having conducted an independent, de novo review of the file and for the reasons stated in the Report, will accept and adopt the factual and legal conclusions recommended by the Magistrate Judge as it relates to whether the proposed classes were adequately defined and clearly ascertainable.

b. Whether Plaintiffs failed to establish predominance

To maintain a class under Rule 23(b)(3), Plaintiffs must establish that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." See Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997) ("[T]he issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." (internal quotations and citations omitted)).

In the Report, the Magistrate Judge recommends that Plaintiffs also failed to establish that common issues of the proposed classes predominate over individual issues. See Report at 12-18. The Magistrate Judge explains that "an individualized assessment of each proposed class member's circumstances would be necessary to determine the issue of liability for each of Plaintiffs' claims." Id. at 13. The Magistrate Judge states that "[b]ecause Defendant does not track whether the mortgaged properties are used for rental or other investment purposes, an individualized assessment regarding how the subject funds and properties were used would be required." Id. at 14 (citing (Doc. 59-1 at 3)). Additionally, the Magistrate Judge recommends that determining actual knowledge would also require individual inquires. See id. at 14-15.

The Magistrate Judge considers Defendant's bona fide error defense to Plaintiffs' FDCPA and FCCPA claims and recommends that Plaintiffs' arguments should be rejected because "the search results relied on by Plaintiffs are not limited to only those individuals who were wrongfully contacted post-discharge." See id. at 15-16. Regarding the proposed TCPA class, which involves issues of prior express consent, the Magistrate Judge recommends that "[a]lthough it may be possible to determine on a class-wide basis whether the subject discharge orders initially constituted a revocation of consent, an individualized inquiry would still have to be made to determine if required consent was subsequently provided again." Id. at 16-17.

Finally, the Magistrate Judge recommends that Plaintiffs' reliance on Prindle v. Carrington Mortg. Servs., LLC, No. 3:13-CV-1349-J-34PDB, 2016 WL 4466838, at *1 (M.D. Fla. Aug. 24, 2016) (Howard, J.) is misplaced with regard to predominance in this case. See id. at 17-18. Prindle involved a certified class for a single FDCPA claim that did

not require actual knowledge and the defendant had different policies for sending monthly mortgage statements. See id. Unlike the proposed classes here, individualized inquires, consent, and bona fide errors despite a policy of not contacting post-discharge customers were not necessary in Prindle. See id.; see also Prindle, 2016 WL 4466838 at *8 ("[T]he Court is satisfied that determination of whether a particular account was in default at the time [the defendant] obtained it would not require a significant individualized inquiry and so would not overwhelm the common questions at the core of this case.").

Plaintiffs object to the Report recommending that Plaintiffs failed to establish predominance as required by Rule 23(b)(3). See Obj. at 16-24. In short, Plaintiffs argue that the individualized issues identified by the Magistrate Judge do not present an insurmountable hurdle to adjudicating the common issues on a class-wide basis. See id. at 17-24. Plaintiffs state that the form mortgage statements do not require any individualized inquiry. See id. at 18-20. Plaintiffs argue that Defendant had actual knowledge for the proposed FCCPA class through its knowledge of the Chapter 7 bankruptcy. See id. at 20. Plaintiffs also state that Defendant's bona fide error defense and consent considered by the Magistrate Judge did not defeat predominance. See id. at 21-24. Finally, Plaintiffs argue that the Court may amend the class definitions to solve any impediments to the requested certification. See id. at 17-18.

In response, Defendant argues that the Magistrate Judge properly recommended that common issues do not predominate the individual issues. See Opp. at 13-20. Defendant states that narrowing the class definitions does not remedy the predominance of the individual assessment required in this case. See id. at 14-18. Defendant also argues that the Magistrate Judge correctly considered the actual knowledge and bona

fide error defense issues and noted how these issues are individual issues rather than class issues. See id. at 18-19. Finally, Defendant contends that the Magistrate Judge "properly found that determining post-discharge consent is an individual issue of fact that belies aggregate resolution." Id. at 20.

The Court finds that the Magistrate Judge properly considered Plaintiffs' arguments and evidence and properly found that Plaintiffs failed to establish predominance as required under Rule 23(b)(3). The liability issues turn upon highly individualized facts that predominate over the class issues. See Report at 18 (citing Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1356 (11th Cir. 2009); McCamis, 2017 WL 589251 at *5-6; Foster v. Green Tree Servicing, LLC, No. 8:15-CV-1878-T-27MAP, 2017 WL 5508371, at *5-6 (M.D. Fla. Nov. 15, 2017)). The Court having conducted an independent, de novo review of the file and for the reasons stated in the Report, will accept and adopt the factual and legal conclusions recommended by the Magistrate Judge as it relates to predominance under Rule 23(b)(3)

Accordingly, after due consideration, it is

ORDERED:

1. Plaintiffs' Objections to the Magistrate's Report and Recommendation (Doc. 76) are **OVERRULED**.

2. The Report and Recommendation (Doc. 75) is **ADOPTED** as the opinion of the Court.

3. Plaintiffs' Motion for Class Certification and Incorporated Memorandum of Law (Doc. 55) is **DENIED**.

4. On or before **March 18, 2019**, the parties shall file a Case Management Report notifying the Court how the parties intend to proceed in this case.

DONE and **ORDERED** in Jacksonville, Florida this 4th day of March, 2019.

BRIAN J. DAVIS
United States District Judge

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Copies furnished to:

The Honorable Joel B. Toomey
United States Magistrate Judge

Counsel of Record

Unrepresented Parties