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United States District Court, S.D. Florida.

Mark Donald HUNT, Plaintiff,
v.
JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, Defendant.

Case No. 17-cv-62094-BB
|
Signed 02/23/2018
|
Entered 02/26/2018

Attorneys and Law Firms

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Alisa M. Taormina, Brian C. Frontino, Stroock & Stroock & LaVan LLP, Miami, FL, for Defendant.

Opinion

ORDER ON DEFENDANT'S MOTION TO DISMISS

BETH BLOOM, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** is before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice. *See* ECF No. [14] (the "Motion"). The Court has reviewed the Motion, all supporting and opposing submissions, the record and applicable law, and is otherwise fully advised. For the reasons that follow, Defendant's Motion is granted.

I. BACKGROUND

Plaintiff's Complaint stems from supposed inaccuracies provided by Defendant to various credit reporting agencies ("CRA's") in relation to a loan and mortgage executed by Plaintiff and previously serviced by Defendant. In November 2002, Plaintiff executed a promissory note and mortgage in exchange for a loan from Defendant to purchase property in Coconut Creek, Florida. *See* ECF No. [1], at ¶ 30; *see also* ECF Nos. [1–10], [1–11]. In December 2012, Plaintiff ceased making payments on the note. *See* ECF No. [1], at ¶ 31. As a result, Defendant sent Plaintiff an "Acceleration Warning" on January 28, 2013, informing Plaintiff that he was in default. *See* ECF No. [1], at ¶ 28; *see also* ECF No. [1–8].

Plaintiff did not thereafter make any payments on the note. As a result, in May 2013, Defendant filed a Verified Complaint to Foreclose Mortgage, declaring the full amount payable under the note and mortgage to be due. *See* ECF No. [1], at ¶¶ 30, 32; *see also* ECF No. [1–9]. On May 28, 2014, the court entered a Final Judgment of Foreclosure against Plaintiff for $123,836.94. *See* ECF No. [1], at ¶ 42; *see also* ECF No. [1–12]. In March 2015, Defendant closed the account after transferring it to another lender. *See* ECF Nos. [1–3], [1–7], [1–19], [1–20]. For twenty-two (22) consecutive months, from May 2013 to February 2015, Defendant reported to CRAs, including Experian, Equifax, and TransUnion, that Plaintiff's account with Defendant was 120 days past due. *See* ECF No. [1], at ¶ 45; *see also* ECF No. [1–3]. The credit reports also reflect a $0 balance and $0 past due on the account as of March 2015. *See* ECF No. [1–3]. On June 22, 2015, Plaintiff paid the foreclosure judgment. *See* ECF No. [1], at ¶ 44; *see also* ECF No. [1–13].

Plaintiff first discovered that Defendant had reported his account as past due for those 22 months when he retrieved his credit report from the CRAs in May 2017. *See* ECF No. [1], at ¶ 45. On June 30, 2017, Plaintiff sent dispute letters to the three CRAs, notifying them that he was disputing the "inaccurate, incomplete, and derogatory" information provided by Defendant and asking them to re-investigate the accuracy of the information. *See* ECF No. [1], at ¶ 46; *see also* ECF No. [1–4]. Each CRA provided notice to Defendant that Plaintiff was disputing the information furnished by Defendant. *See* ECF No. [1], at ¶¶ 49, 51, 54. In July and August 2017, Equifax and TransUnion, respectively, supplied Plaintiff with the results of their investigation. *See* ECF No. [1], at ¶¶ 55, 59. After reaching out to Defendant and conducting their inquiries, both CRAs continued to report that the account had been 120 days past due, that the account had been transferred or sold, and that the balance on the account was $0. *See* ECF No. [1], at ¶¶ 56, 62; *see also* ECF Nos. [1–19], [1–20]. Both reports also did not mention that the account had been paid off or that it was being disputed. *See* ECF No. [1], at ¶¶ 58, 65.

***2** On August 23, 2017, Plaintiff presented four class-wide, pre-suit notices of dispute and intent to commence lawsuit to Defendant and the CRAs. *See* ECF No. [1],

at ¶ 66; *see also* ECF No. [1–6]. On September 27, 2017, Defendant responded to Plaintiff's pre-suit dispute letter, disagreeing with Plaintiff's assertions and maintaining that all information furnished in relation to Plaintiff's account had been accurately reported to the CRAs. *See* ECF No. [1], at ¶¶ 72–73; *see also* ECF No. [1–26]. On October 16, 2017, Plaintiff retrieved another set of credit reports from the CRAs, which continued to report the same information. *See* ECF No. [1], at ¶¶ 78–79; *see also* ECF No. [1–7].

On October 25, 2017, Plaintiff filed his class-action Complaint against Defendant, asserting that Defendant willfully and negligently violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). Defendant filed the instant Motion, Plaintiff filed his response, *see* ECF No. [16], and Defendant filed its reply, *see* ECF No. [18]. The Motion is ripe for adjudication.

II. LEGAL STANDARD

Rule 8 of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). In the same vein, a complaint may not rest on " 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. These elements are required to survive a motion brought under Rule 12(b)(6), which requests dismissal for "failure to state a claim upon which relief can be granted."

When reviewing a motion under Rule 12(b)(6), a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1349, 1353 (S.D. Fla. 2009). However, this tenet does not apply to legal conclusions, and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555; *see Iqbal*, 556 U.S. at 678; *Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006). Moreover, "courts may infer from the factual allegations in the complaint 'obvious alternative explanations,' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 682).

A court considering a Rule 12(b)(6) motion is generally limited to the facts contained in the complaint and the attached exhibits, including documents referred to in the complaint that are central to the claim. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.") (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)). "[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007).

III. DISCUSSION

***3** Plaintiff alleges that Defendant violated the FCRA due to its negligent and/or willful failure to investigate the disputes Plaintiff submitted to the CRAs regarding the accuracy of the account information furnished by Defendant, and by Defendant's continued furnishing of allegedly inaccurate information. [1] *See* ECF No. [1], at 27–30. In the Motion, Defendant argues for the dismissal of the entire Complaint with prejudice because no factual inaccuracy exists and, as such, any additional amendment of the Complaint would be futile. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

1 Under 15 U.S.C. § 1681s–2(a)(3), a furnisher may not provide information to a CRA "without notice that such information is disputed by the consumer." The duties imposed under Section 1681s–2(a), however, are not privately enforceable. *See* 15 U.S.C. § 1681s–2(c)(1); *see also Green v. RBS Nat. Bank*, 288 Fed.Appx. 641, 642 (11th Cir. 2008) ("[Appellant] contends that [Appellee] violated § 1681s–2(a) by tendering false information regarding his account.

> The FCRA, however, does not provide a private right of action to redress such a violation."). Thus, Plaintiff's allegation that Defendant failed to indicate that his mortgage account was or is in dispute cannot form the basis of Plaintiff's FCRA claim.

The FCRA imposes certain duties upon furnishers of credit information. After a furnisher of credit information receives notice pursuant to section 1681i(a)(2), the furnisher is required to "conduct an investigation with respect to the disputed information," and "review all relevant information provided" to it by the CRA. 15 U.S.C. § 1681s–2(b)(1). Regardless of the results of its investigation, the furnisher must report back to any CRA that notified it of the dispute. *See**Rambarran v. Bank of America, N.A.*, 609 F. Supp. 2d 1253, 1257 (S.D. Fla. 2009) (citing 15 U.S.C. § 1681s–2(b)(1)(C)). "If the investigation results in a finding that [the furnisher] provided incomplete or inaccurate information to the CRA, then it must report the results of its investigation to all other CRAs that received such incomplete or inaccurate information." *Id.* (citing 15 U.S.C. § 1681s–2(b)(1)(D)). Finally, if the investigation is either inconclusive or results in a finding that the furnisher provided incomplete or inaccurate information to the CRA, then the furnisher shall, "for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the investigation promptly modify that item of information; delete that item of information; or permanently block the reporting of that item of information." 15 U.S.C. § 1681s–2(b)(1)(E). The furnisher must complete its investigations, reviews, and reports within the thirty day period after the consumer notifies the CRA of the dispute. *See**Rambarran*, 609 F. Supp. 2d at 1257 (citing 15 U.S.C. § 1681s–2(b)(2)). [2]

2 A successful FCRA plaintiff is entitled to a damage award that varies depending on the willfulness of the breach. *See**Rambarran*, 609 F. Supp. 2d at 1258. Recovery for a negligent violation of FCRA is limited to the amount of actual damages and attorneys' fees and costs. *See*15 U.S.C. § 1681*o*. "If the breach is willful, however, the plaintiff is entitled to recover either actual damages or statutory damages (from $100–$1,000), whichever is greater, in addition to attorneys' fees and costs." *Rambarran*, 609 F. Supp. 2d at 1258. The Court may also impose punitive damages to punish a willful violation of FCRA. *See*15 U.S.C. § 1681n.

"Construed literally, the text of the FCRA would seem to impose liability—regardless of the accuracy of the underlying information—if the furnisher did not conduct a proper investigation after receiving notice of a dispute." *Davidson v. Capital One*, No. 14–20478–CIV, 2014 WL 6682532, at *4 (S.D. Fla. Nov. 25, 2014). However, "to interpret the FCRA to create liability for the failure to conduct a reasonable investigation when the disputed information" is not inaccurate or misleading "would do violence to the primary goal of the FCRA: to promote the accurate reporting of credit information to CRAs." *Id.*; *see also**Saunders v. Branch Banking and Trust Co. of VA*, 526 F.3d 142, 149 (4th Cir. 2008) ("Courts have held that a credit report is not accurate under FCRA if it provides information in such a manner as to create a materially misleading impression."); *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 37–38 (1st Cir. 2010) ("The FCRA is intended to protect consumers against the compilation and dissemination of *inaccurate* credit information.") (emphasis in original).

***4** "As legislation should not be interpreted in a way 'actually inconsistent with the policies underlying the statute,' courts appear to agree an FCRA plaintiff must prove the challenged information is inaccurate." *Davidson*, 2014 WL 6682532, at *4 (quoting *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988)); *see also**Chiang*, 595 F.3d at 38 (requiring "a showing of actual inaccuracy in suits against furnishers"). Finally, the Court "emphasize[s] that, just as in suits against CRAs, a plaintiff's required showing is *factual* inaccuracy, rather than the existence of disputed legal questions. Like CRAs, furnishers are 'neither qualified nor obligated to resolve' matters that 'turn[ ] on questions that can only be resolved by a court of law.' " *Chiang*, 595 F.3d at 38 (internal citation omitted) (emphasis in original).

Plaintiff has not disputed that he failed to make any payments on the note after December 2012. Instead, Plaintiff alleges that Defendant's reporting that he was 120 days past due for 22 months was inaccurate because, after Defendant accelerated the mortgage upon the filing of the foreclosure action in May 2013, "Plaintiff no longer had the ability and/or obligation to make monthly payments to Defendant." ECF No. [1], at ¶ 34; *see also* ECF No. [16], at 12. Plaintiff further alleges that, "[I]t is only upon the dismissal of a foreclosure action, in which acceleration has been declared, that the Note and Mortgage are decelerated and making monthly payments becomes possible." ECF

No. [1], at ¶ 35. However, the very documents that Plaintiff attached to his Complaint establish that no inaccuracy existed.

In particular, the terms of the Acceleration Warning and mortgage belie Plaintiff's legal assertion that he no longer had the ability and/or obligation to make monthly payments following the initiation of the foreclosure lawsuit. First, the Acceleration Warning provides in paragraph 5 that, "[I]f permitted by your loan documents or applicable law, you have the right to reinstate after acceleration of the Loan and the right to assert in the foreclosure proceeding the nonexistence of a default, or any other defense to acceleration and foreclosure." ECF No. [1–8], at 3. The mortgage, moreover, provides in paragraph 19 that if a borrower meets certain conditions, including paying the lender "all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred," the borrower "shall have the right" to reinstate after acceleration. ECF No. [1–11]. *See also* *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938, 947 (Fla. 3rd DCA 2016) ("This provision, while addressing only a borrower's right to cure, confirms that after acceleration, the borrower is not obligated to pay the entire accelerated balance due to cure but, until a final judgment is entered, need only bring the loan current to avoid foreclosure. Stated another way, despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise."); *Espinoza v. Countrywide Home Loans Servicing, LP*, 708 Fed.Appx. 625, 627 (11th Cir. 2017) ("Thus, under Florida law, a mortgage-lender's 'acceleration of [a] loan' is not 'effective before final judgment in favor of the mortgagee-lender in a foreclosure action.' ").

In addition, Plaintiff's allegation that he did not have the ability or obligation to make monthly payments or reinstate the mortgage following acceleration is a legal conclusion devoid of factual support. The allegation is "at best a legal defense to the debt, not a factual inaccuracy in [Defendant's] reporting. This is an insufficient basis for [Plaintiff's] asserted FCRA claims against a furnisher under § 1681s-2(b)." *Leones v. Rushmore Loan Mgmt. Servs.*, LLC, No. 0:17–CV–61216–WPD, 2017 WL 6343622, at *3 (S.D. Fla. Dec. 11, 2017); *see also* *Bauer v. Target Corp.*, No. 8:12–CV–00978–AEP, 2013 WL 12155951, at *13 (M.D. Fla. June 19, 2013) ("[A] furnisher's duty to investigate extends to factual inaccuracies, not legal disputes.") (citation omitted); *Chiang*, 595 F.3d at 38 (holding that, to prevail in a suit against a furnisher, plaintiff has the burden to prove a "factual inaccuracy, rather than the existence of disputed legal questions" to prove liability under § 1681s-2(b) for a failure to report an inaccuracy). Thus, Plaintiff's allegation that he was under no obligation to make monthly payments and that he had no ability to reinstate the mortgage does not affect the undisputed fact that he was in default from May 2013 to February 2015. [3]

3 "Further, as the reported information was not inaccurate or incomplete, [Defendant] had no further duty to investigate. Stated another way, where the reported information was accurate and complete, Plaintiff cannot plausibly allege damages based on the furnisher's alleged failure to conduct a reasonable investigation or reinvestigation." *Leones*, 2017 WL 6343622, at *3; *see also* *Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1302 (11th Cir. 2016) ("Section 1681s-2(b) contemplates three potential ending points to reinvestigation: *verification of accuracy*, a determination of inaccuracy or incompleteness, or a determination that the information 'cannot be verified.' ") (emphasis added); *Bauer*, 2013 WL 12155951, at *9 ("Target's investigation, which verified Bauer's information, was reasonable simply because the reported balance of the debt was accurate.").

***5** Plaintiff cites to only one case in its response to the Motion, *Elliott v. Specialized Loan Servicing, LLC*, No. 1:16–CV–4804–TWT–JKL, 2017 WL 3327087 (N.D. Ga. July 10, 2017), to support his proposition that the Acceleration Warning sent by Defendant in January 2013 —four months prior to the filing of the foreclosure action—"on its face supports Plaintiff's claims that after acceleration, Plaintiff did not have the ability to reinstate the Note and Mortgage and continue making monthly payments." ECF No. [16], at 12. In *Elliott*, the court concluded, in the context of a wrongful foreclosure claim, that the plaintiff had "alleged facts that plausibly suggest[ed] that she did reinstate the loan" because the judge could "not tell based on the pleadings and attachments what amount [the plaintiff] was actually required to pay to bring her loan current." *Elliott*, 2017 WL 3327087, at *6. It is unclear how *Elliott* is relevant to the allegations at issue in this FCRA action, especially

since Plaintiff has not alleged that at any point he attempted to reinstate the note while he was in default.

Plaintiff also seems to take issue with Defendant's continued reporting that his account was past due after the foreclosure judgment was entered against him in May 2014. *See* ECF No. [1], at ¶¶ 41–43. Yet from May 2014 until March 2015, when Defendant transferred the account to another lender, Plaintiff did not make any payments to Defendant in satisfaction of the judgment. Indeed, as Plaintiff admits, he did not pay the foreclosure judgment until June 2015, three months after Defendant transferred the mortgage and no longer had an interest in the note and mortgage. *See* ECF No. [1], at ¶ 44. Plaintiff also alleges that Defendant is inaccurately depicting the status of the account as currently past due. *See*, *e.g.*, ECF No. [1], at ¶ 79. However, all of the credit reports attached to Plaintiff's Complaint reflect that, as of March 2015, the account is closed, Defendant transferred or sold it, there is a $0 balance, and $0 past due.[4] *See* ECF Nos. [1–3], [1–7], [1–19], [1–20].

[4] What Plaintiff really seems to be contesting is the fact that his adverse account history continues to show on his credit reports. FCRA, however, permits past monthly reporting of adverse information to remain on a consumer's credit report for seven years. *See*15 U.S.C. § 1681c(a)(5) ("Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information: .... Any other adverse item of information, ... which antedates the report by more than seven years."). Plaintiff also alleges that Defendant is providing inaccurate information because its reporting did not mention that the foreclosure judgment was paid off, *see* ECF No. [1], at ¶ 79, yet Plaintiff provides no authority to support his claim that Defendant had any obligation to report the payoff *after* it transferred the account. Equally unavailing is Plaintiff's allegation that the account is inaccurately described as "adverse" on his credit reports. *SeeId.* Apart from the fact that the account was adverse from May 2013 to February 2015, it seems that this allegation should be directed to the CRAs. *See**Arianas v. LVNV Funding LLC*, 132 F. Supp. 3d 1322, 1327 n.3 (M.D. Fla. 2015) ("To the extent Arianas's claim is based on the insufficiency of the dispute description, that claim is properly directed at the credit reporting agency, not the furnisher."); *Stroud v. Bank of America*, 886 F.Supp.2d 1308, 1316 (S.D. Fla. 2012) ("[T]he rule is that if a credit reporting agency relays an insufficient dispute description to an information furnisher, then an individual may instead simply have a cause of action against the credit reporting agency.") (citing *Chiang*, 595 F.3d at 38).

Plaintiff does not refute that he failed to make mortgage payments since at least December 2012. As such, Plaintiff cannot genuinely dispute the accuracy of the reported information. Based on the undisputed facts and exhibits, the Court determines that Defendant correctly reported the status of Plaintiff's account from May 2013 to February 2015 to the CRAs, and that he had the ability and/or obligation to make monthly payments to Defendant following the acceleration of the mortgage. *See**Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) ("[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."). Because the documents attached to Plaintiff's Complaint indisputably show that the reported information regarding Plaintiff's mortgage account was accurate, the Court finds that dismissing Plaintiff's Complaint with prejudice is warranted as no amendment would change the result. No valid cause of action exists. *See**Jimenez v. Cont'l Serv. Grp. Inc. Conserve*, No. 17–CV–60270, 2017 WL 2833441, at *2 (S.D. Fla. June 30, 2017) ("A court considers an additional amendment futile if, by amending the complaint, a plaintiff would still be unable to state a sufficient cause of action.") (citing *Anderson v. Vanguard Car Rental USA, Inc.*, 304 Fed.Appx. 830, 832 (11th Cir. 2008)).

IV. CONCLUSION

***6** For all of the reasons stated, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss, **ECF No. [14]**, is **GRANTED**, and because amendment would be futile, Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. Judgment will be entered in favor of Defendant by separate order.

DONE AND ORDERED in Miami, Florida, this 23rd day of February, 2018.

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