UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-cv-20915-KMM

JOSEPH CELESTINE,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendant JP Morgan Chase Bank's Motion for Summary Judgment. *Mot.* (ECF No. 69). Plaintiff Joseph Celestine responded.[1] *Response* (ECF No. 79). Defendant replied. *Reply* (ECF No. 91). The matter is now ripe for review. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

I. BACKGROUND[2]

On June 30, 2008, Plaintiff secured from Defendant a private education loan (the "Loan") for $21,790.[3] *Statement of Material Facts* (ECF No. 70 at ¶¶ 1, 4). Defendant agreed to defer

[1] As Defendant points out, Plaintiff filed his response five days after the deadline. *Notice* (ECF No. 71); *Reply* (ECF No. 91 at 2–3). In an abundance of caution and equity, the Court elects to consider Plaintiff's untimely response.

[2] Plaintiff's Statement of Material Facts does not comply with Local Rule 56.1(a), which sets forth clear style and substance requirements. For example, many of Plaintiff's enumerated responses contest facts with arguments that are unsupported by record evidence and/or do not correspond with Defendant's enumerated material facts. *Plaintiff's Statement of Material Facts* (ECF No. 78 at ¶¶ 2, 5, 6, 8, 9, 11–31). Accordingly, the Court deems admitted those facts that Plaintiff has not properly contested. *Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (affirming district court's decision to deem defendant's statement of material facts admitted given plaintiff's failure to comply with Local Rule 56.1).

[3] Defendant states that Plaintiff improperly secured the Loan by forging the signature of a co-signer, Joseph Cambronne. *Statement of Material Facts* at ¶¶ 2, 6. Plaintiff disputes the alleged

payments on principal and interest until Plaintiff graduated; however, there was a maximum deferment period of five-and-a-half years from the Loan disbursement date. *Id*. at ¶ 9. Plaintiff applied for and received numerous deferments.[4] *Id*. at ¶ 10–12. When the deferment period ended on December 30, 2013, Plaintiff was obligated to make Loan payments. *Id*. at ¶ 11. Plaintiff did not make any payments. *Id*. at ¶ 14.

Between March 2014 and September 2014, Defendant called Plaintiff seventeen times to ask about overdue Loan payments. *Id*. at ¶ 28. Defendant's employees manually dialed Plaintiff's telephone number and did not use either an automatic dialer or an artificial/pre-recorded voice.. *Id*. at ¶ ¶ 30– 31. Plaintiff answered only two of Defendant's calls. *Id*. at ¶ 29.

On June 30, 2014, in light of Plaintiff's delinquency, Defendant charged off the Loan in the amount of $38,167, which included principal and capitalized interest. *Id*. at ¶ 15. Defendant reported to the credit report agencies the charged off Loan and a March 31, 2014 date of first delinquency. *Id*. at ¶ 16. Between March 2015 and February 2017, Plaintiff submitted nine disputes to the credit reporting agencies about Defendant's reporting of the Loan. *Id*. at ¶ 17. For each dispute, Defendant received Automated Consumer Dispute Verification ("ACDV") forms from the credit reporting agencies. *Id.* As set forth in the ACDV forms, Plaintiff contended that the Loan was not his; he paid the Loan in full; the Loan should not reflect a "derogatory" status; and Defendant "inaccurately reported" the Loan. *Id*. at ¶ 18. Defendant

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forgery. *Plaintiff's Statement of Material Facts* (ECF No. 78 at ¶ 6). The question whether Plaintiff secured the Loan through forgery, however, is not relevant to the dispositive legal issues addressed herein.

[4] Defendant states that Plaintiff improperly received a deferment based on his military status. *Statement of Material Facts* at ¶ 12. Plaintiff agrees that he was not entitled to such a deferment, but contends that Defendant lead Plaintiff to believe that he was eligible for the military deferment despite his inactive military status. *Plaintiff's Statement of Material Facts* at ¶¶ 9–12. The question whether Plaintiff's military deferment was appropriate, however, is not relevant to the dispositive legal issues addressed herein.

investigated Plaintiff's disputes—Defendant checked Plaintiff's personal identifying information, the Loan account number, and that all data points for the Loan were accurate—and confirmed to the credit reporting agencies that the reported Loan was accurate and belonged to Plaintiff. *Id.* at ¶¶ 19–22. Defendant consistently reported an original amount of $36,539 and a charge off amount of $38,167. *Id*. at ¶ 23.

In March 2017, Plaintiff filed a six-count Complaint alleging that Defendant inaccurately reported Plaintiff's debt, failed to properly investigate Plaintiff's disputes, and made harassing telephone calls to Plaintiff about his overdue Loan payments. *Compl*. (ECF No. 1 at 1–19). Plaintiff asserts that Defendant violated the Fair Credit Reporting Act ("FCRA"); the Telephone Consumer Protection Act ("TCPA"); the Florida Consumer Collection Practices Act ("FCCPA"); and committed state law torts for negligent/wanton/intentional conduct concerning the Loan. *Id*. at 19–30. Defendant moves for summary judgment arguing, as set forth below, that Plaintiff's claims fail based on the undisputed material facts. *Mot.* at 1–24.

II. LEGAL STANDARD

Summary judgment is appropriate where there is "no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed R. Civ. P. 56. A genuine issue of material fact exists when "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "For factual issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc*., 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Speculation or conjecture cannot create a genuine issue of material fact sufficient to defeat a well-supported motion for summary judgment. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005).

The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In assessing whether the moving party has met this burden, the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to come forward with evidence showing a genuine issue of material fact that precludes summary judgment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002); *see also* Fed. R. Civ. P. 56(e). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). But if the record, taken as a whole, cannot lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

A. Fair Credit Reporting Act

Plaintiff contends that Defendant violated the FCRA by reporting inaccurate information to credit reporting agencies and failing to properly investigate Plaintiff's disputes. *Compl.* at 19–25. The FCRA requires "a furnisher of credit information to investigate information disputed by a consumer after receiving notice of a dispute from a credit rating agency." *Taylor v. Ga. Power Co.*, 697 F. App'x 630, 631 (11th Cir. 2017) (per curiam) (citing 15 U.S.C. §§ 1681s-2(b)). To evaluate whether a furnisher properly discharged its duty to investigate, courts consider the "reasonableness" of the investigation. *Id.* "What constitutes a 'reasonable investigation' will vary depending on the circumstances of the case." *Id.* When "a furnisher reports that disputed

information has been verified, the question of whether the furnisher behaved reasonably will turn on whether the furnisher acquired sufficient evidence to support the conclusion that the information was true." *Id*. (quoting *Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1302 (11th Cir. 2016)). Here, the undisputed facts reveal that Defendant's investigation was unquestionably reasonable: following each dispute, Defendant confirmed Plaintiff's name, social security number, date of birth, address, account number, account opening/closure dates, date of first delinquency, outstanding balance, and amount charged off. *Statement of Undisputed Material Facts* at ¶¶ 19–21; *Taylor*, 697 F. App'x at 631 (affirming district court's conclusion that furnisher conducted reasonable investigation where furnisher verified name, birth date, social security number, and the amount owed on the account).

Plaintiff does not offer any evidence that Defendant's investigation was unreasonable. Instead, Plaintiff insists that Defendant erroneously reported both the $36,539 outstanding balance and $38,167 charge off instead of only one amount. *Response* at 4, 7. However, as set forth above, the record reveals that both amounts were accurate and that Defendant reasonably investigated Plaintiff's disputes. *Statement of Undisputed Material Facts* at ¶¶ 19–21. Consequently, even viewing the facts in the light most favorable to Plaintiff, Defendant fully satisfied its obligations under the FCRA. Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's FCRA claim.

B. Telephone Consumer Protection Act

Plaintiff contends that Defendant violated the TCPA by using an automatic telephone dialing system and/or artificial prerecorded voice to call Plaintiff about his outstanding loan payments. *Compl*. at 28. The TCPA makes it unlawful "to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C.

§ 227(b)(1)(A)(iii). Here, the undisputed evidence is clear: when calling Plaintiff Defendant used neither an automatic telephone dialing system nor an artificial prerecorded voice. *Statement of Material Facts* at ¶¶ 30–31 (citing *Borden Decl*. (ECF No. 68-1 at ¶ 12) (Defendant's employees manually dialed Plaintiff's telephone number and did not use any artificial or pre-recorded voices)); (citing *Celestine Dep*. (ECF No. 68-2 at 233:6–8) (Plaintiff testified that he heard "an actual voice" that was "not an artificial voice.")). Accordingly, Defendant's telephone calls to Plaintiff did not violate the TCPA.

Plaintiff insists that the calls were not manually dialed because, when he answered the telephone, there was a long pause before the caller began speaking. *Response* at 16–18. Plaintiff's theory, however, is speculative and undermined by the above-referenced evidence. *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1318 (11th Cir. 2011) (speculative inference insufficient to defeat motion for summary judgment). Plaintiff also contends that Defendant must have used an automatic telephone dialing system to call Plaintiff because Defendant has settled claims brought under the TCPA in other actions. *Response* at 16–18. Plaintiff cannot, however, point to these previous actions as evidence that Defendant violated the TCPA. *Fisk Elec. Co. v. Solo Const. Corp*., 417 F. App'x 898, 902 (11th Cir. 2011) ("Federal Rule of Evidence 408(a) excludes evidence of settlement negotiations when offered to prove liability . . . ."). For the reasons set forth above, the undisputed evidence reveals that Defendant did not violate the TCPA; therefore, Defendant's Motion for Summary Judgment is GRANTED as to Plaintiff's TCPA claim.

C. Florida Consumer Collection Practices Act and Negligence

As Defendant argues, Plaintiff has waived his FCCPA and negligence claims by failing to address them in his summary judgment response. *See Schwarz v. Bd. of Supervisors on Behalf of*

Vills. Cmty. Dev. Dist., 672 F. App'x 981, 983 (11th Cir. 2017) (affirming district court's conclusion that plaintiff waived claims by failing to address them in summary judgment response). But even if these claims were not waived, they lack merit. Plaintiff's first FCCPA claim—that Defendant harassed Plaintiff by repeatedly calling him in 2014 about the outstanding debt—is barred by the FCCPA's two-year statute of limitations. *See Solis v. CitiMortgage, Inc.*, 700 F. App'x 965, 971 (11th Cir. 2017) (citing Fla. Stat. § 559.77(4) (providing two-year statute of limitations for FCCPA claims)). Plaintiff's remaining claims—that Defendant violated the FCCPA and common law by inaccurately reporting Plaintiff's debt—are preempted by the FCRA. *See Ross v. F.D.I.C.*, 625 F.3d 808, 813 (4th Cir. 2010) (claim concerning reporting of inaccurate credit information "runs into the teeth of the FCRA preemption provision"); *Davidson v. Capital One, N.A.*, No. 14-cv-20478, 2014 WL 3767677, *3 (S.D. Fla. July 31, 2014) (applying *Ross* to conclude that claims preempted by FCRA).

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (ECF No. 69) is GRANTED. It is further ORDERED AND ADJUDGED that all other pending motions are DENIED AS MOOT. The Clerk of Court is instructed to CLOSE the case.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of May, 2018.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record