
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:20-cv-02304-JLS-JDE
Title: In re: Banner Bank

Date: June 03, 2022

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

D. Rojas
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING IN PART SUMMARY
JUDGMENT IN FAVOR OF DEFENDANT AS TO PLAINTIFFS’
FCRA CLAIMS**

Before the Court is Plaintiffs’ Response to Court’s Order to Show Cause Re Summary Judgment and Request to Reconsider Order Denying of Partial Summary Judgment (“Response”). (Response, Doc. 70.) Defendant Banner Bank filed a reply to Plaintiffs’ Response. (Reply, Doc. 74.) For the following reasons, the Court GRANTS IN PART summary judgment in favor of Defendant as to Plaintiffs’ FCRA claims.

I. BACKGROUND

On March 10, 2022, this Court denied Plaintiffs’ Motions for Partial Summary Judgment and required Plaintiffs to show cause, in writing, why summary judgment should not be granted in favor of Defendant as to Plaintiffs’ FCRA claims. (Order, Doc. 69.) The Court held that Plaintiffs failed to provide “evidence that the FCRA applies to the transaction at issue in this case.” (*Id.* at 8.) The Court noted that “[t]he ‘FCRA does not apply where a consumer report is used for a business purpose.’” (*Id.* at 5-6 (quoting *Boydston v. U.S. Bank Nat’l Ass’n ND*, 187 F. Supp. 3d 1213, 1217 (D. Or. 2016), *aff’d sub nom. Boydston v. U.S. Bank*, 726 F. App’x 601 (9th Cir. 2018))). The Court explained that “there is no genuine dispute that Plaintiffs’ credit reports were consulted for a

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business purpose ‘and not to establish [Plaintiffs’] personal eligibility for anything.’” (*Id.* at 7.) Indeed, the reports were consulted for purposes of establishing an LLC’s eligibility for several commercial loans. (*Id.*) Moreover, the Court stated that Plaintiffs failed to proof evidence “that ‘the agency that prepared [Plaintiffs’] report for [Defendant] was misled into thinking or otherwise expected that the report would be used to establish [Plaintiffs’] personal eligibility for a loan.’” (*Id.* at 8 (citing *Boydston*, 726 F. App’x at 602).)

In an abundance of caution, however, the Court permitted “Plaintiffs’ another opportunity to present evidence of the FCRA’s applicability to this action.” (*Id.*) The Court noted that “[i]n the submitted briefing, Plaintiffs shall cite to evidence in the record that supports why this action falls within the FCRA’s purview.” (*Id.*) Plaintiffs subsequently filed the instant Response. (Response, Doc. 70.) In their Response, Plaintiffs argue that “Ninth Circuit precedent instructs that the purpose for which a credit report is ultimately used is ‘irrelevant’ in determining the applicability of the FCRA.” (Response at 7, Doc. 70.) Rather, “under the purpose prong of the FCRA’s statutory definition of a ‘consumer report,’ courts must focus on the purpose for which the report was prepared.” (*Id.*) Plaintiffs note that the Ninth Circuit’s decision in *Boydston* “is best understood as a case that merely addresses the limits of damages recoverable under the FCRA.” (*Id.* at 8.) Plaintiffs acknowledge that “the FCRA does not permit recovery of business losses” but argue that this “is a different issue altogether from the applicability of the FCRA’s permissible purpose requirements.” (*Id.* at 14.) Accordingly, Plaintiffs note that they “are entitled to proceed on their FCRA claims, and to seek to recover for damages to their own credit rating, and damages for emotional distress.” (*Id.* at 15.)

In support of their Response, Plaintiffs have submitted several new documents. Plaintiffs have submitted two declarations attesting to, among other things, the alleged emotional distress damages suffered. (*See* Declaration of James L. Hysten, Doc. 70-2; Declaration of Della Hysten, Doc. 70-4.) In addition, as part of the James L. Hysten

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Declaration, Mr. Hysten discusses his experience at Wells Fargo as evidence that the reports obtained by Defendant were “consumer reports” under the FCRA. (Declaration of James L. Hysten ¶¶ 5-6, Doc. 70-2.) In Defendant’s reply to Plaintiffs’ Response, Defendant seeks to strike such documents as not part of the underlying record. (Reply at 6-7, Doc. 74.)

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(f), “[a]fter giving notice and a reasonable time to respond, the court may . . . grant summary judgment for a nonmovant.” Fed. R. Civ. P. 56(f).

III. DISCUSSION

Plaintiffs argue that “while the authorities relied upon by the Court in denying Plaintiffs’ motion may preclude them from seeking damages for business losses, they do not deny them the protections of the FCRA,” and “[a]t a very minimum, Plaintiffs are still entitled to seek emotional distress damages, and other damages for harms they personally suffered.” (Response at 19, Doc. 70.)

Here, the Court concludes that the distinction Plaintiff makes is a valid one under the caselaw. On the one hand, courts have consistently held that “the FCRA does not provide protection for business entities.” *See, e.g., Boydston v. U.S. Bank Nat’l Ass’n ND*, 187 F. Supp. 3d 1213, 1217 (D. Or. 2016), *aff’d sub nom. Boydston v. U.S. Bank*, 726 F. App’x 601 (9th Cir. 2018) (internal quotation marks omitted). Therefore, a consumer cannot recover business-related damages under the FCRA stemming from a commercial transaction involving that consumer’s credit report. *Boydston*, 187 F. Supp. 3d at 1217 (excluding Boydston “from presenting any evidence regarding economic damages caused by denial of credit related to the forklift transaction with Miranda

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Homes”); *Boydston*, 726 F. App’x at 602 (noting that “the district court did not abuse its discretion when it excluded all evidence of damages stemming from Miranda Homes’ failed application for a forklift loan”).¹ And as the Court noted in its Order, the reports obtained by Defendant were used to assess the LLC’s eligibility for several commercial loans. (*See, e.g.*, Order at 7, Doc. 69.) Hence, Plaintiffs’ claims for business-related damages are foreclosed under the FCRA. Accordingly, the Court GRANTS summary judgment in Defendant’s favor as to Plaintiffs’ claim for any economic-related damages sustained by the LLC in connection with the commercial transaction in this case.

Moreover, a claim for emotional distress damages cannot be premised on Defendant’s denial of commercial loans to the LLC. As part of their response, Plaintiffs provided two declarations attesting to the alleged emotional distress damages caused by Defendant’s conduct. (*See* James L. Hysten Decl., Doc. 70-2; Della Hysten Decl., Doc. 70-4.) However, many of the emotional distress damages that Plaintiffs allegedly sustained are disguised claims for economic damages suffered by the LLC. For example, Mr. Hysten attests that “[w]hat was particularly harmful about Banner Bank’s callous and indifferent conduct was that [his] goal in trying to refinance [their] residential rental properties was to turn the three rental properties we owned from a cash-flow negative, to a cash-flow positive so we could own them in perpetuity, and create general wealth by passing them on to our three children.” (James L. Hysten Decl. ¶ 9, Doc. 70-2.) Mr.

¹ *See also Grigoryan v. Experian Info. Sols., Inc.*, 84 F. Supp. 3d 1044, 1093 (C.D. Cal. 2014) (“Because business-related damages are not recoverable under the FCRA . . . the court grants summary judgment in defendants’ favor on Grigoryan’s prayer for damages sustained in connection with his real estate investment business, as well as his purported inability to invest in a Dickies Barbecue franchise.”); *Stevens v. Genesis Credit Mgmt., LLC*, 2017 WL 2695335, at *6 (D. Or. May 2, 2017), report and recommendation adopted, 2017 WL 2701841 (D. Or. June 22, 2017) (“[T]he Court notes that a plaintiff cannot recover business losses under the FCRA”).

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Hysten further attests that “[w]hen Banner Bank pulled my credit without my permission, then went on to purportedly deny [him] a loan for which [he] never applied, [he] was dejected, despondent, and completely discouraged from [their plan].” (*Id.* ¶ 11.) Apart from the conclusory nature of Mr. Hysten’s attestations (i.e., his failure to provide facts illustrating how the denial impacted his “plan”), his described emotional distress damages are premised on Defendant’s denial of commercial loans to the LLC and the impact on the LLC. And as noted above, Plaintiffs may not recover business-related damages associated with the LLC’s failed bid for commercial loans. *See, e.g., Boydston*, 726 Fed. App’x at 602 (“Citi Capital’s decision to consult Boydston’s credit report based on his status as the owner of Miranda Homes did not transform Miranda Homes’ non-consumer application for a forklift into Boydston’s consumer application for a forklift loan.”).

Although unclear, it appears that Plaintiffs’ emotional distress damages may also be premised on Defendant’s alleged unauthorized access to their credit reports and the humiliation caused by that unauthorized access. (*See, e.g., Della Hysten Decl.* ¶ 3, Doc. 70-4.) As the “[t]he term ‘actual damages’ [under the FCRA] has been interpreted to include recovery for emotional distress and humiliation,” the Court finds that Plaintiffs’ emotional distress claims survive at this stage. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Although it is questionable that a reasonable jury could find that the alleged unauthorized access caused the claimed emotional distress, especially where Plaintiffs already disclosed to Defendant personal information about their credit (*see* Order at 2-3, Doc. 69), the Court finds that issues of causation are more appropriate for a jury to consider than for resolution at summary judgment.

Lastly, the Court finds it unnecessary to reconsider its Order declining to grant summary judgment in Plaintiffs’ favor as to whether Defendant, among other things, lacked a permissible purpose in obtaining Plaintiffs’ credit reports. First, Plaintiffs’ request is procedurally improper, as they failed to file a noticed motion for reconsideration, and instead simply raised the argument in its response to the Court’s

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Order to Show Cause. (Request at 19, Doc. 70.) So it is denied on that basis. Second, the Court notes that questions of fact remain as to whether the reports accessed were consumer reports within the meaning of the FCRA. While Plaintiffs have proffered Mr. Hysten’s experiences in Wells Fargo’s dealer services division as evidence that the reports are consumer reports, he has not been disclosed as an expert in this case, and will not be permitted to offer expert testimony. Nor will the Court consider the reports attached to Plaintiffs’ declarations given that such reports are not part of the underlying record.²

IV. CONCLUSION

For the above reasons, the Court grants summary judgment in favor of Defendant on Plaintiffs’ FCRA claims to the extent those claims are based on business-related damages associated with Defendant’s denial of commercial loans to the LLC. The Court also sets a Final Pretrial Conference date of July 29, 2022, at 10:30 a.m. thus vacating the Final Pretrial Conference set for June 10, 2022, at 10:30 a.m.

Initials of Deputy Clerk: droj

² Although the Court considers new evidence, such as the Plaintiffs’ declarations, when determining whether to grant summary judgment against Plaintiffs *sua sponte*, that does not mean that Plaintiffs get a second bite at their own summary judgment motion by proffering new evidence that was available to them earlier.