UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAM DEVINE,

Plaintiff,

v.

THE JUDGE LAW FIRM, ALC; AND STONECREST VILLAGE MASTER ASSOCIATION,

Defendants.

Case No.: 16-CV-02999-AJB-MDD

ORDER:

(1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS; AND

(2) SUA SPONTE DISMISSING PLAINTIFF'S ROSENTHAL ACT CLAIM AGAINST THE JUDGE LAW FIRM, ALC

(Doc. No. 13)

Presently before the Court is Defendant Stonecrest Village Master Association's ("Stonecrest") motion to dismiss Plaintiff Sam Devine's ("Plaintiff") first amended complaint. (Doc. No. 13-1.) Plaintiff opposes the motion. (Doc. No. 29.) Having reviewed the parties' moving papers and controlling legal authority, and pursuant to Local Civil Rule 7.1.d.1, the Court finds the matter suitable for decision on the papers and without oral argument. For the reasons set forth below, the motion to dismiss is **GRANTED IN PART and DENIED IN PART.**

BACKGROUND[1]

Sometime before November of 2012, Plaintiff allegedly owed financial obligations to Stonecrest for homeowner's association ("HOA") fees. (Doc. No. 7 ¶ 27.) Subsequently, Plaintiff allegedly fell behind on his HOA payments to Stonecrest. (*Id.* ¶ 30.) Soon thereafter, Stonecrest retained Defendant the Judge Law Firm, ALC ("JLF") in order to collect the alleged debt from Plaintiff. (*Id*. ¶ 32.) On November 9, 2012, a case was filed against Plaintiff in California state court based upon a consumer account that was allegedly in default in the San Diego Superior Court. (*Id.* ¶ 33.) On January 12, 2015, JLF obtained a default judgment against Plaintiff for a total of $1,357.39. (*Id.* ¶ 34.)

After several attempts to collect the judgment, JLF at the instruction of Stonecrest filed a Memorandum of Costs after Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest, which added an additional $463.50 in cost and $203.05 in interest. (*Id.* ¶¶ 35–36.) When Plaintiff discovered a levy placed on his bank account stemming from this judgment, he contacted JLF to discuss the alleged debt. (*Id.* ¶¶ 39–40.) Plaintiff then received an e-mail from a JLF representative on November 2, 2016, that annotated that the debt owed had now elevated to $4,624.78. (*Id.* ¶¶ 41–42.) Furthermore, the letter from JLF stated that attorney costs and fees would increase if additional correspondence, demands, or payment plans were requested. (*Id.* ¶ 43.) Additionally, JLF stated that if payment plans were instituted, a $275.00 fee would be added to the debt as well as an additional $20.00 charge per payment. (*Id.* ¶ 44.)

In sum, Plaintiff asserts that once his account was reduced to a judgment, neither JLF nor Stonecrest had the right to collect further attorney fees, collection costs, or payment plan set up fees, without filing a Memorandum of Costs pursuant to California Civil Code of Procedure § 685.070(b). (*Id*. ¶ 45.) Moreover, Plaintiff contends that JLF's

---

[1] The following facts are taken from the FAC and construed as true for the limited purpose of resolving the pending motion. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

August 8, 2016 demand letter was inflated by $640.00 for attorney's fees and $1,918.44 in costs. (*Id*. ¶ 48.)

Plaintiff filed his complaint with this Court on December 9, 2016. (Doc. No. 1.) Stonecrest and JLF jointly moved to dismiss Plaintiff's complaint on January 10, 2017. (Doc. No. 3.) In response, Plaintiff filed his first amended complaint ("FAC") on January 25, 2017. (Doc. No. 7.) Plaintiff alleges two claims for relief: (1) violations of the Fair Debt Collection Practices Act ("FDCPA") against JLF only; and (2) violations of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") against both Stonecrest and JLF. (*Id.* ¶¶ 62–67.) Stonecrest filed the instant motion, its motion to dismiss the FAC for failure to state a claim on February 22, 2017.[2] (Doc. No. 13.)

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state a claim upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court may dismiss a complaint as a matter of law for: (1) "lack of a cognizable legal theory," or (2) "insufficient facts under a cognizable legal claim." *SmileCare Dental Grp. v. Delta Dental Plan of Cal*., 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). However, a complaint survives a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Notwithstanding this deference, the reviewing court need not accept legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for

---

[2] The Court notes that after it set a briefing schedule for the motion to dismiss that is the subject of this order, a notice of settlement was filed by Plaintiff. (Doc. No. 16.) Based upon this, on March 6, 2017, a joint motion to continue the motion to dismiss for failure to state a claim was granted. (Doc. No. 21.) The motion extended the briefing schedule so that Plaintiff's opposition was due May 10, 2017, and Stonecrest's reply brief was due on May 17, 2017. (*Id*.)

the court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). On the other hand, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

DISCUSSION

I. Plaintiff's Motion to Strike

As an initial matter, the Court first turns to Plaintiff's contention that Stonecrest has introduced extrinsic statements in its motion to dismiss that must be stricken as improper. (Doc. No. 29 at 12.) In opposition, Stonecrest asserts that Plaintiff has mischaracterized its arguments and that Stonecrest is simply re-describing Plaintiff's own allegations. (Doc. No. 30 at 10.)

It is without question that a district court may not consider materials beyond the pleadings in ruling on a motion to dismiss. *McColgan v. Mut. Of Omaha Ins. Co.*, 4 F. Supp. 3d 1228, 1231 (E.D. Cal. 2014). "The exceptions are material attached to, or relied on by, the complaint so long as the authenticity is not disputed, or matters of public record, provided that they are not subject to reasonable dispute." *Id* (citing *Sherman v. Stryker Corp.*, No. SACV 09-224 JVS (ANx), 2009 WL 2241664, at *2 (C.D. Cal. Mar. 30, 2009). Under Rule 12(f) of the Federal Rules of Civil Procedure, a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Here, Plaintiff seeks to strike from Stonecrest's motion to dismiss statements that argue that (1) Stonecrest is a creditor or judgment creditor; (2) Stonecrest is a "creditor seeking recovery of [HOA] fees and responsible only for collecting the debt prior to the time it went into default"; (3) "Stonecrest does not engage in debt collection practices"; (4)

"The FDCPA does not regulate creditors' activities at all"; and (5) "Plaintiff alleges that JLF is an authorized agent of Stonecrest solely because it is Stonecrest's attorney." (Doc. No. 29 at 12–13.)

After a careful analysis of Plaintiff's FAC, the Court agrees that the first four statements listed above are extrinsic statements that are not pled within the four corners of Plaintiff's complaint. However, the Court finds the fifth statement is simply a logical inference drawn from the vicarious liability section of Plaintiff's FAC. (*See* Doc. No. 7 ¶¶ 57–61.) Accordingly, finding the first four statements not properly submitted as part of Plaintiff's amended complaint, and whose authenticity is contested, and not wishing to convert this motion into a motion for summary judgment, the Court will disregard statements one through four in deciding the present motion. The Court notes that it finds it more appropriate to simply disregard the statements then strike them, as motions to strike are "generally disfavored because the motions may be used as delaying tactics and because of the strong policy favoring resolution on the merits." *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).

II. STONECREST'S MOTION TO DISMISS

The Court now turns to the merits of Stonecrest's motion to dismiss. Stonecrest asserts that Plaintiff's FAC does not allege facts sufficient to state a claim under the FDCPA and the Rosenthal Act, and that Stonecrest is not a debt collector under the Rosenthal Act. (Doc. No. 13-1 at 6–17.) Additionally, Stonecrest rejects Plaintiff's claims that it meets the criteria for direct and vicarious liability under the FDCPA and the Rosenthal Act. (*Id*. at 10–12.)

A. Violations of the FDCPA

Stonecrest first asserts that the FAC fails to adequately allege that it is vicariously liable for JLF's purported violations of the FDCPA. (Doc. No. 13-1 at 10.) Plaintiff illustrates in his opposition that the FAC is not seeking a cause of action against Stonecrest for a violation of the FDCPA, but is only alleging a cause of action against it under the Rosenthal Act. (Doc. No. 29 at 14–15.) Consequently, agreeing with Plaintiff that the FAC

clearly states that the FDCPA violation is brought against "JLF only" the Court **DENIES** Stonecrest's motion to dismiss Plaintiff's FDCPA claims. (*See* Doc. No. 7 ¶¶ 62–64.)

B. Violations of the Rosenthal Act

i. Plaintiff Has Not Pled Sufficient Facts to Allege that Stonecrest is a Debt Collector Under the Rosenthal Act

Next, Stonecrest contends that the FAC fails to provide sufficient allegations to characterize Stonecrest as a debt collector under the Rosenthal Act. (Doc. No. 13-1 at 13–14.) Plaintiff contends that taking his allegations as true, his statement that Stonecrest is a debt collector and that it regularly engages in debt collection on behalf of itself is sufficient to plead a cause of action under the Rosenthal Act. (Doc. No. 29 at 16.)

To successfully plead a claim under the Rosenthal Act, a plaintiff must establish that (1) he is a debtor; (2) the debt at issue is a "consumer debt"; (3) the defendant is a "debt collector"; and (4) "that the defendant violated one of the liability provisions of the [Rosenthal Act]."[3] *Ansari v. Elec. Document Processing Inc.*, Case No. 5:12-CV-01245-LHK, 2013 WL 4647621, at *4 (N.D. Cal. Aug. 29, 2013). The Rosenthal Act defines "debt collector" as:

> [A]ny person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law.

Cal. Civ. Code § 1788.2(c). "The term 'debt collection' means any act or practice in connection with the collection of consumer debts." *Id.* § 1788.2(b).

Here, Plaintiff's Rosenthal Act claim fails as a matter of law. The Court finds that Plaintiff only states in a conclusory manner that Stonecrest is a debt collector pursuant to the Rosenthal Act with no factual allegations to support his legal conclusion. (Doc. No. 7

[3] Neither party disputes that the first two elements have been pled.

¶ 32.) Moreover, even taking the factual contentions as true, this barren statement fails to argue the essential elements of the statute necessary to establish liability as a debt collector. Specifically, Plaintiff fails to allege facts that support his argument that Stonecrest's ordinary course of business is debt collection. Instead, Plaintiff simply states that "Defendants, in the ordinary course of business, regularly, on behalf of themselves, or others, engage in debt collection . . . ." (*See id.* ¶ 23.) These statements are simply "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that do not satisfy Federal Rule of Civil Procedure 8's pleading standard.[4]

Accordingly, finding that Plaintiff's FAC has failed to adequately plead that Stonecrest is a debt collector under the Rosenthal Act, the Court **GRANTS** Stonecrest's motion to dismiss Plaintiff's Rosenthal Act cause of action. *See Rosal v. First Federal Bank of Cal.*, 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009) (dismissing plaintiff's Rosenthal Act claim as the plaintiff did not allege facts giving rise to the inference that any of the defendants was a debt collector as defined by the Rosenthal Act.); *see also Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 WL 1010565, at *4 (S.D. Cal. Mar. 13, 2013) (dismissing plaintiff's Rosenthal Act claim as plaintiff failed to allege facts "sufficient to permit the [c]ourt to draw the reasonable inference that [defendant] was engaged in debt collection . . . ."); *Miranda v. Field Asset Servs.*, No. 3:11-cv-1514-GPC-JMA, 2013 WL 124047, at *4 (S.D. Cal. Jan. 9, 2013) (dismissing plaintiff's Rosenthal Act claim as he failed to allege facts to support a theory of debt collector liability under the Rosenthal Act).

---

[4] Plaintiff asserts that its FAC is sufficient and that requiring him to allege more facts would alter the pleading requirement to an unnecessarily heightened particularity standard, mirroring Federal Rule of Civil Procedure 9. (Doc. No. 29 at 19.) The Court disagrees. The Court notes that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft*, 556 U.S. at 679. Here, Plaintiff's FAC has failed to do so.

ii. Plaintiff Fails to Plead What Section of the Rosenthal Act Stonecrest Allegedly Violated

Though the Court need not reach this issue, for Plaintiff's benefit, the Court notes that Plaintiff's FAC fails to identify which section of the Rosenthal Act Stonecrest allegedly violated. Plaintiff's FAC states that JLF and Stonecrest violated section 1788–1788.32 of the Rosenthal Act. (Doc. No. 7 at 10.) However, this is a reference to the entire act. Consequently, Plaintiff's FAC is also **DISMISSED** based upon his failure to adequately plead the fourth element of a Rosenthal Act claim. *See Lingad v. IndyMac Fed. Bank*, 682 F. Supp. 2d 1142, 1148 (E.D. Cal. 2010) (finding that a claim for violation of the Rosenthal Act that fails to identify the specific provisions of the Act that the defendant has violated should be dismissed for failure to state a claim); *see also Castaneda v. Saxon Mortg., Servs., Inc.*, 687 F. Supp. 2d 1191, 1197 (E.D Cal. 2009) (dismissing plaintiffs' claims as they did not "identify in their FAC the sections of the [Rosenthal Act]" that defendants allegedly violated); *Breidenbach*, 2013 WL 1010565, at *4 (same).

On a final note, the Court highlights that Plaintiff's Rosenthal Act claim is brought against both JLF and Stonecrest. Thus, based on the foregoing analysis, the Court finds that Plaintiff's FAC similarly fails to adequately plead a Rosenthal cause of action against JLF. Accordingly, the Court **SUA SPONTE DISMISSES** the Rosenthal Act claim against JLF for neglecting to identify the specific provision of the Act it allegedly violated.

iii. Plaintiff Has Not Pled Sufficient Facts to Allege that JLF and Stonecrest are Vicariously Liable

Next, the Court finds that Plaintiff's FAC fails to adequately allege that JLF and Stonecrest are vicariously liable. Plaintiff asserts that JLF was an authorized agent of Stonecrest as it was one of Stonecrest's attorneys. (Doc. No. 7 ¶ 57.) Thus, Plaintiff argues that any liability of JLF is also the liability of Stonecrest. (*Id*. ¶ 60.)

Here, the shortcomings of Plaintiff's argument are twofold. First, the Court notes that Plaintiff's case law is inapposite to the instant matter. Plaintiff argues that pursuant to *Fox v. Citicorp Credit Serv.*, 15 F.3d 1507 (9th Cir. 1994), that the actions of the attorney

are to be imputed to the client on whose behalf they are taken. (Doc. No. 7 ¶ 58.) However, the Court notes that *Fox* was an appeal from a motion for summary judgment that dealt solely with violations of the FDCPA. *Fox*, 15 F.3d at 1510. Here, the instant matter is a motion to dismiss Plaintiff's Rosenthal cause of action against Stonecrest.

Second, *Fox* held that a finding of liability for a debt collector should not be vicariously imposed on the assignee who was not a debt collector under the FDCPA. *Id*. at 1516 (*see Oei v. N. Star Capital Acquisitions*, 486 F. Supp. 2d 1089, 1097 (C.D. Cal. 2006) ("Vicarious liability under the [FDCPA] has similarly been restricted to principals who themselves are statutory 'debt collectors.'")). The Court notes that district courts in different circuits as well as this circuit disagree as to whether non-debt collector creditors can be held vicariously liable for their attorneys' actions under the FDCPA. *Compare Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) (concluding that a company may be held vicariously liable for acts of its agents because the company and agent were debt collectors), *with Huy Thanh Vo. v. Nelson & Kennard*, 931 F. Supp. 2d 1080, 1090 (E.D. Cal. 2013) (rejecting *Pollice* and holding that non-debt collector creditors can be vicariously liable for their attorneys' actions under the FDCPA).

Presently, the Court is persuaded by the weight of authority limiting FDCPA liability to entities that fit the statutory definition of "debt collector." *Muhammad v. Reese Law Group, APC*, Case No.: 16cv2513-MMA (BGS), 2017 WL 1520144, at *5 (S.D. Cal. Apr. 27, 2017). Thus, as Plaintiff has failed to plead that Stonecrest is a debt collector under the Rosenthal Act, he cannot establish that JLF and Stonecrest are vicariously liable. Additionally, the Court notes that vicarious liability for an attorney-client relationship is a principal-agent relationship as a matter of law. *Bottoni v. Sallie Mae, Inc.*, No. C 10-03602 LB, 2011 WL 2293226, at *5 (N.D. Cal. June 8, 2011). Thus, as an agency relationship is generally a question of fact, agency arguments regarding a right to control are better suited to a motion for summary judgment than a motion to dismiss. *See Dion LLC v. Infotek-Wireless, Inc.*, No. C07-1431 SBA, 2007 WL 3231838, at *4 (N.D. Cal. Oct. 30, 2007) (denying motion to dismiss vicarious liability claim where plaintiffs alleged agency

relationship between parties without additional factual allegations). Accordingly, without more, Plaintiff has not established that Stonecrest is vicariously liable for JLF's purported violations of the FDCPA.

C. Leave to Amend

Stonecrest argues that Plaintiff should not be granted leave to amend his complaint because it would be "futile." (Doc. No. 13-1 at 19.) According to Rule 15 of the Federal Rules of Civil Procedure, leave should be freely given "when justice requires." Fed. R. Civ. P. 15(a)(2). However, the Court may deny leave to amend "where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994) (citation omitted). Additionally, leave to amend should be granted unless "the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

After analyzing the FAC, and the highlighted deficiencies, the Court finds leave to amend appropriate. The Court notes that if Plaintiff chooses to amend that this would be his second amended complaint. Moreover, the Court has found no reason to believe that Plaintiff is seeking to amend based on bad faith or that Stonecrest would be prejudiced if amendment were provided. Accordingly, the Court **GRANTS** Plaintiff leave to file a second amended complaint if he wishes to do so.

CONCLUSION

As explained more fully above, the Court **GRANTS IN PART and DENIES IN PART** Stonecrest's motion to dismiss. Additionally, the Court **SUA SPONTE DISMISSES** Plaintiff's Rosenthal Act claim against JLF. Plaintiff is granted **fourteen (14) days** from the date of this Order to file a second amended complaint.

IT IS SO ORDERED.

Dated: July 21, 2017

Hon. Anthony J. Battaglia
United States District Judge