

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

MICHAEL J. ROSS,

Plaintiff,

v.

HAYT, HAYT & LANDAU, LLC,
et al.,

Defendants.

Civ. No. 15-1506 (NLH/JS)

OPINION

Appearances:

MICHAEL J. ROSS
P.O. BOX 847
ALLOWAY, NJ 08001

Pro se plaintiff

KENNETH HAYES
LAW OFFICES OF HAYT, HAYT, & LANDAU, LLC
MERIDIAN CENTER 1
TWO INDUSTRIAL WAY WEST
P.O. BOX 500
EATONTOWN, NJ 07724-0500

Attorney for defendants

HILLMAN, District Judge

Plaintiff brings this action for damages arising from Defendants' alleged violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq. and the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. For the

reasons explained below, Defendants' motion will be granted. Plaintiff also filed a "Notice of Objection and Motion to Strike." Plaintiff's motion will be denied.

I. FACTUAL BACKGROUND

This matter concerns an alleged debt owed to Capital One Bank. On June 3, 2013, the Law Offices of Hayt, Hayt & Landau, LLC ("HHL") and two of its attorneys, Kenneth Hayes and Christopher Fox (collectively, "Defendants") sent Plaintiff Michael J. Ross a dunning letter to collect a debt on behalf of its client, Capital One Bank, in the amount of \$13,339.77. On June 28, 2013, Plaintiff sent a certified letter to Defendants disputing the debt and demanding validation. On August 2, 2013, Defendants filed a complaint in the Superior Court of New Jersey on behalf of Capital One Bank to collect the alleged debt.

On February 27, 2015, Plaintiff filed a five count complaint against Defendants for the: (1) violation of § 1692d of the FDCPA; (2) violation of § 1692e, § 1692e(2) and § 1692e(1) of the FDCPA; (3) violation of § 1692f and § 1692f(1) of the FDCPA; (4) violation of § 1681 of the FCRA for willful non-compliance by HHL; and (5) violation of § 1681 of the FCRA for negligent non-compliance by HHL.

II. JURISDICTION

Plaintiff asserts claims pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. The Court exercises jurisdiction over Plaintiff's federal law claims under FCRA and FDCPA pursuant to 28 U.S.C. § 1331. See also 15 U.S.C. §§ 1681p, 1692k(d) (allowing FCRA and FDCPA claims to "be brought in any appropriate United States district court without regard to the amount in controversy, ...").

III. STANDARD FOR MOTION TO DISMISS

When considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations in the claim as true and view them in the light most favorable to the claimant. Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005); MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 128 (D.N.J. 1995). It is well settled that a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, "[a]llthough the Federal Rules of

Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 149-50 n.3 (1984) (quotation and citation omitted).

A district court, in weighing a motion to dismiss, asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Bell Atlantic v. Twombly, 550 U.S. 544, 563 n.8 (2007) (quoting Scheuer v. Rhoades, 416 U.S. 232, 236 (1974)); see also Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Our decision in Twombly expounded the pleading standard for 'all civil actions'"); Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("Iqbal . . . provides the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before Twombly").

Following the Twombly/Iqbal standard, the Third Circuit has outlined a three-part analysis in reviewing a complaint under Rule 12(b)(6). First, the Court must take note of the elements needed for plaintiff to state a claim. Santiago v. Warminster

TP., 629 F.3d 121, 130 (3d Cir. 2010). Second, the factual and legal elements of a claim should be separated; a district court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Id.; Fowler, 578 F.3d at 210 (citing Iqbal, 129 S. Ct. at 1950). Third, a district court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. Id.

A complaint must do more than allege the plaintiff's entitlement to relief. Fowler, 578 F.3d at 210; see also Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (stating that the "Supreme Court's Twombly formulation of the pleading standard can be summed up thus: stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element") (internal quotations and citations omitted). A court need not credit either "bald assertions" or "legal conclusions" in a

complaint when deciding a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997).

Finally, a court in reviewing a Rule 12(b)(6) motion must only consider the facts alleged in the pleadings, the documents attached thereto as exhibits, and matters of judicial notice. S. Cross Overseas Agencies, Inc. v. Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999). A court may consider, however, "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

IV. DISCUSSION

Defendants argue that Plaintiff's FDCPA claims are barred by the Act's one year statute of limitations and that Plaintiff fails to state a claim under the FCRA. The Court addresses each argument in turn.

1. FDCPA

The FDCPA was enacted "to eliminate abusive debt collection practices which contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and

to invasions of individual privacy." Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000) (citations and internal quotations omitted). As Congress has explained, "the purpose of the Act was not only to eliminate abusive debt collection practices, but also to 'insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'" Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 996 (3d Cir. 2011) (citing 15 U.S.C. § 1692(e)). In light of the inadequacy of the existing consumer protection laws at the time, Congress elected to give consumers a private right of action against debt collectors who fail to comply with the FDCPA's requirements. Lesher, 650 F.3d at 996-97.

An action under the FDCPA must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In Schaffhauser v. Citibank (S.D.) N.A., 340 F. App'x 128 (3d Cir. 2009), the Third Circuit considered the issue of when the one-year statute of limitations begins to run. The court noted that some courts have held that FDCPA claims begin to run upon filing of the underlying collection action, while others use the date the purported debtor was served with the

complaint. Id. at 130-31. The Third Circuit declined to endorse one of these two approaches, instead finding that under either approach, the plaintiff's complaint was untimely. Id. at 131. The court further addressed the plaintiff's argument that ongoing debt collection constituted "continuing violations" of the FDCPA. The court noted that there was no authority for the proposition that that participation in ongoing debt collection litigation "qualifies as a 'continuing violation' of the FDCPA." Id. Thus the court found the plaintiff's FDCPA claims untimely. Id.; Wells Fargo Bank, N.A. v. Berteau, No. 13-7232, 2014 WL 5813704, at *4 (D.N.J. Nov. 10, 2014) (dismissing complaint where the plaintiff failed to allege discrete FDCPA violations within the one-year period to bring such claims).

In this case, HHL sent a letter dated June 3, 2013 to Plaintiff seeking to collect a debt. Compl. ¶ 19. HHL filed suit on August 2, 2013 in the Superior Court of New Jersey. Plaintiff was served with the complaint some time before September 3, 2013, when he filed a dispute in response to the complaint in the same civil action. Compl., Exhs. C, D.¹

¹ Further, the Court may take judicial notice of the dockets of the state courts of New Jersey. See Fed. R. Evid. 201; Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.,

Plaintiff filed the instant federal lawsuit on February 27, 2015. Plaintiff has pled no other incidents which would constitute a continuing violation of the FDCPA from February 27, 2014 to February 27, 2015. Plaintiff states that "[w]hile Defendants *initially* sent a letter to Plaintiff dated June 3, 2013 attempting to collect an alleged debt, Defendants are *still* acting based upon that communication *to this day*." Pl.'s Br. at 3 (emphasis in original). However, Plaintiff has failed to plead an identifiable incident wherein his rights under the FDCPA were violated within the one-year statutory period.²

181 F.3d 410, 426-27 (3d Cir. 1999) (federal court, on a motion to dismiss, may take judicial notice of another court's opinion, not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity); M & M Stone Co. v. Pennsylvania, 388 F. App'x 156 (3d Cir. 2010) (district court was not required to convert motion to dismiss to motion for summary judgment where it took judicial notice of the existence of state court opinions without considering the underlying factual analysis). The docket of the state litigation additionally shows Plaintiff was served with Defendants' complaint on August 6, 2013.

² While not cited in his complaint, Plaintiff states in his opposition brief that on October 3, 2013, Defendants sent Plaintiff a letter which stated: "We are attempting to collect a debt. Any information we obtain will be used for that purpose." Opp. Br. at 2. Plaintiff fails to explain how this letter constitutes a FDCPA violation. Further, Plaintiff cannot use an opposition brief to supplement his complaint. Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

Participation in the debt collection litigation does not constitute an ongoing violation. Schaffhauser, 340 F. App'x at 131.

Thus, under either approach articulated by the Third Circuit in Schaffhauser, Plaintiff's FDCPA claims are barred by the one-year statute of limitations. Accordingly, Plaintiff's FDCPA claims in Counts I-III of his Complaint will be dismissed with prejudice.

2. FCRA

"Congress enacted the FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.'... In doing so, Congress sought to preserve the consumer's privacy in the information maintained by consumer reporting agencies." Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187, 191 (3d Cir. 2009) (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007); Cole v. U.S. Capital, Inc., 389 F.3d 719, 725 (7th Cir. 2004)). Under the Act, "consumer reporting agencies" ("CRAs") are entities which "regularly engage[] ... in the practice of assembling or evaluating consumer credit information or other information on consumers

for the purpose of furnishing consumer reports to third parties [.]” 15 U.S.C. § 1681a(f). As explained by another court in this District, “the function of such entities is more accurately described by the common term, ‘credit rating agencies.’” Burrell v. DFS Services, LLC, 753 F. Supp. 2d 438, 441 n.2 (D.N.J. 2010).

Plaintiff alleges in Counts IV and V of the Complaint that HHL willfully and negligently violated FCRA by obtaining Plaintiff's “consumer report” without a permissible purpose. Under the FCRA a “consumer report” is:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.

15 U.S.C.A. § 1681a(d)(1).

Section 1681b of the Act outlines the only permissible purposes for which a consumer report (also known as a credit

report) may be obtained by another person or entity. See generally 15 U.S.C. § 1681b(a) (outlining a variety of permissible purposes for obtaining a consumer report including, but not limited to: in response to a court order, in accordance with the written instructions of the consumer himself, or where the report is obtained to use the information in connection with a credit transaction involving the consumer or for employment purposes). "The FCRA imposes civil liability upon a person who willfully obtains a consumer report for a purpose that is not authorized by the FCRA." Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 34 (3d Cir. 2011) (citing 15 U.S.C. §§ 1681b(f), 1681n(a)). Pursuant to Sections 1681b(f) and 1681o(a), liability may also be imposed for any person who negligently obtains a consumer report for a purpose that is not permitted under the Act.

HHL argues in its motion to dismiss that Counts IV and V fail to state a claim for either the willful or negligent violation of the FCRA and that these Counts should be dismissed with prejudice. It is clear that HHL had a permissible purpose for obtaining Plaintiff's credit report under FCRA. Specifically, FCRA "expressly permits distribution of a consumer

report to an entity that 'intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.'" Huertas, 641 F.3d at 34 (citing 15 U.S.C. § 1681b(a)(3)(A)) (emphasis in original, footnote omitted); Zieger v. J.A. Cambece Law Office, P.C., No. 14-2965, 2015 WL 3647267, at *4 (D.N.J. June 12, 2015) ("The Third Circuit has explicitly found this provision permits a credit reporting agency to furnish a credit report to a debt collector, and that the debt collector's act of obtaining and using the credit report is authorized under the circumstances.") (citing Huertas, 641 F.3d at 34). Plaintiff alleges HHL is a debt collector. Compl. ¶ 8. Accepting Plaintiff's allegations that HHL obtained his credit report as true, HHL obtained Plaintiff's credit report for the authorized purpose of collecting an outstanding debt.

Plaintiff argues that the Defendants did not have a permissible purpose to obtain his credit report because his debt was not "verified." Plaintiff has cited no authority for this proposition. Further, Defendants provided Plaintiff with the validation of the debt and an affidavit from Capital One

establishing the existence and amount of the debt along with supporting documentation. See Decl. of Kenneth Hayes, Defs.' Reply Br., Ex. G [Doc. No. 10].³

Accordingly, Counts IV and V of Plaintiff's complaint must be dismissed as asserted against HHL. This dismissal is with prejudice as amendment of Plaintiff's complaint would be futile because HHL had a permissible purpose to obtain a copy of Plaintiff's consumer credit report as debt collectors.⁴

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss will be granted. Plaintiff's claims under the FDCPA contained Counts I-III of the Complaint will be dismissed with prejudice. Plaintiff's claims under the FCRA contained in Counts IV-V of the Complaint will also be dismissed with prejudice.

³ A court may consider "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

⁴ Plaintiff filed a "Notice of Objection and Motion to Strike" which the Court construes as impermissible sur-reply. Plaintiff does not raise any issues in his sur-reply which affect the Court's analysis. Plaintiff's motion will be denied.

Plaintiff's "Notice of Objection and Motion to Strike" will be denied.

An Order consistent with this Opinion will be entered.

Dated: December 14, 2015

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey