[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58

Justice

FRAN MARTIN, Individual and On Behalf of All Other New York Residents Who Have Been Sued in the New York Courts, or Have Been Threatened With Such Suit, By Defendants to Collect on Consumer Credit Card Debt on Credit Cards Issued by Heritage Chase And As To Which There Has Been No Credit Card Activity in the Prior Three Years, Despite the Fact that Such Lawsuits Are Time-Barred Under the Delaware Statute of Limitations As Made Applicable By New York's Borrowing Statute,

Plaintiff,

-against-

PALISADES COLLECTION, LLC, and KIRSCHENBAUM & PHILLIPS, P.C.,

Defendants.

INDEX NO. ~~401643/11~~ 116099-2010

MOTION DATE

MOTION SEQ. NO. ~~001~~ 003

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits-- Exhibits....	1,2,3,4,5,7
Answering Affidavits-- Exhibits	6
Replying Affidavits	8,9

CROSS-MOTION: ✓ YES ___ NO

FILED

JUL 02 2012

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 6/27/12

DONNA M. MILLS, J.S.C.

Check one: ___ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

FRAN MARTIN, Individually and On Behalf of All Other New York Residents Who Have Been Sued In the New York Courts, or Have Been Threatened With Such Suit, By Defendants to Collect on Consumer Credit Card Debt on Credit Cards Issued by Heritage Chase And As To Which There Has Been No Credit Card Activity in the Prior Three Years, Despite the Fact that Such Lawsuits Are Time-Barred Under the Delaware Statute of Limitations As Made Applicable By New York's Borrowing Statute,

Plaintiff,

- against-

PALISADES COLLECTION, LLC, and KIRSCHENBAUM & PHILLIPS, P.C.,

Defendant.

Index No. 116099/2010

DECISION AND ORDER

003

DONNA M. MILLS, J.S.C.:

These competing motions to compel disclosure, for a protective order, and for leave to serve and file an amended complaint, arise in an uncertified class action.

Background

According to the proposed amended complaint, the class would include all New York State residents who were either sued or threatened with suit by defendants Palisades Collection, LLC (Palisades) and/or the law firm Kirschenbaum & Phillips, P.C. (the Kirschenbaum firm), to collect on allegedly time-barred

unsecured credit card debt (the Chase accounts) on credit cards issued by "Chase a/k/a Heritage Chase." The Chase accounts were allegedly time-barred under the applicable three-year Delaware statute of limitations, because no charge had been made on the credit card within three years (ex. JJ to pltff.'s mov. aff., ¶ 2).

The proposed class representative, plaintiff Fran Martin, contends that defendants' actions violated the Fair Debt Collection Practices Act (FDCPA) (*see* 15 USC § 1692 *et seq.*) by bringing a time-barred collection action against her in the Civil Court of the City of New York on December 14, 2009. The Civil Court granted Martin's motion for summary judgment on the ground that the action was time-barred. The exact time frame of the proposed class is not defined in the amended complaint.

Plaintiff moves for an order (1) pursuant to CPLR 3124, compelling defendants to comply with plaintiff's first and second sets of interrogatories, and to produce the documents demanded in those interrogatories; (2) pursuant to CPLR 2004, granting plaintiff permission to serve plaintiff's third set of interrogatories, and plaintiff's third demand for production of documents; (3) pursuant to CPLR 2004, extending plaintiff's time to move for class certification until 60 days after "provision of the discovery sought on this motion and submission to deposition on the class issues;" (4) striking as untimely, pursuant to CPLR

3103, defendants' first requests for admission, first set of interrogatories, and first set of document production requests; (5) pursuant to CPLR 3025 (b), granting plaintiff leave to file a proposed amended complaint; (6) pursuant to CPLR 2004, extending the close of merits discovery until no earlier than three months after plaintiff's motion for class certification is decided; and (7) for such other relief as the court deems just.

The Kirschenbaum firm cross-moves for an order compelling plaintiff to comply with its discovery demands, or, alternatively, striking the complaint or precluding plaintiff from offering evidence at trial relating to the items that are the subject of the discovery demands. Plaintiff responds that the Kirschenbaum firm's discovery demands are untimely pursuant to the terms of the preliminary conference order (ex. P to pltff.'s mov. aff.), which required that discovery demands be served within 30 days. That order also required that all production or objections thereto be completed within 30 days, and that all disclosure be completed by June 13, 2012.

The amended complaint contains two causes of action. The first cause of action alleges that the collection action against plaintiff constitutes a violation of the FDCPA because it falsely represented the legal status of a debt, which defendants knew or should have known was time-barred. The first cause of action also alleges that defendants violated the FDCPA by using "unfair

or unconscionable means to collect ... debt" (amended complaint, ¶ 25), citing 15 USCA § 1692 (f), by threatening to file, and filing time-barred causes of action for debt. The second cause of action seeks a judgment declaring that threatening to file or filing, time-barred actions for the collection of debt violates the FDCPA.

Discussion

Disclosure at this pre-certification stage is limited to "determin[ing] whether the prerequisites to class certification listed in CPLR 901 are present, and to assess[ing] the feasibility considerations listed in CPLR 902 in relation to the particular facts" (*Chimenti v American Express Co.*, 97 AD2d 351, 352 [1st Dept 1983]). It is limited to "ascertaining only those facts which are necessary to support an application for class status [citation omitted]" (*Gewanter v Quaker State Oil Ref. Corp.*, 87 AD2d 970, 970 [4th Dept 1982]).

Thus, the threshold issue with respect to the disclosure sought in both the motion and the cross motion is which items are material and necessary for the class certification motion, considering the criteria set forth in CPLR 901 and 902. CPLR 901, captioned, "[p]rerequisities to a class action," provides, as pertinent:

> a. One or more members of a class may sue or be sued as representative parties on behalf of all if: (1) the class is so numerous that joinder of all members is ... impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims ... of the representative parties are typical of the claims ... of the class; (4) the representative parties will fairly and adequately protect the interest of the class; and (5) class action is superior to other available methods for the fair and efficient adjudication of the controversy

(CPLR 901).

CPLR 902, captioned, "[o]rder allowing class action provides:

> Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:
>
> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. The difficulties likely to be encountered in the management of a class action.

(CPLR 902).

Neither plaintiff nor the Kirschenbaum firm has limited their numerous discovery demands to those reasonably calculated to lead to discoverable evidence necessary to establish the limited criteria to be addressed upon a motion for class certification, as set forth in CPLR 901 and 902. All of the discovery devices served or submitted include merits-based disclosure demands that are improper at this stage of the action. The respective motions to compel compliance with all merits-based disclosure requests are denied. "The purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance [internal quotation marks and citations omitted]" (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842-843 [2d Dept 2010]).

The motion for leave to serve and file the proposed amended complaint is granted, in accordance with our policy that such leave should be freely granted in the absence of prejudice, which has not been demonstrated here (*see* CPLR 3025 [b]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). The principal effect of the amendment is to clarify that the class is intended to include persons sued by either of the defendants, not only those sued by the Kirshenbaum firm on behalf of Palisades.

Plaintiff's first set of interrogatories seeks detailed and extensive information, including the names and addresses of all

individuals in New York State who were either sued or threatened with suit on or after December 14, 2009, with respect to the Chase accounts. This request is overly broad, and not necessary for the class certification motion. It also seeks improper merits-based disclosure concerning various investigative steps that defendants took prior to suing or threatening to sue, with respect to which "it is improper to require [defendant] to respond at this juncture since such information cannot assist the plaintiff in ascertain[ing] the dimensions of the group of individuals who share plaintiff's grievance [internal quotation marks and citations omitted]" (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d at 843).

The Kirschenbaum firm objects to the first set of interrogatories, and contends that Martin is not capable of representing a class consisting of persons threatened with suit because there is no allegation that she was ever threatened with suit by defendants. The Kirshenbaum firm responded that it had commenced actions, on behalf of Palisades, against 13 New York State residents between December 14, 2009 and September 14, 2010, on allegedly time-barred Chase Heritage accounts. This is insufficient, both as to the time frame and limiting the response to actions commenced on behalf of Palisades.

Plaintiff is entitled to disclosure of a reasonable number

of individuals who were threatened with suit on the Chase accounts. While bringing an action on time-barred accounts is not by itself a violation of the FDCPA, threatening to bring suit on time-barred claims may be actionable (*see People v Boyajian Law Offices, P.C.*, 17 Misc 3d 1119[A], 2007 NY Slip Op 52077[U] (Sup Ct, NY County 2007]; *Freyermuth v Credit Bureau Services, Inc.*, 248 F3d 767, 770 [8th Cir 2001]).

While there is no precise minimum number that satisfies the numerosity requirement for certification of a class action, a class of as few as 39 members has been approved *(see Pesantez v Boyle Environmental Serv., Inc.*, 251 AD2d 11 [1st Dept 1998]; *see also Dabrowski v Abax Inc.*, 84 AD3d 633 (1st Dept 2011])(certifying class of between 50 to 100 laborers).

In the exercise of the court's discretion, plaintiff's motion to compel compliance with its first and second demand for production of documents is granted only to the extent of directing the Kirshenbaum firm to answer interrogatories and produce documentation, including contact information, identifying no more than 50 individuals that it threatened with suit in connection with the Chase accounts, either on behalf of Palisades or any other client, no earlier than one year prior to the commencement of this action, and up to the present.

The Kirschenbaum firm's motion to compel plaintiff to comply

with its notice to admit, its first set of interrogatories, and its first demand for production of documents is granted. The information sought is material to the issues that may be presented in the confirmation motion because it may relate to typicality of claims and the appropriateness of the proposed class representative. The notice to admit seeks to confirm matters as to which "there can be no substantial dispute at the trial" (CPLR 3123 [a]).

All depositions and all disclosure related to the confirmation motion are to be completed by September 30, 2012. The depositions shall be limited to issues relating solely to the confirmation motion, and not merits-based issues. The remaining demands in plaintiff's first, second and third sets of interrogatories, and demands for production of documents are all merits-based, as are those in the proposed third sets of interrogatories and document demands, and must await the determination of any motion for class certification.

Accordingly, it is

ORDERED that the motion of plaintiff Fran Martin for an order pursuant to CPLR 3124 is granted only to the extent of compelling the Kirschenbaum firm to produce documentation and respond to interrogatories compiling no more than 50 individuals that it threatened with suit in connection with the Chase accounts, either on behalf of Palisades or any other client, and

is otherwise denied; and it is further

ORDERED that plaintiff's motion to compel compliance with its third set of interrogatories and its third demand for production of documents is denied; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 2004, extending plaintiff's time to move for class certification until 60 days after "provision of the discovery sought on this motion and submission to deposition on the class issues," is granted only to the extent of extending plaintiff's time to move for class certification until December 14, 2012, and is otherwise denied; and it is further

ORDERED that plaintiff's motion for an order pursuant to CPLR 3103, striking defendants' first requests for admission, first set of interrogatories, and first set of document production requests is denied; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3025 (b) for leave to file the proposed amended complaint is granted; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 2004 for an order extending the close of merits discovery until no earlier than three months after plaintiff's motion for class certification is granted, is denied as not ripe for determination, with leave to renew upon any such grant of class certification; and it is further

ORDERED that the cross motion of defendant Kirschenbaum & Phillips, P.C. for an order striking the complaint, precluding admission of evidence, or compelling plaintiff to comply with defendant's first notice to admit, its first set of interrogatories, and its first demand for production of documents, is granted, to the extent of compelling plaintiff to comply with the three foregoing instruments.

Dated: 6/27/12

ENTER:

J. S. C.
GERALD W. MILLS, J.S.C.