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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF ALASKA**
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8 **Arthur R. Thorpe,**

9 **Plaintiff,**

10 **vs.**

11 **Ralph V. Ertz, Jr. d/b/a Ralph Ertz**
12 **Attorney at Law, and Michael Rose,**

13 **Defendants.**

3:16-CV-00160 JWS

ORDER AND OPINION

[Re: Motion at Docket 30]

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15 **I. MOTION PRESENTED**

16 At docket 30 defendants Ralph V. Ertz, Jr. d/b/a Ralph Ertz Attorney at Law and
17 Michael Rose (collectively, "Ertz") move pursuant to Federal Rule of Civil Procedure 56
18 for summary judgment on all claims brought by plaintiff Arthur R. Thorpe ("Thorpe").
19 Ertz supports the motion with affidavits at docket 31 and 32, a memorandum of points
20 and authorities at docket 33, and exhibits at dockets 34 through 52. Thorpe opposes
21 the motion at docket 63 and submits a declaration in support of the opposition at
22 docket 64. Ertz replies at docket 65. Oral argument was not requested and would not
23 assist the court.

24 **II. BACKGROUND**

25 Ertz is the lawyer who represented Valli Vue Estates Property Owners
26 Association in the state small claims action it filed against Thorpe in 2014 for unpaid
27 homeowner's association dues and late fees ("*Valli Vue I*").¹ After Thorpe did not
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¹Doc. 1 at 3 ¶ 10.

1 answer the complaint in that case, Ertz moved for default judgment.² Ertz also sought
2 attorney's fees, asserting that the declarations of the homeowner's association
3 permitted "full, reasonable attorney fees."³ On August 5, 2014, a \$2,533.61 default
4 judgment was entered, which included an award of full attorney's fees of \$911.50.⁴

5 On August 6, 2015, Thorpe moved for relief from the judgment.⁵ Thorpe argued
6 that the attorney's fee award conflicted with District Court Rule of Civil Procedure 20(a),
7 which limits the amount of attorney's fees that may be awarded with entry of default
8 judgment to "10% of the judgment or reasonable actual fees, whichever is less."⁶ After
9 noting that the record before it did not include the Declarations of the homeowner's
10 association, the small claims court granted the motion and reduced the attorney's fee
11 award to 10% of the default judgment, or \$152.71.⁷

12 In this action, Thorpe asserts two causes of action under the federal Fair Debt
13 Collection Practices Act ("FDCPA") and two causes of action under Alaska's Unfair
14 Trade Practices and Consumer Protection Act ("UTPCPA"). Specifically, in Counts I
15 and II, respectively, Thorpe alleges that Ertz's pursuit of excessive attorney's fees
16 violated 15 U.S.C. §§ 1962f (unfair or unconscionable means of attempting to collect a
17 debt) and 1962e (false, deceptive, or misleading representations in connection with the
18 collection of a debt). He raises in Count III a violation of AS 45.50.471 (unfair or
19 deceptive acts or practices) and in Count IV derivative liability under the UTPCPA due
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22 ²Doc. 52.

23 ³*Id.* at 3 ¶ 5.

24 ⁴Doc. 35.

25 ⁵Doc. 39.

26 ⁶*Id.* at 2-3.

27 ⁷Doc. 41 at 4-5.

1 to the FDCPA violations. Ertz now moves for summary judgment on all claims as time-
2 barred and without merit.

3 III. STANDARD OF REVIEW

4 Summary judgment is appropriate where “there is no genuine dispute as to any
5 material fact and the movant is entitled to judgment as a matter of law.”⁸ The
6 materiality requirement ensures that “only disputes over facts that might affect the
7 outcome of the suit under the governing law will properly preclude the entry of summary
8 judgment.”⁹ Ultimately, “summary judgment will not lie if the . . . evidence is such that a
9 reasonable jury could return a verdict for the nonmoving party.”¹⁰ However, summary
10 judgment is mandated “against a party who fails to make a showing sufficient to
11 establish the existence of an element essential to that party’s case, and on which that
12 party will bear the burden of proof at trial.”¹¹

13 The moving party has the burden of showing that there is no genuine dispute as
14 to any material fact.¹² Where the nonmoving party will bear the burden of proof at trial
15 on a dispositive issue, the moving party need not present evidence to show that
16 summary judgment is warranted; it need only point out the lack of any genuine dispute
17 as to material fact.¹³ Once the moving party has met this burden, the nonmoving party
18 must set forth evidence of specific facts showing the existence of a genuine issue for
19 trial.¹⁴ All evidence presented by the non-movant must be believed for purposes of
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21 ⁸Fed. R. Civ. P. 56(a).

22 ⁹*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

23 ¹⁰*Id.*

24 ¹¹*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

25 ¹²*Id.* at 323.

26 ¹³*Id.* at 323-25.

27 ¹⁴*Anderson*, 477 U.S. at 248-49.

1 summary judgment and all justifiable inferences must be drawn in favor of the
2 non-movant.¹⁵ However, the non-moving party may not rest upon mere allegations or
3 denials but must show that there is sufficient evidence supporting the claimed factual
4 dispute to require a fact-finder to resolve the parties' differing versions of the truth at
5 trial.¹⁶

6 **IV. DISCUSSION**

7 **A. Federal Claims (Counts I and II)**

8 The FDCPA was enacted to eliminate abusive debt collection practices, ensure
9 that debt collectors who abstain from those practices are not competitively
10 disadvantaged, and to promote consistent state action to protect consumers.¹⁷ The
11 FDCPA regulates interactions between consumer debtors and "debt collector[s],"
12 defined to include any person who "regularly collects . . . debts owed or due or asserted
13 to be owed or due another."¹⁸ A lawyer regularly engaged in debt collection activity,
14 even litigation, is considered a debt collector.¹⁹ A debt collector who violates the
15 FDCPA is liable for actual damages and additional damages not to exceed \$1,000.²⁰
16 Under the FDCPA, a plaintiff must bring suit "within one year from the date on which the
17 violation occurs."²¹

21 ¹⁵*Id.* at 255.

22 ¹⁶*Id.* at 248-49.

23 ¹⁷15 U.S.C. § 1692(e).

24 ¹⁸*Id.* § 1692a(6).

25 ¹⁹*See Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

26 ²⁰15 U.S.C. § 1692k(a).

27 ²¹*Id.* § 1692k(d).

1 Thorpe filed the complaint in the instant action on July 28, 2016.²² To survive
2 summary judgment, Thorpe's federal claims must not have accrued prior to July 28,
3 2015. The record shows that Ertz moved for attorney's fees in *Valli Vue I* on July 21,
4 2014,²³ more than two years before Thorpe filed the instant complaint.²⁴ Thorpe also
5 does not dispute that no debt collection activity occurred after July 23, 2015, when Ertz
6 filed a final motion for Thorpe to appear at a debtor's exam.²⁵

7 Thorpe nonetheless urges the court to apply the continuing violation doctrine to
8 find his FDCPA claims timely. The continuing violation doctrine applies to "repeated
9 instances or continuing acts of the same nature."²⁶ As applied to debt collection claims,
10 the continuing violation doctrine permits recovery for actions outside the limitations
11 period if they are sufficiently linked to unlawful conduct within the limitations period.²⁷ In
12 support of his continuing violation theory, Thorpe points to two filings Ertz submitted in
13 *Valli Vue I*: (1) the August 12, 2015, opposition to Thorpe's motion for relief from the
14 judgment; and (2) the September 18, 2015, motion to reconsider the order granting
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16 ²²Doc. 1.

17 ²³Doc. 52.

18 ²⁴Thorpe states that he does not recall receiving the July 21, 2014, service copy of Ertz's
19 motion for attorney's fees. Doc. 64 at 2 ¶ 8. The Ninth Circuit has held that equitable tolling,
20 otherwise known as the "discovery rule," is applicable to the FDCPA. *Magnum v. Action*
21 *Collection Serv., Inc.*, 575 F.3d 935, 939-40 (9th Cir. 2009). The discovery rule does not save
22 Thorpe's federal claims, however, because Thorpe acknowledges that he "first discovered
23 Defendants' unlawful conduct" on November 24, 2014, when he was served a copy of Ertz's
24 motion for Thorpe to appear at a debtor's exam. Doc. 63 at 8-9. Thorpe was thus on notice of
25 the basis for his FDCPA claims more than one year and eight months prior to the filing of this
26 lawsuit.

27 ²⁵Doc. 33 at 7; Doc. 42 at 3; Doc. 63 at 7. Nor does Thorpe dispute that a judgment
28 debtor's exam was never held. Doc. 33 at 7 n.43.

²⁶*Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 597 (9th Cir. 1990).

²⁷*See Joseph v. J.J. Mac Intyre Cos., LLC*, 281 F. Supp. 2d 1156, 1162 (N.D. Cal. 2003)
(applying the doctrine where defendant made hundreds of repeated, automated collection calls
to plaintiff over an 18-month period).

1 relief from the judgment.²⁸ According to Thorpe, “[t]hese motions were continued
2 unlawful attempts to collect an unauthorized amount in attorney’s fees, were directly
3 related to Defendants’ original unlawful act of seeking an unlawful amount in attorney’s
4 fees, and they occurred less than one year before Thorpe filed the [instant] case on
5 July 28, 2016.”²⁹

6 As an initial matter, not all courts agree that the continuing violation doctrine is
7 applicable under § 1692k(d).³⁰ It is unnecessary to answer that question here because,
8 in any event, the continuing violation doctrine is inapplicable under the facts of this
9 case. Thorpe does not cite to any case that supports his contention that subsequent
10 filings made in the course of litigation constitute continuing, separate violations of the
11 FDCPA.³¹ Moreover, the court is unpersuaded that the mere act of Ertz re-asserting his
12 client’s position during litigation restarted the limitations period anew.³² The court thus
13 finds that Thorpe’s claims under the FDCPA are time-barred, and summary judgment is
14 granted on those claims.

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19 ²⁸Doc. 63 at 7.

20 ²⁹*Id.*

21 ³⁰*See, e.g., Wilhem v. Credico Inc.*, 455 F. Supp. 2d 1006, 1009 (D. N.D. 2006)
22 (collecting cases).

23 ³¹*Cf. Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 936 (9th Cir. 2007) (holding that
24 “communications directed only to a debtor’s attorney, and unaccompanied by any threat to
contact the debtor, are not actionable under the [FDCPA]” (footnote omitted)).

25 ³²*See Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997) (holding that, where the
26 alleged FDCPA violation is the filing of a lawsuit, “the statute of limitations beg[ins] to run on the
27 filing of the complaint”); *see also Prowell v. Cam Credits, Inc.*, No. 2:14-cv-00337-SU, 2015 WL
28 2239309, at *7 (D. Or. May 12, 2015) (“New communications about old claims do *not* constitute
independent violations . . . and the course of debt-collection litigation, without more, is not a
continuing violation of the FDCPA.” (citations omitted)).

1 **B. State Claims (Counts III and IV)**

2 The timeliness of Thorpe’s state law claims are measured under the two-year
3 statute of limitations set forth in AS 45.50.531(f). This court has, however, dismissed all
4 federal FDCPA claims over which it had original jurisdiction.

5 “A district court ‘may decline to exercise supplemental jurisdiction’ if it ‘has
6 dismissed all claims over which it has original jurisdiction.’”³³ “[I]n the usual case in
7 which all federal-law claims are eliminated before trial, the balance of factors to be
8 considered under the pendent jurisdiction doctrine—judicial economy, convenience,
9 fairness, and comity—will point toward declining to exercise jurisdiction over the
10 remaining state-law claims.”³⁴ Consideration of these factors here weigh against
11 continuing to exercise supplemental jurisdiction in this case. Only state-law claims
12 remain, the case has yet to proceed to trial, and the court has not addressed or
13 considered the factual merits of any of Thorpe’s contentions. Under 28 U.S.C.
14 § 1367(c), Thorpe’s state-law claims are dismissed without prejudice to renewal in state
15 court.³⁵

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24 ³³*Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (quoting 28 U.S.C.
25 § 1367(c)(3)).

26 ³⁴*Id.* (quoting *Carnegie-Mellon Univ. v. Cahill*, 484 U.S. 343, 350 n.7 (1988)).

27 ³⁵*See Gini v. Las Vegas Metro. Police Dep’t*, 40 F.3d 1041, 1046 (9th Cir. 1994)
28 (dismissal based on declining supplemental jurisdiction over state law claims should be without
prejudice).

1 **V. CONCLUSION**

2 For the reasons above, the motion for summary judgment at docket 30 is
3 **GRANTED** as to Counts I and II, and Counts III and IV are dismissed for lack of
4 jurisdiction. The Clerk will please enter judgment for defendants,

5 DATED this 29th day of January 2018.

6
7 /s/ JOHN W. SEDWICK
8 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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