UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KRISTIANE SMITH, Plaintiff, v. NCO FINANCIAL SYSTEMS, INC., Defendant.	No. 2:14-cv-1650 TLN CKD PS FINDINGS AND RECOMMENDATIONS

Defendant's motion to dismiss came on regularly for hearing on May 6, 2015. Plaintiff Kristiane Smith, proceeding in propria persona, failed to appear. Damian Richard appeared telephonically for defendant. Upon review of the documents in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

In this action, plaintiff alleges a claim under the Telephone Consumer Protection Act ("TCPA"), asserting that defendant violated the Act by calling and leaving a message on her cell phone using an auto-dialer without plaintiff's prior express consent. Plaintiff also alleges claims under the Fair Debt Collections Practices Act ("FDCPA") and the state law equivalent, the Rosenthal Act, and the Fair Credit Reporting Act ("FCRA"). Defendant moves to dismiss for failure to state a claim.

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In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and construe the pleading in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

In order to avoid dismissal for failure to state a claim a complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Defendant moves to dismiss the TCPA claim on three grounds: (1) plaintiff's exhibit attached to the complaint shows that the phone number called (916-929-4665) was different than that alleged in the complaint (916-918-9481) and plaintiff does not allege that the former number was cellular; (2) plaintiff fails to allege any facts supporting the conclusory allegation that the call was placed using an automatic dialing system; and (3) plaintiff consented to receiving calls on her cell phone by providing her cell phone to her medical provider.[1] The second contention appears to be dispositive.[2]

"The three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express

[1] The complaint does not allege the basis of the debt underlying defendant's collection attempt. Defendant has submitted as an exhibit to the motion to dismiss an unauthenticated copy of the medical bill in the amount of $207.00 and what purport to be some notes from the medical provider showing plaintiff's cell phone number of "918-9481" as the "[b]est contact number."

[2] In opposition, plaintiff asserts that the reason her phone bill shows that the call was placed to a different number is because the different number is simply used for recording voicemails but that the call at issue was initially placed to her cell phone.

consent. 47 U.S.C. § 227(b)(1). The term 'automatic telephone dialing system' means 'equipment that has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.' 47 U.S.C. § 227(a)(1)." Meyer v. Portfolio Recovery Associates, LLC, 707 F.3d 1036, 1043 (9th Cir. 2012). In the second amended complaint, plaintiff makes the conclusory allegation that the call at issue "was placed using equipment that had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and/or a predictive dialer; with the capacity to dial such numbers. Plaintiff alleges no facts supporting this allegation. Moreover, the exhibits attached to the complaint appear to contradict plaintiff's conclusory allegation. The voicemail message references a specific identification code that appears to be unique to the debt in dispute. The specificity of the message left on plaintiff's answering machine contradicts any assertion made by plaintiff that this is a case where a series of telephone calls were made to randomly generated telephone numbers with an identical message left for each phone number dialed. In the absence of any facts supporting plaintiff's conclusory allegations, which are simply a "formulaic recitation" of the elements of a claim for violation of the TCPA, the claim should be dismissed. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Plaintiff proffers no facts which would cure this deficiency. The claim should therefore be dismissed without leave to amend.

Plaintiff's other claims are similarly deficient in setting forth conclusory allegations without factual support. Plaintiff premises her claims under the FDCPA on two asserted violations. First, plaintiff alleges that defendant violated 15 U.S.C. § 1692(e)(2), which provides in pertinent part that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. . . [T]he following conduct is a violation of this section: . . . The false representation of . . . the character, amount, or legal status of any debt." The second amended complaint simply alleges that defendant misrepresented the amount of the alleged debt demanded. In opposition to the motion to dismiss, plaintiff argues that she has no obligation to defendant because defendant is not in possession of any agreement between plaintiff and defendant and therefore defendant misrepresented the amount of debt owed. Although there may not be a direct contract between plaintiff and defendant, that does not

necessarily mean there is no debt owed and that defendant is wrongfully representing a debt owed to plaintiff's medical provider. Without factual support for the conclusory allegation of "misrepresentation," this claim should be dismissed without leave to amend.

Plaintiff premises the second claim under the FDCPA on a purported violation of 15 U.S.C. § 1692g(b), which requires the debt collector to cease collection of a disputed debt until the debt collector obtains verification of the debt. Other than alleging that defendant failed to cease collection efforts, the second amended complaint contains no factual allegations of when or how further collection efforts were made. Plaintiff's opposition proffers no factual evidence to support this claim and it should be dismissed without leave to amend. Plaintiff's claim under the Rosenthal Act, Cal. Civ. Code § 1788 et seq., is derivative of plaintiff's claims under the FDCPA and should accordingly be dismissed as well. See Riggs v. Prober & Raphael, 681 F.3d 1097, 1100 (9th Cir. 2012) (whether conduct violates Rosenthal Act turns on whether it violates FCDPA).

Plaintiff's claim under the FCRA alleges in conclusory fashion that defendant violated 15 U.S.C. § 1681b by obtaining plaintiff's credit report without a permissible purpose. However, the statute provides that requesting a credit report to aid in the collection of a debt is a permissible purpose. See 15 U.S.C. § 681b(a)(3)(A); see also Huertas v. Galaxy Asset Management, 641 F.3d 28, 34 (3rd Cir. 2011); Thomas v. U.S. Bank, N.A., 325 Fed. Appx. 592, 593 (9th Cir. 2009) (plaintiff presented no evidence that defendant requested credit report for any reason other than to attempt to collect on the debt, which is permissible purpose under FCRA). The second amended complaint alleges defendant is a debt collector and the plain reading of the complaint is that defendant obtained the credit report in order to collect on the debt at issue. In opposition, plaintiff contends that the credit report could not be obtained for a permissible purpose because the alleged account was bought by defendant while in default. However, the debt at issue resulted from a transaction initiated by plaintiff, i.e. obtaining medical care from a provider for which plaintiff was obligated to pay. See generally Pintos v. Pacific Creditors Ass'n, 605 F.3d 665 (9th Cir. 2010) (where claim against plaintiff did not result from transaction initiated by plaintiff, defendant was not authorized under 15 U.S.C. § 681b(a)(3)(A) to obtain credit report). Under

these circumstances, plaintiff cannot state a viable claim under the FCRA and the claim should be dismissed with prejudice. Because it appears amendment would be futile on all of plaintiff's claims, leave to amend should not be granted.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendant's motion to dismiss (ECF No. 21) be granted; and

2. This action be closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: May 7, 2015

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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