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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LISA MARIE DITLEVSON,
Plaintiff,
v.
LEGAL EXPRESS, LTD., et al.,
Defendants.

No. C-15-3977 MMC

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE AFFIRMATIVE
DEFENSES; AFFORDING DEFENDANTS
LEAVE TO AMEND ANSWER;
VACATING HEARING**

Before the Court is plaintiff Lisa Marie Ditlevson's ("Ditlevson") "Motion to Strike Affirmative Defenses Contained in Defendant, Legal Express, Ltd.'s Answer to Plaintiff's Complaint," filed October 29, 2015. Defendant Legal Express, Ltd. ("Legal Express") has filed opposition, to which Ditlevson has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for December 4, 2015, and rules as follows.

In her complaint, Ditlevson alleges that Bleier & Co, APC ("Bleier"), filed a lawsuit against her in state court "in an attempt to collect [a] defaulted consumer debt" (see Compl. ¶ 46), that Bleier hired Legal Express to serve the summons and complaint on Ditlevson (see Compl. ¶ 47), and that Legal Express thereafter did not serve Ditlevson but prepared for Bleier a "Proof of Service of Summons" that Legal Express knew falsely stated it had

1 served Ditlevson (see Compl. ¶¶ 50, 53, 57), which document Bleier filed in state court and
2 relied on when it obtained a default judgment (see Compl. ¶¶ 21, 55). Based on said
3 allegations, Ditlevson alleges against Legal Express two causes of action, specifically, a
4 federal claim under the Fair Debt Collection Practices Act (“FDCPA”) and a state claim
5 under the Rosenthal Fair Debt Collection Practices Act (“RFDCPA”). In response to the
6 complaint, Legal Express filed an answer, which includes seven “Affirmative Defenses”
7 (see Def.’s Answer ¶¶ 101-07), each of which Ditlevson challenges by the instant motion.
8 The Court addresses each said defense below.

9 At the outset, the Court will grant the motion to the extent it challenges the First,
10 Second, Fifth, Sixth and Seventh Affirmative Defenses, as Legal Express has “agree[d] to
11 withdraw” those defenses. (See Def.’s Opp. at 1:4-6.) The Court next considers the
12 sufficiency of the remaining defenses, specifically, the Third and Fourth Affirmative
13 Defenses.

14 In the Third Affirmative Defense, Legal Express alleges that “any violation was
15 unintentional and resulted despite the maintenance of procedures reasonably adopted to
16 avoid any such violation.” (See Answer ¶ 103.) By such pleading, however, Legal Express
17 has done no more than paraphrase the statutory language of provisions in FDCPA and the
18 RFDCPA, see 15 U.S.C. § 1692k(c) (providing defendant shall “not be held liable” where
19 “violation was not intentional and resulted from a bona fide error notwithstanding the
20 maintenance of procedures reasonably adapted to avoid any such error”); Cal. Civ. Code §
21 1788.30(e) (providing defendant has “no civil liability” where “violation was not intentional
22 and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid
23 any such violation”), and, as Ditlevson correctly observes, Legal Express has failed to
24 allege any facts in support of the defense or to otherwise provide fair notice of the basis
25 therefor. See Wyshak v. City Nat’l Bank, 607 F.2d 824, 827 (9th Cir. 1979) (holding “key to
26 determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair
27 notice of the defense”; finding statute of limitations adequately pleaded as defense, where
28 conclusory statement thereof was supported by “attached memorandum” identifying

1 specific provision on which defendant relied); see also Shechter v. Comptroller, 79 F.3d
2 265, 270 (2nd Cir. 1996) (holding “defenses which amount to nothing more than mere
3 conclusions of law and are not warranted by any asserted facts have no efficacy”) (internal
4 quotation and citation omitted). Nonetheless, as it does not appear Legal Express would
5 be unable to provide fair notice of the basis for its Third Affirmative Defense, to state, for
6 example, the procedures it allegedly has adopted to avoid violations of the nature here
7 alleged, the Court will afford Legal Express leave to amend its answer to do so.

8 In the Fourth Affirmative Defense, Legal Express alleges the claims are “barred by
9 the litigation privilege embodied either in California Civil Code § 47(b) or under state and
10 federal common law.” (See Def.’s Answer ¶ 104.) Ditlevson argues that the litigation
11 privilege is not a cognizable defense to the claims alleged herein. The Court agrees. First,
12 under state law, the California Court of Appeal has held the litigation privilege is not a
13 defense to a claim under the RFDCPA, see Komarova v. National Credit Acceptance, Inc.,
14 175 Cal. App. 4th 324, 338-40 (2009) (holding § 47(b), which sets forth privilege for
15 communications in judicial proceedings, provides no defense to claims brought under
16 RFDCPA; noting to hold otherwise “would effectively immunize conduct that the Act
17 prohibits”) (internal quotation and citation omitted), and Legal Express has not argued, let
18 alone shown, the California Supreme Court would rule to the contrary, see Klingebiel v.
19 Lockheed Aircraft Corp., 494 F.2d 345, 346 n. 2 (9th Cir. 1974) (holding “[d]ecisions of the
20 California Courts of Appeal are to be followed by a federal court where the Supreme Court
21 of California has not spoken on the question, in the absence of convincing evidence that
22 the highest court of the state would decide differently”). Second, under federal law, the
23 “Noerr-Pennington doctrine,” which requires federal statutes be construed to “avoid
24 burdening conduct that implicates the protections afforded by the [First Amendment’s]
25 Petition Clause,” is not a defense to an FDCPA claim, at least where the claim is based on
26 the defendant’s having made false statements in connection with a court proceeding. See
27 Hartman v. Great Seneca Financial Corp., 569 F.3d 606, 615-16 (6th Cir. 2009) (holding
28 defense under Noerr-Pennington not available where FDCPA claim based on defendant’s


1 allegedly having submitted falsified exhibit to state court); Sial v. Unifund CCR Partners,
2 2008 WL 4079281, at *3-4 (S.D. Cal. August 28, 2008) (holding Noerr-Pennington doctrine
3 did not bar claim based on defendant's having "submitted false statements in support of [a]
4 request for default judgment").

5 **CONCLUSION**

6 For the reasons stated above, Ditlevson's motion to strike Legal Express' affirmative
7 defenses is hereby GRANTED. If Legal Express wishes to amend its answer to cure the
8 deficiencies identified above with respect to the Third Affirmative Defense, it shall file an
9 amended answer no later than December 18, 2015.

10 **IT IS SO ORDERED.**

11
12 Dated: November 24, 2015


MAXINE M. CHESNEY
United States District Judge