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E-Filed 01/15/2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THERESA CALLOWAY,

Case No. C 09-04858 RS

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

CASH AMERICA NET OF CALIFORNIA,
LLC, et al.,

Defendants.

_____ /

I. INTRODUCTION

In this putative class action, named plaintiff Theresa Calloway asserts claims under the California Rosenthal Fair Debt Collection Practices Act, alleging that defendants Cash America Net of California, LLC (“CashNet”) and Cash America International, Inc. (“CAI”) engaged in improper debt collection activities. Defendants move to dismiss on the grounds that Calloway lacks standing, having obtained relief from the underlying debt in her Chapter 7 bankruptcy action. Because defendants have failed to show that Calloway’s affirmative claim under the Rosenthal Act was extinguished by those bankruptcy proceedings, that prong of the motion to dismiss will be denied.

1 The motion of CAI to dismiss on grounds that no facts have been alleged to support liability against
2 it will be granted, with leave to amend.

3
4 II. BACKGROUND

5 In September of 2008, CashNet sent Calloway a document entitled “Settlement Offer
6 Notice,” which Calloway contends contains language that violates the Rosenthal Act. In March of
7 2009, Calloway filed for bankruptcy under Chapter 7. Her original petition did *not* list her potential
8 Rosenthal Act claim among her assets.

9 After the creditors’ meeting and the bankruptcy trustee’s report, and shortly before the
10 bankruptcy proceedings were closed, Calloway filed amended schedules listing the claim as an asset
11 and claiming an exemption for it under California law. The bankruptcy court then granted Calloway
12 a discharge and closed the case in July of 2009, without any express provision for disposition of the
13 Rosenthal Act claim.

14 Calloway subsequently filed this action in Santa Clara Superior Court in September of 2009.
15 Defendants removed to this court, asserting both diversity and federal question jurisdiction.
16 Although it appears Calloway elected not to pursue any claims under federal law thereby obviating
17 any federal question jurisdiction, diversity jurisdiction remains to permit litigation in the federal
18 forum.

19
20 III. DISCUSSION

21 A. Standing

22 Defendants’ initial moving papers argued that Calloway (1) failed at the outset to list the
23 Rosenthal claim among her assets, (2) thereafter improperly asserted the claim was exempt under an
24 inapplicable provision of the California Code of Civil Procedure, and (3) failed to establish
25 abandonment of the claim by the bankruptcy trustee. In opposition, Calloway acknowledged that
26 she had not initially listed the claim as an asset but asserted that she properly amended her schedules
27 to list it while the bankruptcy proceedings were pending. Plaintiff offered arguments and authorities
28 directed at showing that the California Code of Civil Procedure exemption on which she relied *does*

1 apply, and that the trustee abandoned the claim by operation of law when the bankruptcy
2 proceedings concluded.

3 On reply, defendants did not attempt to rebut Calloway's showing that the exemption was
4 applicable to the claim and that the trustee effectively abandoned it. Instead, defendants argued that
5 it is simply inconsistent and improper for Calloway to use the bankruptcy proceedings to avoid her
6 debt obligation, while attempting to preserve her affirmative claims relating to that same debt. As
7 that argument presented new matter on reply, the Court continued the hearing and allowed further
8 briefing.

9 Defendants may be correct that there is some practical unfairness in permitting Calloway to
10 obtain a discharge of the underlying debt and a bar against further enforcement efforts, but then to
11 permit her to pursue affirmative claims in this Court. Particularly given the fact that Calloway did
12 not list her Rosenthal claim as an asset until the bankruptcy proceeding was nearly concluded, there
13 is an argument that these circumstances are not fully consistent with the spirit and intent of the two
14 schemes of protections provided to debtors by the bankruptcy code and the Rosenthal Act,
15 respectively. Defendants have not shown, however, that Calloway has violated any provision of
16 bankruptcy law in so proceeding.

17 Moreover, defendants have offered no authority for the proposition that where a claim has
18 been disclosed in a bankruptcy action and then abandoned by the bankruptcy trustee, the debtor
19 cannot pursue it. The cases on which defendants rely all involve significantly different factual
20 circumstances. See *Walls v. Wells Fargo*, 262 F.3d 502 (9th Cir. 2002) (holding creditor's alleged
21 violation of bankruptcy discharge actionable only by the bankruptcy court, not through FDCPA
22 claim); *Siegel v. Fed Home Loan Mortg. Corp.*, 143 F.3d 525 (9th Cir. 1998) (finding that
23 allowance of secured creditors' claims in bankruptcy proceeding operated as *res judicata* bar to
24 separate tort and breach of contract action relating to the subject of those claims); *In re Coastal*
25 *Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) (rejecting notion that a debtor can subsequently
26 pursue a claim that *was not disclosed* in the bankruptcy proceedings).

27 Finally, defendants' suggestion that Calloway should not be able to pursue this action
28 because she has already obtained legal protection against any future collection activities does not

1 address the fact that she seeks recovery arising out of CashNet’s alleged prior wrongful conduct that
2 transcends debt discharge and collection preclusion. Accordingly, the motion to dismiss based on
3 Calloway’s purported lack of standing is denied.
4

5 B. CAI

6 CAI alone moves to dismiss on the additional ground that Calloway has not sufficiently
7 alleged facts showing that it is liable as a “debt collector” under the Rosenthal Act. In opposition,
8 Calloway argues that she has *alleged* that CAI is a debt collector and that the Court should not
9 disregard those allegations or require anything more. Calloway has attached to her complaint,
10 however, the Settlement Offer Notice upon which her claims are based, and that document shows it
11 was sent by CashNet, not CAI. In these circumstances, Calloway’s conclusory allegation that CAI
12 acted as a “debt collector” is insufficient and its motion to dismiss will be granted. At the hearing,
13 counsel acknowledged that Calloway lacks any specific information that CAI was involved in the
14 collection activities at issue. Accordingly, the motion to dismiss will be granted as to CAI, with
15 leave to amend in the event Calloway can in good faith allege sufficient facts to support a claim
16 against it.
17

18 IV. CONCLUSION

19 Defendants’ motion to dismiss for lack of standing is denied. CAI’s motion to dismiss for
20 failure to state a claim against CAI is granted. Any amended complaint shall be filed within 20 days
21 of the date of this order.
22

23
24 IT IS SO ORDERED.

25 Dated: 01/15/2010



26 RICHARD SEEBORG
27 UNITED STATES DISTRICT JUDGE
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