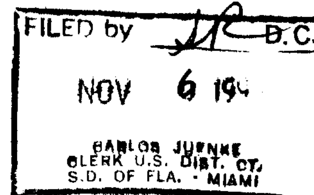
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-14317-CIV-MOORE

ADRIANNE WILLIAMSON,

Plaintiff,

vs.



DLS ENTERPRISES, INC., a dissolved Florida corporation; G.C. FINANCIAL CORPORATION, a dissolved Florida corporation; and all partners of G.C. SERVICES, LIMITED PARTNERSHIP,

Defendants.
_______________/

ORDER ON SUMMARY JUDGMENT MOTIONS

THIS CAUSE came before the Court upon Plaintiff's Motion for Partial Summary Judgment (D.E. 26) and Defendant's Cross-Motion for Summary Judgment (D.E. 46).

THE COURT has considered the Motions, responses, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the said Motions be disposed of as follows.

Background

Plaintiff Adrianne Williamson ("Williamson") received notices and telephone calls from defendants relating to a debt she allegedly owed to a hospital. In her amended complaint, Williamson alleges four violations of the Fair Debt Collection Practice Act, 15 U.S.C. § 1692-1692o ("FDCPA"). Specifically, Williamson alleges that defendant violated 15 U.S.C. §

91
46

1692c(a)(1) by telephoning her at least once at or after 9 p.m., the statutory cut-off time for telephone calls relating to debt collection; that defendant violated 15 U.S.C. § 1692e(11), by defendant's representative's failure to make the statutorily required disclosures in each communication with Williamson; and that defendant violated 15 U.S.C. §§ 1692e(4), and 1692e, by allegedly making threats and referring to a non-existent payment plan in a February 27, 1995 letter from defendant G.C.Services.

I. SUMMARY JUDGMENT STANDARD

The standard to be applied in reviewing a summary judgment motion is stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

To obtain summary judgment, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Twiss v. Kury, 25 F.3d 1551 (11th Cir. 1994). In assessing whether the movant has met this burden, the Court views the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 157. The party opposing a motion for summary judgment need not respond to a summary judgment motion with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Id. at 160. If a response is required, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). There

is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Moreover, "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Id. at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Id. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. Id. at 254-55.

Plaintiff seeks partial summary judgment on two counts, defendant's alleged violation of § 1692c(a)(1) for telephone calls made at or after 9 p.m. and defendant's alleged violation of § 1692e(11), by its representative's failure to make the required disclosures in every communication. Defendant opposes plaintiff's motion and cross-moves for summary judgment on plaintiff's claims for violations of 15 U.S.C. §§ 1692e(4), 1692c(a)(1), and 1692e(11).[1]

II. DISCUSSION

A. The Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act, codified at 15 U.S.C. §§ 1692-1962o, was enacted to protect consumers "from a host of unfair, harassing and deceptive debt collection practices

[1]Defendant moved for summary judgment on additional claims that were dropped from plaintiff's amended complaint. Accordingly, defendant's cross-motion for summary judgment on those claims is denied as moot.

without imposing unnecessary restrictions on ethical debt collectors." 123 Cong. Rec. S. 27,386 (daily ed. Aug. 5, 1977) (statement of Senator Riegle). The FDCPA was enacted to protect unsophisticated consumers. Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1174-75 & n.6 (11th Cir. 1985). The FDCPA is a strict liability statute. Stewart v. Slaughter, 165 F.R.D. 696, 699 (M.D.Ga. 1996); Woolfolk v. Van Ru Credit Corp., 783 F.Supp. 724, 725 (D.Conn. 1990). Proof of one violation is sufficient to support summary judgment for the plaintiff. Woolfolk v. Van Ru Credit Corp., 783 F.Supp. at 725.

B. The Section 1692c(a)(1) Claim

15 U.S.C. § 1692c(a)(1) provides that a debt collector "may not communicate with a consumer in connection with the collection of any debt . . . at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer" and that the "debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location." Id. Therefore, in order to succeed on her claim, plaintiff must prove that defendants contacted her after 9 p.m. or before 8 a.m.

At her deposition, Williamson stated that she received telephone calls at her home outside the permissible time period (Williamson Dep. at 37, ll. 7-24). Williamson also points to telephone records (the Debtor Detail Listing Report or "DDLR") produced by defendant showing a telephone call made to plaintiff on February 27, 1995 at 21:00 (Exhibit A to Plaintiff's Motion for Partial Summary Judgment).[2] Plaintiff submitted an affidavit, in which she stated "I can state, without

[2]Williamson also relies on the deposition testimony of defendant's representative Kirk Highsmith ("Highsmith"). However, because Highsmith testified that he did not know how the

reservation, that I did receive telephone calls from agents of G.C. Services, Limited Partnership, which commenced at 9:00 p.m. or later local time, which were received after November 15, 1994 (Williamson Aff., ¶ 5).

In opposition to plaintiff's summary judgment motion and in support of its cross-motion, defendant submitted two affidavits by Deborah Ingram, a Vice President of Defendant. In her affidavit dated July 25, 1996, Ms. Ingram testified that G.C. Services' telephone system records the time and duration of the telephone calls, that no calls are permitted after 9 p.m. and that the time listed on the DDLR is actually the time the representative completed his entries in the computer system, updating the files, not when the time was initiated (Affidavit of Deborah Ingram, ¶¶ 7, 10-14, dated 7/25/96, annexed as Exh. D to Defendant's Appendix) ("Ingram Aff.").

Plaintiff's sworn statements directly contradict those of defendant's representative, Ms. Ingram. Such a credibility determination is best left to the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions"). Based on the Court's review of the depositions, the affidavits and the pertinent portions of the record, the Court finds that there is a disputed issue of material fact as to whether defendant called plaintiff at or after 9 p.m. in violation of 15 U.S.C. § 1692c(a)(1). Accordingly, both plaintiff's motion and defendant's cross-motion for summary judgment on 15 U.S.C. § 1692c(a)(1) are DENIED.

---

timing system was connected to the telephones, his testimony is not dispositive. Plaintiff also submitted defendants' long distance telephone records in a supplemental submission. As these records were not authenticated, the Court has not relied upon them. Williams v. Eckerd Family Youth Alternative, 908 F.Supp. 908, 911 (M.D.Fla.. 1995).

C. The Section 1692e(11) Claim

The FDCPA requires a debt collector to "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Williamson moves for partial summary judgment on this claim, alleging that defendant's representative did not always inform her that information obtained would be used for the purpose of collecting a debt in follow-up telephone conversations.[3] Defendant cross-moves for summary judgment, arguing that (1) defendant's representative gave both parts of the required notice at all times and that (2) if the court finds that if the full notice was not always given, the court should find, as a matter of law, that the full notice is not required in oral follow-up communications.

In support of her motion for partial summary judgment, Williamson relies on her deposition testimony, wherein she stated that Highsmith did not always provide both parts of the notice, but that she always knew why he was calling (Williamson Dep. at 40, ll. 8-12). In his deposition, Highsmith stated that he did not always give the required two part warning each time he spoke to a client on a follow-up telephone call if he felt that the debtor recognized him and remembered him (Highsmith Dep. at 95, ll. 1-5; 96, ll. 19-22; 98, ll.18-22, 24-25; 99, ll.1-4).

In opposition to summary judgment, defendant notes that Highsmith did not recall any

---

[3]The question of whether the full statutory notice is required in each and every follow-up oral communication between a debtor and a debt collection appears to be an issue of first impression. The Circuits disagree on the question of whether the statute requires complete disclosure in every follow-up written communication, compare Pressley v. Capital Credit & Collection Serv., Inc., 760 F.2d 922 (9th Cir. 1985) (per curiam) (holding that strict compliance with statute not required with follow-up communications) with Dutton v. Wolpoff and Abramson, 5 F.3d 649 (3d Cir.1993) (holding that statute requires full disclosure in follow-up written communications); Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992) (same); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 26-27 (2d Cir. 1989) (same). No court appears to have addressed the applicability of 1692e(11) to oral follow-up communications.

specific conversations with plaintiff, stated that his general practice was to give the full notice and that the testimony cited by plaintiff was elicited not with regard to plaintiff's account, but in response to hypothetical questions (Highsmith Dep. at 21, ll. 15-18, 22, ll. 10-13, 86, ll. 7-25, 87, ll. 1-10, 94 ll. 10-20).

In support of its cross-motion, defendant argues that no liability should attach because, even if the information was not provided each time, disclosure was not required because plaintiff already knew the information in the disclosure and requiring such disclosure in each oral communication would frustrate the purposes of the FDCPA.

The FDCPA provides that a debt collector must "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11) (emphasis added). The statute defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). Oral communications, including follow-up telephone calls, are not excluded from the definition of communication.

The Court finds that there is a disputed issue of material fact as to whether defendant provided plaintiff with complete notice required by 15 U.S.C. § 1692e(11) in all of the follow-up communications. Accordingly, the Court DENIES plaintiff's partial motion for summary judgment for violation of 15 U.S.C. § 1692e(11). Moreover, the Court declines to read the clear language of the FDCPA in a fashion other than as enacted by Congress. The FDCPA requires the full notice in all communications. As a matter of law, "all communications" includes oral follow-up communications. Accordingly, the Court DENIES defendant's cross-motion for summary judgment on this claim.

D. The Section 1692e(4) Claim[4]

Plaintiff's amended complaint alleges that "[d]efendant violated 15 U.S.C. § 1692e(4) in its letter of February 27, 1995, . . . by including threats of actions to be taken in the event payments were late, which actions were either not permitted by law or intended at the time threatened." Amended Complaint, ¶ 9.[5] The February 27, 1995 letter states, in pertinent part, that "[i]f any payments are late, the arrangement will be canceled and collection efforts for the balance in full will resume."

Defendant argues that, since the letter in question does not represent or threaten arrest or imprisonment, seizure, garnishment, attachment or sale of wages, section 1692e(4) does not apply and summary judgment is warranted. Plaintiff argues that the letter threatened to take action in the event payments were late, which actions were either not permitted by law or intended at the time threatened. Accordingly, plaintiff asserts that summary judgment is not available to defendant.

The evidence before the Court shows that defendant's collection efforts on plaintiffs account

---

[4]The statute provides, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

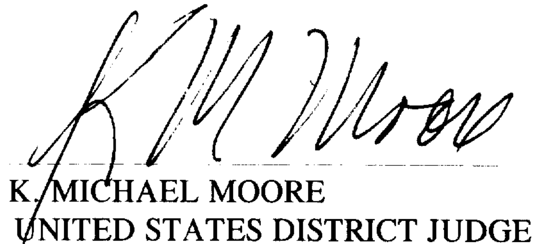
15 U.S.C. §§ 1692e(4), (5).

[5]Although plaintiff cites 15 U.S.C. § 1692e(4), plaintiff adopts the language of 15 U.S.C. § 1692e(5). Accordingly, the Court will look to § 1692e(5) in analyzing defendants' cross-motion for summary judgment. See Fed.R.Civ.P. 8(f) (pleadings shall be construed as to do substantial justice). On motion for summary judgment, evidence must be viewed in light most favorable to nonmovant. Pritchard v. Southern Co. Services, 92 F.3d 1130, 1132 (11th Cit. 1996); Fed.R.Civ.P. 56.

ceased in March, 1995, when defendant labeled plaintiff's account "uncollectible." Reading the complaint in the light most favorable to the non-movant (plaintiff here), the Court finds that defendant has not established that there is no triable fact that defendant did not threaten to take an action which it never intended to take. Accordingly, defendant's motion for summary judgment is DENIED.

For the reasons stated above, Plaintiff's motion for partial summary judgment is DENIED and Defendants cross-motion for summary judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of November, 1996.



K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
Samuel C. Aurilio, Esq.
Benjamin L. Bedard, Esq.