

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JERRY BERG,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 12-1123-KHV-KGG
)	
JON L. FROBISH, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

MEMORANDUM AND ORDER

Currently before the Court are Defendants’ Motion to Amend First Amended Counterclaims (Doc. 78) and the “Motion to Add Mark G. Ayesh as a Party Defendant to Plaintiff’s Fair Debt Collection Practices Act and Injunctive Relief Actions” (Doc. 89) filed by Plaintiff.¹ Having reviewed the submissions and exhibits presented by the parties in addition to various other relevant filings in this case, the Court is prepared to rule on these two motions.

BACKGROUND

¹ The Court notes that various other motions are currently pending before the Court, including Plaintiff’s “Motion for an Order Compelling Disclosure and for Sanctions for Defendant’s Failure to File Adequate Initial Disclosures as Required Under F.R.C.P. 26(a)” (Doc. 65), Defendants’ “Motion for Order Mandating A Mental Evaluation of the Plaintiff” (Doc. 80), and Defendants’ “Motion for Immediate and Emergency Protective Order” (Doc. 84). These motions will be address under separate Order(s).

The present action was initially filed in Sedgwick County District Court by Plaintiff against individual Defendant Jon Frobish, who is the property management agent for Defendant Cedar Lakes Village Condominium Association (“CLVCA”), where Plaintiff is an owner/resident of a condominium unit. (*See generally* Doc. 1-1, at 2-15.) Plaintiff also sued Gary Fugit “personally d/b/a Cross Real Estate Management,” along with Cross Real Estate Management, L.L.C., Cedar Lakes Village Condominium Association (“CLVCA” or “condo association”), and Simon Palmer Properties, Inc. (*Id.*) Plaintiff’s factual contentions relate to alleged disputes he had with his condo association, its ownership, and/or its representatives. (*Id.*) Plaintiff brings various causes of action against the Defendants, including Assault & Battery (against Defendant Frobish), Fraud, and violations of the Fair Debt Collection Practices Act (“FDCPA” or “the Act”). (*Id.*) Plaintiff also requests injunctive relief “from an intentional, knowing and illegal denial of access” to the condominium association meetings. (*Id.*, at 13-14.)

Defendants removed Plaintiff’s state court Petition to federal court on April 5, 2012. Defendants filed their counterclaims on April 9, 2012, alleging claims for assault & battery, fraud, breach of contract, and seeking certain injunctive relief.

(*Id.*, at 2.) Plaintiff contends that this not only makes Ayesh directly liable under the FDCPA, it also makes him a necessary party whose absence in this litigation “might subject that cause of action to a motion to dismiss for failure to join a necessary party.” (*Id.*, at 9.) Defendants respond that Plaintiff’s motion “is calculated to remove Mark G. Ayesh as counsel for the defendants” and “just another example of plaintiff’s [mental] instability.” (Doc. 97, at 2, 3.)

In order to proceed with any “motion to amend or a motion for leave to file a pleading or other document that may not be filed as a matter of right,” the party bringing the motion “**must** . . . attach the proposed pleading . . .” to their motion. D. Kan. Rule 15.1(a). Plaintiff has failed to do so. Because this is compulsory under the rule, Plaintiff’s motion should be denied on this basis alone.

In the spirit of judicial economy, the Court has attempted to evaluate Plaintiff’s motion on its merits as the Court anticipates a denial of Plaintiff’s motion on a procedural technicality will merely invite Plaintiff refile the motion in an attempt to cure the technical deficiency.

Even if the Court were inclined to decide the issue on its merits, however, the lack of the proposed pleading makes it virtually impossible for the Court to do so. Plaintiff’s motion does not provide the Court with sufficient information to evaluate the substantive merits of any potential claims against Mr. Ayesh

individually. Based on the information currently available, however, the Court is not persuaded that Mr. Ayesh can be held liable under the Act.

The FDCPA restricts practices of ‘debt collectors’ collecting ‘debts,’ but it does not impose the same restrictions on ‘creditors.’ *See, e.g.*, 15 U.S.C. § 1692(1); *See also Schmitt v. FMA Alliance*, 398 F.3d 998, 998 (8th Cir.2005).

....

The FDCPA defines ‘creditor’ as ‘any person who offers or extends credit creating a debt or to whom a debt is owed.’ 15 U.S.C. § 1692a(4). On the other hand, a ‘debt collector’ is defined as ‘any person . . . **who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due [to] another.**’ *Id.* § 1692a(6). In other words, a ‘creditor’ is one who collects his own debts and a ‘debt collector’ is one who seeks to collect the debts of another. The FDCPA intentionally distinguishes between debt collectors and creditors, and the two categories are mutually exclusive. *Id.*

The FDCPA does not regulate the actions of ‘creditors’ *See Schmitt v. FMA Alliance*, 398 F.3d 995, 998 (8th Cir.2005). The Act is aimed at debt collectors, who may have no future contact with the consumer and often are unconcerned with the consumer's opinion of them. *Montgomery v. Huntington Bank*, 346 F.3d 693, 698–99 (6th Cir.2003). Additionally, **vicarious liability for an attorney's actions is imposed under the FDCPA only if the client itself is a debt collector and not a creditor.**

Preszler v. Levy & Craig, No. 1:10-CV-108, 2011 WL 666163, at *1 (D. Utah, Feb. 14, 2011) (emphasis added).

A lawyer is not automatically subject to liability under the FDCPA merely because he or she attempts to collect a debt on behalf of a client. Rather, only “a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings meets the Act's definition of ‘debt collector’: one who ‘regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed ... another,’ 15 U.S.C. § 1692a(6).” *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L.Ed.2d 395 (1995). The Act specifically states that to be considered a “debt collector,” the “principal purpose” of that person’s business must be the collection of debts owed or due to another. 15 U.S.C.A. 1692a(6) (emphasis added). There is no evidence before the Court that Mr. Ayesh would qualify as a “debt collector” under the Act given the areas of his legal practice. As such, Plaintiff’s motion (Doc. 89) is **DENIED**.

IT IS THEREFORE ORDERED that Defendants’ “Motion to Amend First Amended Counterclaims” (Doc. 78) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff’s “Motion to Add Mark G. Ayesh as a Party Defendant to Plaintiff’s Fair Debt Collection Practices Act and Injunctive Relief Actions” (Doc. 89) is **DENIED**.

IT IS SO ORDERED.

Dated at Wichita, Kansas, on this 15th day of November, 2012.

S/ KENNETH G. GALE
Kenneth G. Gale
United States Magistrate Judge