SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS NOCK** **PART** **38M**

Justice

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SYMPHONY HOUSE LLC,

Plaintiff,

- v -

OREN ITZHAK,

Defendant.

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INDEX NO. 652182/2021

MOTION DATE 06/02/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that defendant's motion to dismiss the complaint is denied in accordance with the following memorandum.

BACKGROUND

Plaintiff residential landlord commenced this action seeking the principal sum of $47,500 in rent arrears. The action was commenced by summons and complaint filed April 2, 2021. Annexed thereto is a rent demand, dated March 15, 2021, stating rent due at that time of $39,500 (NYSCEF Doc. No. 19). It is signed by "SYMPHONY HOUSE, LLC" "BY: Lawrence E. GOLDSTEIN (ATTORNEY FOR LANDLORD)." Beneath said signature boxes is the legend of Attorney Goldstein's law firm, identified prominently as "ATTORNEYS FOR LANDLORD," with the firm's address and telephone numbers. Directly beneath that is the paragraph:

> We are Debt Collectors attempting to collect a debt, and any information obtained will be used for that purpose. PLEASE TAKE FURTHER NOTICE that attached hereto is a letter to the tenant(s) informing him/her of certain rights under the Fair Debt Collection Practices Act which allows you to dispute the validity of the debt.

The referenced letter, dated March 15, 2021, is written on the law firm's letterhead and identifies the firm as "the attorneys for the above-referenced landlord, the Creditor." The letter goes on to inform defendant tenant that: "Under Federal law, unless you dispute the validity of the debt or any portion thereof, within (30) days of receipt of this notice, the debt will be assumed to be valid. If you notify this office in writing within the (30) day period that you dispute the debt, or any portion thereof, this office will obtain verification of the debt, and such verification will be mailed to you."

By responsive letter dated the very same day – March 15, 2021 – defendant's counsel wrote plaintiff's law firm that defendant "dispute[d] the validity of the debt in the amount of $39,500" (NYSCEF Doc. No. 21). Defendant asserts that no verification of the debt was ever sent (*see*, NYSCEF Doc. No. 16 ¶ 13). Plaintiff commenced this lawsuit within the thirty-day period by way of summons and verified complaint, verified on April 2, 2021, by plaintiff's managing agent – Andrew Bentivegna – alleging the default in payment of rent and itemizing in detail defendant's failure to pay monthly rent installments, spanning April 2020 through April 2021, aggregating the then-outstanding sum of $47,500. Moreover, the rent demand itself, dated March 15, 2021, also provides an itemization of the monthly installments aggregating the sum of $39,000 demanded in the rent demand (*see*, NYSCEF Doc. No. 34). "Verification" of the debt is defined as furnishing an itemization of the principal balance of the debt (*see, Eric M. Berman, P.C. v City of N.Y.*, 25 NY3d 684 [2015]). As just noted, the March 2021 rent demand – distinct of the April 2021 verified complaint – provides such itemization.

Citing CPLR 3211 (a) (7), and city and federal enactments discussed below, defendant now moves to dismiss the complaint on the stated grounds that "[d]efendant never received a verification of the alleged debt as required by NYCAC [New York City Administrative Code] §

20-493.2" (NYSCEF Doc. No. 16 ¶ 25). Although that Code section governs the activities of "debt collection agenc[ies]" (*see*, NYCAC § 20-489), defendant asserts that it applies to the plaintiff's law firm by virtue of the rent demand's statement – "We are Debt Collectors attempting to collect a debt" – found directly beneath the firm's legend printed on the rent demand as "ATTORNEYS FOR LANDLORD" (*see*, NYSCEF Doc. No. 34). Defendant further assails the rent demand on the basis of NYCAC § 20-490, which requires debt collection agencies to be licensed as such (*see*, NYSCEF Doc. No. 16 ¶ 20). Plaintiff's law firm is not so licensed.

Defendant also cites to the Fair Debt Collection Practices Act ("FDCPA") (15 USC §§ 1692 *et seq.*), which similarly requires verification of debt where the debt is disputed within 30 days of a debt notice (*see*, *id.*, § 1692g[b] ["the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt . . . ."]).

Defendant seeks dismissal of the action on the asserted ground that plaintiff's law firm which sent the rent demand *is* a "debt collection agency" within the meaning of the NYCAC and FDCPA, and that it failed to provide verification of the debt as required under said enactments.

DISCUSSION

Section 20-489(a)(5) of NYCAC excludes from the definition of "debt collection agency" "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." As observed above, the rent demand itself is signed by "LANDLORD SYMPHONY HOUSE, LLC, BY: Lawrence E. GOLDSTEIN (ATTORNEY FOR LANDLORD)." This clearly denotes the law firm as acting "on behalf of and in the name of" its client – the plaintiff landlord. Moreover, the law firm's letter which accompanies the rent demand clearly and unambiguously identifies the firm as "the attorneys for the above-referenced landlord, the Creditor," i.e., plaintiff

Symphony House, LLC. This, too, clearly denotes the law firm as acting "on behalf of and in the name of" its client – the plaintiff landlord. Insofar as defendant places heavy reliance on the form demand notice's opening boilerplate sentence "We are Debt Collectors," this court declines to exalt such form over substance in the face of clear descriptive indications from the notice itself, as well as in its accompanying lawyer's letter, that plaintiff's law firm was acting solely on behalf of and in the name of its client, the plaintiff landlord. Moreover, defendant's said reliance on such boilerplate language alone ignores the precept that the only types of law firms falling outside NYCAC's law firm exception are those which are proven to regularly engage in activities traditionally associated with debt collection or the making of collection calls to consumers (*see*, NYCAC § 20-489 [5]). Defendant submits no documentary evidence on this motion to dismiss to show that plaintiff's law firm in this instance operates in a manner which would place it within that carve-out to NYCAC's law firm exception.

Thus, this court has not been presented with sufficient evidence to lead it to conclude that plaintiff's law firm is, as a matter of fact or law, a "debt collection agency" subject to the strictures of NYCAC, or FDCPA for that matter. However, even if there were, insufficient indications exist to render a finding that the law firm violated any of those debt collection strictures. As noted, the notice itself, on its face, provides an itemization of the debt, expressed as the monthly rent installment amounts alleged to be due and owing, which is all the Court of Appeals has recognized as necessary in order to satisfy a debt collector's verification requirement (*see*, *Eric M. Berman, P.C.*, *supra*). It defies all logic to suggest that such itemization, furnished prior to a dispute of debt, measures any less than the very same thing furnished after a dispute of debt.

A final challenge interposed by defendant is his focus on language found at the beginning of the rent demand demanding payment within 14 days from the date of service of the demand (*see*, NYSCEF Doc. No. 34). Defendant argues that such timeframe is inconsistent with the accompanying lawyer's letter which sets forth the statutory 30-day period for dispute and verification. As defendant's counsel puts it, "In the Rent Demand, Plaintiff's counsel states that Defendant has fourteen days to pay off the alleged debt. . . . As such, Plaintiff's counsel's Rent Demand is defective and in violation of the FDCPA § 1692g." (NYSCEF Doc. No. 16 ¶ 31.) This argument misconstrues the FDCPA. FDCPA § 1692g(b) specifically provides that "Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed . . . ." Thus, had plaintiff taken action on its 14-day payment deadline prior to any dispute of debt within 30 days, that action would have been permitted to continue. It just so happens, though, in this case, that plaintiff did not take any such action. Thus, no debt collection precept was violated merely because the rent demand began by requiring a 14-day deadline for payment.

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action

cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]).

Nothing presented by the defendant at this time warrants dismissal of the complaint. As discussed, insufficient evidence has been put forward to define the plaintiff's law firm as a "debt collection agency" under NYCAC of FDCPA; and even if there were, nothing is presented to the court which could warrant a finding that said firm is in violation of debt collection notice and verification requirements. Accordingly, the motion is denied.[1]

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that counsel for the parties are directed, within 30 days from the filing of this order, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division P.C. Order located at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PCCD.pdf, to the Clerk of this Part (Part 38) at SFC-Part38-Clerk@nycourts.gov

[1] Without cross-moving, plaintiff's opposition seeks a sanction against defendant for making the motion to dismiss, which it deems frivolous under 22 NYCRR § 130-1.1. The court issues no such sanction based on its reading of the motion as a sincere, albeit incorrect, effort by defense counsel. No indicia of any intent to unduly prolong this 2021-filed case is evident to the court.

This will constitute the decision and order of the court.

ENTER:

11/8/2021
DATE

LOUIS NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE