

FILED
IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO
2016 JUN 28 P 1:01

TERRY YORTY,

Plaintiff

vs.

DELRAY CAPITAL, LLC, et al.,

Defendants

CASE NO. 15CV001865

JUDGE VINCENT A. CULOTTA

JUDGMENT ENTRY

This matter comes before the Court for consideration of the Defendant National Credit Adjuster's Motion to Dismiss, Named Plaintiffs Memorandum in Opposition to Defendant National Credit Adjuster's Motion to Dismiss, and the Reply Brief in Further Support of Defendant National Credit Adjuster's Motion to Dismiss.

STATEMENT OF THE CASE

Terry Yorty, Individually and on Behalf of a Class of Individuals, initiated this action against Delray Capital, LLC, Cooper Financial, LLC, Delaware Solutions, LLC, Mark Gray, Kelly Brace, National Credit Adjusters and John Does I-X alleging violation of the Fair Debt Collection Practices Act, 15 U.S.C. §1692. Plaintiff alleges that Defendants are involved in an ongoing scheme whereby they extort the payment of money from consumers across the country who have allegedly failed to repay payday loans. Specifically, Plaintiff asserts that he obtained a payday loan from Ace Cash Express on or about January, 2014, and failed to repay it. Plaintiff alleges that Ace Cash Express charged off the debt and sold it to Defendant Delray Capital, LLC. Plaintiff alleges that Delray Capital, LLC placed the debt for collections with Delaware Solutions, LLC. Plaintiff contends that on or about August, 2015, Defendants' employee or agent placed a call to Plaintiff's cell phone and left a message that he is a "processing server" for the Crawford County District Court with authority to come to Plaintiff's home/workplace to "sign a summons" for a court appearance next week. Plaintiff was advised to call a number to avoid "further legal action." Plaintiff alleges that he called the number and the call was answered by an employee or agent who identified himself as "Tom Wilson" and answered the

phone “law offices.” Plaintiff alleges that “Mr. Wilson” told him his case was “going over to the courts so they can serve you.” Plaintiff further alleges that he placed a second call to get more information about the debt and spoke to someone who told him the debt was being “sent out.” Plaintiff indicates that he asked to speak with a supervisor and he was transferred to someone who identified himself as “Tom Wells, Director for Delaware Solutions.” Plaintiff indicates that Mr. Wells denied that Delaware Solutions was a debt collector and made other representations about service on the summons. Plaintiff alleges that the representations were part of a standard script used to extort money. Plaintiff further alleges that similar false accusations have been made against individuals in the purported class. Plaintiff contends that Defendants behavior amounts to unlawful harassment of consumers and false representation. Plaintiff alleges that Defendants did not contact him in writing within the time-period prescribed in 15 U.S.C. §1692(g) and did not inform Plaintiff or class members that they have the right to request validation of the debt. Plaintiff alleges that Defendants’ conduct amount to various violations of the Fair Debt Collection Practices Act. Plaintiff further makes class action allegations and indicates that he is seeking statutory damages as well as attorney fees and the costs of this action.

At this time, Defendant National Credit Adjusters is seeking an Order pursuant to Civ.R. 12(B)(6) dismissing Plaintiff’s Complaint against it. Defendant contends that such an Order is appropriate because Plaintiff’s Complaint fails to make any allegations whatsoever regarding the conduct of Defendant National Credit Adjusters, except that it purchased Plaintiff’s account from Ace Cash Express and sold it to Defendant Delray Capital, LLC. Defendant contends that since Plaintiff has failed to allege any collection activity on the part of National Credit Adjusters, much less unlawful debt collection practices, dismissal of said Defendant is appropriate. Defendant further contends that Plaintiff has not pled a claim for vicarious liability. Defendant notes that while Plaintiff alleges that all Defendants are part of a common enterprise, Plaintiff has produced no supporting facts.

DEFENDANT’S MOTION TO DISMISS

In support of its motion, Defendant National Credit Adjusters notes that in order to be liable under the FDCPA’s substantive provisions, a debt collector’s conduct must have been taken “in connection with the collection of a debt” or “to collect a debt.” See 15 U.S.C. §§1692c(a)-(b), 1692d, 1692e, 1692(f), 1692(g).; *Glazer v. Chase Home Fin., LLC* 704 F.3d 453,

459-60 (6th Cir. 2013); *Clark v. Lender Processing Services*, 2014 WL 1408891 (6th Cir. 2014). Defendant contends that the allegations which include National Credit Adjusters are naked assertions devoid of factual enhancement and require a Rule 12 dismissal. Defendant relies upon *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) which was also relied on in *Hoffman v. Fraser*, 2011-Ohio-2200 (11th Dist.) to support its position.

Defendant also contends that the complaint is devoid of any plausible allegation that the parties who did conduct the alleged debt collection activities had any relationship with Defendant National Credit Adjusters that could give rise to liability. Specifically, Defendant notes that there is no allegation of an agency relationship. Defendant maintains that Plaintiff's unsupported allegations that Defendants engaged in a common enterprise is insufficient to state a claim of agency.

Defendant further contends that Plaintiff has failed to plead satisfaction of conditions precedent. Defendant notes that the Credit Services Agreement executed between Plaintiff and Ace Cash Express contains a notice and cure provision which is a prerequisite to litigation. Defendant contends that Plaintiff has not pled compliance with that provision which is a condition precedent to any recovery.

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Plaintiff opposes Defendant National Credit Adjusters Motion to Dismiss relying, in part, upon *Mohat v. Horvath* 2013-Ohio-4290, wherein the Eleventh District Court of Appeals held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt from the face of the complaint that the plaintiff can prove no set of facts entitling him to relief." Plaintiff notes that in *Mohat*, under the plausibility standard, "a plaintiff is required to allege a set of facts, which, if proven, would plausibly allow for recovery." *Id.* Plaintiff notes that the Ohio Supreme Court has not considered the "plausibility" standard set forth in *Twombly*, 550 U.S. 544.

Plaintiff maintains that he has properly stated a claim for violation of the Fair Debt Collection Practices Act. Plaintiff notes that he has alleged that Defendant National Credit Adjusters has directly or indirectly participated in the unlawful debt collection practices described in the Complaint and that said Defendant operated as a "common enterprise" with the other Defendants. Plaintiff relies upon *Vantu v. Echo Recovery*, 85 F.Supp.3d 939 (N.D. Ohio

2015) wherein the judge held that an argument that a plaintiff's allegations should be dismissed because they were "too speculative" lacked merit because the plaintiff lacked access to the materials and information that would establish the relationship between the defendants. Plaintiff further relies upon *Plummer v. Atlantic Credit & Finance, Inc.*, 66 F.Supp.3d 484 (S.D.N.Y. 2014) wherein the court held that the issue is more appropriately addressed at a later stage of the litigation. See also *Marucci v. Cawley & Bergmann, LLP*, 66 F.Supp.3d 559 (D.N.J. 2014)

Plaintiff also asserts that Defendant's arguments concerning arbitration are premature at this stage of litigation. Plaintiff notes that the Agreement is not part of the Complaint and cannot be referred to by the Court in ruling on a Civ.R. 12(B)(6) Motion to Dismiss.

DEFENDANT'S REPLY

In reply to Plaintiff's opposition, Defendant National Credit Adjusters maintain that the opposition amounts to formulaic recitations and legal conclusions insufficient to state a claim. Defendant further maintains that Plaintiff's Complaint fails to plead satisfaction of conditions precedent.

STANDARD OF REVIEW

When considering a Civ. R. 12(B)(6) motion, the Court must, as a matter of law, accept all of the allegations in the complaint as true. To grant such a motion, it must appear beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Greeley v. Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228 (1999).

COURT'S ANALYSIS AND CONCLUSION

Upon review of Plaintiff's Complaint, and accepting all of the allegations therein as true, the Court finds that it would be improper to dismiss Plaintiff's claims against Defendant National Credit Adjusters at this time. Specifically, Plaintiff has alleged that Defendant National Credit Adjusters directly or indirectly participated in unlawful debt collection practices in order to collect a debt from Plaintiff. Plaintiff further alleges that all Defendants are part of a common enterprise to commit unlawful debt collection practices.

ACCORDINGLY, Defendant National Credit Adjuster's Motion to Dismiss is not well taken and denied. Defendant National Credit Adjusters has fourteen days from the date of this Entry to file an Answer.

IT IS SO ORDERED.

A handwritten signature in dark ink, appearing to read 'V. Culotta', is written over a horizontal line.

VINCENT A. CULOTTA, JUDGE

Copies:

Barbara Quinn Smith, Esq.
Rose Marie L. Fiore, Esq.