4.2 Plaintiff's Motion to Strike Affirmative Defenses

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(FORT LAUDERDALE DIVISION)

Case No. 00-6872-CIV-FERGUSON/SNOW

[PLAINTIFF],	)
	)
Plaintiff,	)
	)
vs.	)
	)
INTERNATIONAL COLLECTION SERVICE,	)
INC., a/k/a "Int'l Collection	)
Service, Inc., ADAM B. SAGE,	)
MARTIN E. HAWLEY, and	)
DOES 1 through 4,	)
	)
Defendants.	)

PLAINTIFF [PLAINTIFF'S] MOTION
TO STRIKE AFFIRMATIVE DEFENSES

PLAINTIFF, by and through the undersigned attorney, hereby move this court, pursuant to F.R.C.P. 12(f), to strike DEFENDANTS' Affirmative Defenses, on the grounds that they are insufficient as they fail to state legal defenses.

MEMORANDUM

I. Procedural history

On June 26, 2000, PLAINTIFF filed this action alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and Florida Consumer Collections Practices Act ("FCCPA"). On or about August 21, 2000, DEFENDANTS INTERNATIONAL COLLECTION SERVICE, INC. ("ICS"), ADAM B. SAGE ("SAGE"), and MARTIN E. HAWLEY ("HAWLEY") filed their Answer and Affirmative Defenses, in which they alleged eight affirmative defenses. No other defendant has yet been served.

II. Substantive arguments

Pursuant to 15 U.S.C. § 1692k(a),

> "*[e]xcept as otherwise provided by this section, any* debt collector who fails to comply with *any* provision of this subchapter with respect to any person *is liable* to such person"(emphasis supplied).

Thus, for an FDCPA defense to be viable, it must be found within "this section", 15 U.S.C. § 1692k(a). There are only two defense found in "this section", those being found under 15 U.S.C. §§ 1692k(c) and (e). In fact, ICS, SAGE, and HAWLEY have not attempted to allege only one

of them, and have not alleged that defense properly, as set forth below. Moreover, their allegations concerning affirmative defenses to the FCCPA are generally insufficient.

A. Bona fide error defense

For their First Affirmative Defenses, ICS, SAGE, and HAWLEY have alleged that any violations are "bonafide errors." For their Third Affirmative Defense, ICS, SAGE, and HAWLEY have alleged that any violations of the FDCPA occurred "unintentionally and in good faith despite procedures established to avoid the alleged errors." In fact, what ICS, SAGE, and HAWLEY have alleged as the First and Third Affirmative Defense are actually part of a single affirmative defense. By separating the two, ICS, SAGE, and HAWLEY are attempting to have this court, in essence, allow them two FDCPA defenses when in fact they only allege part of a single defense, since each defense alleged is merely part of a single defense.

To have a valid defense to an FDCPA claim[1], a collector must not only establish that the violation was unintentional, but must also establish, at a minimum, that 1) the violation resulted from a bona fide error, **and** 2) the collector maintains procedures reasonably adopted to avoid such error. *See* 15 U.S.C. § 1692k(c); *Dutton v. Wolhar*, 809 F.Supp. 1130 (D.Del. 1992); *Adams v. Law Offices of Stuckert & Yates*, *supra*, at 926 F.Supp. 521; *Villari v. Performance Capital Management, Inc.*, 1998 WL 414932 (S.D.N.Y. 1998). A defense based upon unintentional conduct resulting from a bona fide error is sufficient only if it is "notwithstanding the maintenance of procedures reasonably adopted to avoid any such error." *See* 15 U.S.C. § 1692k(c); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3rd 1507 (9th Cir. 1994); *Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469 (M.D.La. 1995); *Adams*, *supra*; *Oglesby v. Rotche*, 1993 WL 460841 (N.D.Ill.).

The reading of these various courts is based upon a plain reading of 15 U.S.C. § 1692k(c), which provides,

> "[a] debt collector may not be held liable ... if the debt collector shows ... that the violation was not intentional *and* resulted from a bona fide error *notwithstanding* the maintenance of procedures reasonably adapted to avoid any such error" (emphasis supplied).

As can be seem from the plain language of 15 U.S.C. § 1692k(c) and the cases cited above, a bona fide error, in and of itself, is insufficient to establish a defense under the FDCPA.

If a defense does not suffice under the FDCPA, it surely does not suffice under the FCCPA. Unlike the FDCPA, the FCCPA does not specifically provide an exclusive list of defenses. However, the FCCPA provides that,

> "[i]n the event of any inconsistency between any provision of this part and any provision of the [FDCPA], the provision which is more protective of the consumer or debtor shall prevail."

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[1] The other real "defense" to an FDCPA claim, that provided by 15 U.S.C. § 1692k(e) concerning reliance upon FTC advisory opinions, is not a true "defense" to the violative nature of the act but is merely a defense to liability. In any event, the FTC has only issued a single advisory opinion concerning the FDCPA. *See* NCLC Reports, 18 Debt Collection and Repo. Ed. 19 (March/April 2000), a copy of which is attached as Exhibit "A", and no defendant has alleged that defense.

§ 559.552, Fla. Stat.. Thus, to allow a defense under the FCCPA which cannot be maintained under the FDCPA would be contrary to the construction mandated by the FCCPA.

In sum, mere bonafide error is not a defense.

B. Third Affirmative Defense insufficient

In their Third Affirmative Defense, ICS, HAWLEY, and SAGE have alleged that any violations occurred "unintentionally and in good faith despite *procedures established* to avoid the alleged errors." As demonstrated in part II(A) above, this is only part of a single defense under 15 U.S.C. § 1692k(c). Moreover, as demonstrated by the plain language of that subsection, the procedures must be "*reasonably adapted.*" ICS, SAGE, and HAWLEY have alleged via the Third Affirmative Defense that the establishment of *any* procedures, whether or not reasonably adapted, would suffice as a defense to liability. This is simply not the case. Thus, even the allegation by ICS, SAGE, and HAWLEY that a partial affirmative defense should constitute an entire affirmative defense is inconsistent with the requirements of the defense.

C. Three affirmative are mere denials

The Second, Fourth, and Sixth Affirmative Defenses are mere denials, but mere denials are not affirmative defenses. Thus, not only are they not authorized by 15 U.S.C. § 1692k, but they are redundant of the Answer and should be stricken. *See Texidor v. E.B. Aaby's Rederi A/S*, 354 F.Supp. 306 (D.C.P.R. 1972).

While the Sixth Affirmative Defense purports to be a comparative fault defense, in fact no such defense is appropriate under the FDCPA. Pursuant to 15 U.S.C. § 1692k(a),

> "*[e]xcept as otherwise provided by this section, any* debt collector who fails to comply with *any* provision of this subchapter with respect to any person *is liable* to such person."

No defense such as alleged as the Sixth Affirmative Defense is provided by section 1692k. If plaintiff or some third party has engaged in the fraudulent activities, then defendants did not fail to comply with the FDCPA, and are not liable. The principal behind affirmative defenses is that they are justifications or explanations of what would otherwise be a violative conduct. If the Sixth Affirmative Defense is true, there was no violative conduct in the first place, so no explanation is necessary.

D. Fifth Affirmative Defense not responsive to Complaint

Moreover, the Fifth Affirmative Defense is simply inappropriate as a defense to the Complaint. The Fifth Affirmative Defense recites that PLAINTIFF seeks a declaration concerning whether he owes the alleged debt to "Defendant". However, PLAINTIFF nowhere alleges, nor can be it reasonably construed, that "Defendant", whoever ICS, HAWLEY, and SAGE are referring to, is the alleged creditor. Rather, the alleged creditor is "Stanger Health Care Centers".

In fact, PLAINTIFF does not seek a declaration concerning his liability for the alleged underlying debt, but merely as to whether the FDCPA and FCCPA were violated. Declaratory relief is available under the FDCPA. *See Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589 (E.D.Cal. 1999); *Ballard v. Equifax Check Services, Inc.*, 27 F.Supp.2d 1201 (E.D.Cal. 1998); *Young v. Meyer & Njus, P.A.*, 183 F.R.D. 231 (N.D. Ill. 1998). *See also* 18 U.S.C. § 2201, which provides, "any Court of the United States ... may declare the rights and other legal relations of

any interested party seeking such declaration." Indeed, in one FDCPA case, the Fourth Circuit Court of Appeals held that the plaintiff's failure to seek and obtain declaratory relief to be a factor in affirming the district court's reduced award of attorney's fees. *See Carroll v. Wolpoff & Abramson*, 53 F.3rd 626 (4th Cir. 1995).

In addition, the Fifth Affirmative Defense is facially insufficient in that it recites a Florida state court pleading standard, "failed to state a cause of action." The pleading standard in federal court, where one must merely state a "claim", and the pleading standard in Florida state courts "differ radically." *Continental Baking Co. v. Vincent*, 634 So.2d 242, 244 (Fla. 5th DCA 1994).

E. Intent to violate not required under FCCPA

PLAINTIFF has alleged several violations of the FCCPA, including §§ 559.72(3), (9), (10), (11), and (12), Fla. Stat.. In their Fourth Affirmative Defense, ICS, HAWLEY, and SAGE allege that any violations of the FCCPA were without "willful intent to commit a violation."

First of all, a plain reading of the relevant provisions of the FCCPA reveals that only one of the subsections alleged to have been violated requires any intent element. Section 559.72(3), Fla. Stat., is violated when a collector

> "tell[s] a debtor who disputes a consumer debt that he or any person employing him will disclose to another ... information affecting the debtor's reputation for credit worthiness without also informing the debtor ...."

Nothing in that subsection requires intent to violate it for a violation to occur, nor does any other provision of the FCCPA provide lack of intent to violate the law as a defense.

As for § 559.72(10)-(12), Fla. Stat., they are violated through the use of certain prohibited communications. Nothing in those subsections requires intent to violate the FCCPA.

In fact, the legislature clearly knows how to require intent, since § 559.72(9), Fla. Stat., does just that. However, even § 559.72(9) does not require intent to violate the FCCPA, the defense ICS, SAGE, and HAWLEY have plead. Rather, § 559.72(9), Fla. Stat., states that a collector may not,

> "[c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist."

Thus, even under § 559.72(9), Fla. Stat., the only FCCPA subsection PLAINTIFF alleges any defendant violated which requires intent on the part of the defendant, PLAINTIFF need not prove that the defendant intended to violate the FCCPA.

In fact, the only claim of PLAINTIFF's that the Fourth Affirmative Defense could apply to is PLAINTIFF's punitive damages claim. This is demonstrated by the case of *Tallahassee Title Co. v. Dean*, 411 So.2d 204 (Fla. 1st DCA 1982), in which the court vacated a punitive damages award for violations of §§ 559.72(7) and (9), but did not vacate the trial court's finding of violations. However, even in this regard, the Fourth Affirmative Defense is not an affirmative defense, but a mere denial.

F. Unclean hands is not a defense to the FDCPA

As to their Seventh Affirmative Defense, ICS, SAGE, and HAWLEY allege that PLAINTIFF has unclean hands. However, pursuant to 15 U.S.C. § 1692k(a),

> "*[e]xcept as otherwise provided by this section, any* debt collector who fails to comply with *any* provision of this subchapter with respect to any person *is liable* to such person."

There is absolutely nothing in the that section of the FDCPA, or any other section of the FDCPA for that matter, which provides for an unclean hands defense. The only defenses which can exist are within 15 U.S.C. § 1692k, and those are set forth in 15 U.S.C. §§ 1692k(c) and (e). Since the § 1692k(a) requires any defense to liability to be found within § 1692k, and since § 1692k does not contain an unclean hands defense, there is no such defense under the FDCPA, and no court has held otherwise.

G. Prayer for attorneys fees not a defense

For their Eight Affirmative Defense, ICS, SAGE, and HAWLEY have prayed for attorney's fees. Such a prayer is not an affirmative defense.

H. Lack of specificity

"Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements." *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). "Thus, defenses must set forth a 'short and plain statement', Fed.R.Civ.P. 8(a), of the defense." *Id.* "'Bare bones conclusory allegations' without a short and plain statement setting forth each element of the claimed defense are insufficient as a matter of law." *Heller*, at 1294-1295.

This standard is an additional reason the First, Second, Third, Fourth, Seventh, and Eighth Affirmative Defenses should be stricken. For instance, the First and Third Affirmative Defenses do nothing more than attempt to recite statutory language. They do not articulate what any particular "bonafide error" was, nor do they explain what "procedures" are maintained and "reasonably adapted to avoid such errors."

III. Conclusion

Pursuant to the plain language of 15 U.S.C. § 1692k(a), there are only two defenses to liability under the FDCPA. ICS, SAGE, and HAWLEY have only attempted to plead one of those two, but in fact have plead that one in such a way that they would have the court believe there are actually two separate defenses, each easier to maintain than the one. In fact, even combined, ICS, SAGE, and HAWLEY have failed to properly plead the one affirmative defense.

In sum, the Second, Fourth, Fifth, and Sixth, and Seventh Affirmative Defenses should be stricken with prejudice, the Eight Affirmative Defense should be stricken without prejudice to the defendants' right to move for attorneys fees, and the First and Third Affirmative Defenses should be stricken with leave to file a single amended affirmative defense as set forth in 15 U.S.C. § 1692k(c).

CERTIFICATE OF CONFERRAL

I HEREBY CERTIFY that I have conferred with the attorney for ICS, HAWLEY, and SAGE, Joe Coleman, in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

[Attorney for Plaintiffs]