

Notice

Notice Sent 3.3.15

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GLD	-CL	-Hic
-Koa	-JCC	-RSS
		-AMS

(2)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2014-2684-BLS2

TARA DORRIAN, on behalf of herself and
all others similarly situated

vs.

LVNV FUNDING, LLC

**MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION TO DISMISS OR
TO STRIKE CERTAIN CLASS ALLEGATIONS**

This action arises from defendant LVNV Funding, LLC's (LVNV) allegedly unlawful debt collection activities. After obtaining a judgment in her favor in a collection action brought against her by LVNV, Tara Dorrian ("Dorrian") has now filed this lawsuit on behalf of herself and an alleged class of similarly situated people claiming LVNV improperly engages in collection activities of consumer debt without a debt collector license, as required by G. L. c. 93, § 24A. LVNV moves to dismiss Dorrian's claims pursuant to Mass.R.Civ.P. 12(b)(6), or alternatively, to strike Dorrian's request for relief from Massachusetts judgments on behalf of putative class members. Following hearing March 4, 2015, and for the reasons that follow, the Motion is **DENIED**.

Factual Allegations in Complaint

The following allegations are taken from the complaint, and are assumed to be true for the purposes of the Motion.

On September 24, 2013, LVNV through licensed Massachusetts counsel sued Dorrian in the Small Claims Session of the Quincy District Court. LVNV sought judgment in the amount of \$3,426.26, plus costs, on a defaulted consumer debt LVNV had purchased from HSBC Bank

notice, or on which it relied in framing the complaint. Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n. 4 (2004); Jarosz v. Palmer, 436 Mass. 526, 530 (2002).

Discussion

Declaratory and Injunctive Relief (Count I)²

To bring a claim for declaratory judgment under G. L. c. 231A, § 1, a plaintiff must plead an actual controversy. G. L. c. 231A, § 1 (The Superior Court “may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen ”); Massachusetts Ass’n of Independent Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977)(“In order for a court to entertain a petition for declaratory relief, an ‘actual controversy’ sufficient to withstand a motion to dismiss must appear on the pleadings.”). An actual controversy is “a ‘real dispute’ caused by the assertion by one party of a duty, right, or other legal relation in which he has a ‘definite interest,’ in circumstances indicating that failure to resolve the conflict will almost inevitably lead to litigation.” District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 659 (1980).

LVNV argues that because Dorrian obtained a defense judgment in the underlying collection action there is currently no actual controversy between the parties, and therefore the declaratory judgment claim is moot. I cannot agree.

The small claims lawsuit concerned whether Dorrian owed a debt to LVNV. That controversy was resolved in Dorrian’s favor. The present action concerns whether LVNV,

² An injunction is a remedy, not a claim. I construe the portion of Count I seeking an injunction as a prayer for relief.

individual who can satisfy both the elements and the typicality requirement with respect to Count II, in which case Count II should be dismissed. And, as Defendant accurately argues, an equitable remedy for unjust enrichment is not available to any party who enjoys the possibility of an adequate remedy at law. Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005). But because LVNV also questions the availability of a Chapter 93A remedy to the entire class, any dismissal of the unjust enrichment count now would be premature, based on the allegations before me. **LVNV's Motion must therefore be DENIED as to Count II.**

G. L. c. 93A (Count III)

LVNV asserts Dorrian cannot maintain a G. L. c. 93A claim against it for three reasons. I will take each in turn.

Trade and Commerce

First, LVNV contends the claim should be dismissed because the conduct upon which Dorrian bases it -- LVNV's bringing a collection lawsuit against her -- did not occur in trade or commerce.

Chapter 93A liability may attach only if the unfair or deceptive act or practice at issue occurred "in the conduct of any trade or commerce." G. L. c. 93A, § 2(a). A party is engaged in trade or commerce for the purposes of c. 93A when it acts in a business context. Peabody NE, Inc. v. Marshfield, 426 Mass. 436, 439 (1998); Lantner v. Carson 374 Mass 606, 611 (1978). Determining whether the party is acting in a business context depends on several factors including the nature of the transaction, the character and activities of the parties involved, and whether the transaction was motivated by personal or business reasons. Peabody NE, Inc., 426 Mass. at 439 & n.6; Poznik v. Massachusetts Med. Prof'l Ins. Ass'n, 417 Mass. 48, 52 (1994)(business context determined by the facts of each case; Chapter 93A imposes liability on

without the need of showing the act was otherwise ‘unfair or deceptive’ or occurred in ‘trade or commerce’”). **Accordingly, LVNV is not entitled to dismissal of Dorrian’s G. L. c. 93A claim on this ground.**

Litigation Privilege

Second, LVNV argues Dorrian’s claim is barred because of the litigation privilege.

The litigation privilege bars all civil actions brought against counsel for statements made in the institution or conduct of litigation, or in conferences and other communications preliminary to litigation, so long as those statements were pertinent to court proceedings. Sriberg v. Raymond, 370 Mass. 105, 108 (1976); Robert L. Sullivan, D.D.S., P.C. v. Birmingham, 11 Mass. App. Ct. 359, 367 (1981); Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140-141 (1996). Once again, however, Dorrian is not challenging statements made by LVNV’s attorney during the lawsuit brought against her. Rather, she is challenging LVNV’s act of filing a lawsuit without having first obtained a debt collection license. **Consequently, LVNV’s argument that Dorrian’s claim should be dismissed because it is subject to the litigation privilege is without merit.**

Division Opinion Letter

Lastly, LVNV maintains the filing of the small claims action against Dorrian was consistent with an Opinion Letter issued by the Massachusetts Division of Banks (Division), and therefore cannot be considered unfair or deceptive conduct as a matter of law.

LVNV argues the Division’s interpretation of the DCL and its regulations (209 Code Mass. Regs. § 18.00 et seq) permitted LVNV to file its lawsuit against Dorrian without first obtaining a debt collector license. The Division issued an Opinion Letter in October 2006, regarding “whether a debt buyer that engages only in the practice of purchasing delinquent

Massachusetts. See Gomes I. Accordingly, LVNV is not entitled to the dismissal of Dorrian's G. L. c. 93A claim based on the Division's Opinion Letter.

Request for Relief from Judgment

Under Mass. R. Civ. P. Rule 60(b) relief from judgment may be sought either by motion as part of the underlying action or through an independent action. The Rule provides several circumstances under which a party may move for relief, including because the judgment is void. Mass. R. Civ. P. 60(b)(4). Dorrian seeks relief from all Massachusetts judgments, including those from the District Court, recovered by LVNV against putative class members. She contends all of those judgments are void because LVNV pursued them while acting as an unlicensed debt collector.⁴

LVNV is correct that such a request for relief ordinarily must be made in the court that rendered the judgment. Air Purchases, Inc. v. Mechanical Coordinators Corp., 21 Mass. App. Ct. 632, 633 (1986) (“Commentators on the Massachusetts and parallel Federal rule are in agreement that where rule 60(b) relief is sought, even if by way of an independent action, the appropriate court is that where the judgment was rendered”); Clark v. Leasecomm Corp., 2000 Mass. Super. LEXIS 381 at *30 (Fabricant, J.) (dismissing class action which requested relief from default judgments and observing that “Massachusetts courts have long held . . . that an independent action seeking relief from a judgment must be brought in the court that issued the judgment”). However, the Reporter's Notes for Rule 60 emphasize that “nothing in Rule 60(b) . . . specifies” that a party must seek relief from the court which issued the judgment.

Given the nature of Dorian's allegations here with regard to the volume of collection

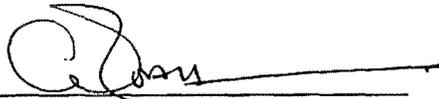
⁴ Although not explicitly alleged in the complaint, it may plausibly be inferred that the majority of the alleged collection actions were brought in the District Court.

Conclusion

For the foregoing reasons, LVNV Funding, LLC's Motion to Dismiss or to Strike Certain Class Allegations is **DENIED** because each of the Counts of the complaint meets the Iannacchino standard.

SO ORDERED

Dated: March 30, 2015



Christine M. Roach