

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

TRIAL COURT DEPARTMENT
QUINCY DISTRICT COURT
DOCKET NO. 1256 CV 0271

MIDLAND FUNDING, LLC

VS.

STEVEN FRANK

MEMORANDUM

Plaintiff filed this action to collect on a credit debt allegedly owed to it by defendant. Defendant has denied liability and has filed a class action counterclaim. Discovery has been sought by defendant, defendant has filed a motion to compel discovery, and that motion and plaintiff's opposition to the motion is before the court.

In the counterclaim, the defendant alleges that the plaintiff purchases consumer debt "typically for pennies on the dollar" and is a debt collector under Massachusetts and federal law. It further alleged that plaintiff files thousands of suits in the Commonwealth; the complaints "lack the most basic information about the alleged debt [it] seeks to collect, plaintiff obtains most judgments by default, "and then aggressively pursues execution on these judgments." Plaintiff admits that suits are brought by Massachusetts attorney to collect debt it owns, but otherwise denies defendant's assertions.

At the very center of this class action counterclaim, which without there may not exist an alleged claim, is the claim that the plaintiff was not, as required by Massachusetts law, a licensed and bonded debt collector. It is the unlicensed and unbonded status of the plaintiff that defendant asserts creates liability under the Federal Fair Debt Collection Practices Act. See 15 U.S.C. 1692e (5) & (10); 15 U.S. C. 1692(f).

Conversely, at the center of the plaintiff's defense, which without liability would likely be plain, is an opinion ruling by the Massachusetts Division of Banks excepting from the licensing requirement those who purchase debt and who do not directly engage in the debt collection: so-called "passive debt buyers." According to plaintiff it is a passive buyer and the collection of the debt it owns is conducted through its licensed "affiliated parent company," Midland Credit Management, Inc., and the Massachusetts attorneys that entity retains to collect the debt.

To this court it is unclear whether the counterclaim is based solely on the asserted position that the unlicensed and unbonded status of the plaintiff is the basis of the counterclaim, because without the alleged required compliance with Massachusetts law, the collection of the debt could not "legally" be taken or would not be "permitted by law," see § 1629e (5) & 1629f. Or, if in fact defendant is by opinion letter excepted from the licensing requirement, the establishment of the

passive paradigm is a “use of . . . [a] deceptive means to collect . . . [a] debt,” see § 1629e (10).

In any event, these and any estoppel issues aside, the matter before the court is discovery. Plaintiff argues that discovery should be, at this time, limited to its activities, its relationship with its parent affiliate, and how attorneys are retained. As such, the court first considers the passive debt buyer defense.

General Laws chapter 93, § 24A, provides, in relevant part, that “(a) No person shall directly or indirectly engage in the commonwealth in the business of a debt collector . . . without first obtaining from the commissioner [of banks] a license to carry on the business.” A license shall issue if the commissioner, in part, finds that the applicant will “operate[] honestly, fairly, soundly and efficiently in the public interest consistent with the purpose” of the statute. G.L. c. 93, § 24H.

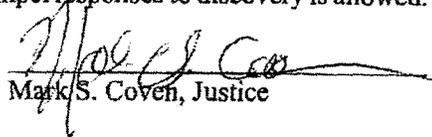
Notwithstanding these provisions, the commissioner has issued an opinion letter (06-060) dated October 13, 2006, in which the commissioner states that a “debt buyer that engages only in the practice of purchasing delinquent consumer debt for investment purposes without undertaking any activities to directly collect on the debt,” while a debt collector for the purposes of Massachusetts law, see G.L. c. 93, § 24 (defining debt collector), is a “passive” debt collector. And, further, “provided that all collection activity performed on behalf of such debt buyer is done by a properly licensed debt collector in the Commonwealth or an attorney-at-law licensed to practice law in the Commonwealth,” the “passive” collector need not be licensed.

Although the opinion letter of the commissioner is entitled to weight, it is not binding. The statute contains clear expression: “directly or indirectly engag[ing.]” Though plaintiff may passively receive from its parent affiliate recovered debt, there is, at least, an appearance of agency in the relationship and this court fails to see how there cannot be found an “indirect[] enage[ment]” of the collection of a debt. In fact, a consent judgment that the Massachusetts Attorney General entered into with another so-called passive debt buyer, required that entity to take steps to monitor its collectors of debt. See Exhibit 2, section 6(e). There existed under the agreement a measure of control.

The court also notes that a violation of G.L. c. 93, § 24 constitutes a violation of G.L. c. 93A, see G.L. c. 93, § 28, and that class action suits are authorized under G.L. c. 93A, § 9. Under plaintiff’s business model, undercapitalization of its parent affiliate may frustrate the goal of the statutory scheme to have a business such as plaintiff “operate[] honestly, fairly, soundly and efficiently in the public interest consistent with the purpose” of the statute. G.L. c. 93, § 24H.

The defendant/counterclaim plaintiff’s motion to compel responses to discovery is allowed.

November 14, 2012


Mark S. Coven, Justice