

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY E. BROWN,)
) Civil Action
Plaintiff,)
) No. 03-CV-05850
vs.)
)
LAW OFFICES OF BUTTERFIELD,)
JOACHIM, SCHAEGLER & KELLEHER,)
and RICHARD J. SCHAEGLER,)
)
Defendants.)

* * *

APPEARANCES:

JASON M. RAPA, ESQUIRE,
On behalf of plaintiff

KEVIN J. KELLEHER, ESQUIRE,
On behalf of defendants

* * *

OPINION

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment Under Rule 56(b), which motion was filed on March 9, 2004, and Plaintiff's Cross Motion for Summary Judgment, which cross-motion was filed on March 15, 2004. For the reasons expressed below, we conclude that defendants are entitled to judgment as a matter of law on Counts I and II of the Complaint and plaintiff is entitled to judgment as a matter of law on Counts III, IV and V of his Complaint. Therefore, we grant in part and deny in part defendants' motion and grant in part and

deny in part plaintiff's cross-motion.

PROCEDURAL BACKGROUND

This civil action arises from a letter dated June 6, 2003 from defendant Richard J. Schaedler of defendant Law Offices of Butterfield, Joachim, Schaedler & Kelleher ("Law Offices") to plaintiff Harry E. Brown. That letter concerned the collection of an alleged \$4,923.47 debt owed by plaintiff to the non-party IRCA Community Credit Union. Plaintiff alleges that such letter was sent to him in violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o ("FDCPA").

On October 22, 2003 plaintiff filed a Complaint against defendants alleging: (1) a violation of 15 U.S.C. § 1692e; (2) a violation of 15 U.S.C. § 1692e(5); (3) a violation of 15 U.S.C. § 1692e(10); (4) a violation of 15 U.S.C. § 1692g(a)(3); and (5) a violation of 15 U.S.C. § 1692g(a)(4).

On March 9, 2004 defendants moved for summary judgment on all counts of plaintiff's Complaint. On March 15, 2004 plaintiff filed a cross-motion for summary judgment. Both parties agree that there are no disputes as to any material fact. The sole issue raised in this case and at issue on these cross-motions for summary judgment is whether Mr. Schaedler's June 6, 2003 letter violates the FDCPA.

For the reasons which follow, we find that the June 6, 2003 letter violates 15 U.S.C. §§ 1692e(10) and 1692g. Thus, we

now grant in part and deny in part defendants' motion for summary judgment and grant in part and deny in part plaintiff's cross-motion for summary judgment.

STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment shall be rendered where it is shown that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where a moving defendant does not bear the burden of persuasion at trial, he need only point out that "there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265, 275 (1986).

FINDINGS OF FACT

Based upon the pleadings, record papers, depositions and exhibits of the parties, the undersigned makes the following findings of fact:

1. On June 6, 2003 defendant Richard J. Schaedler sent a letter on the letterhead of defendant Law Offices to plaintiff Harry E. Brown.¹

¹ Letter dated June 6, 2003 ("June 6, 2003 Letter") from Richard J. Schaedler to Harry E. Brown, Exhibit A to Complaint.

2. The first sentence of the second paragraph of the June 6, 2003 letter states, "If payment in full is not received by me, or if a satisfactory arrangement for prompt payment is not made through my office within five (5) days from receipt of this letter, appropriate legal proceedings may begin."²

3. At the bottom of the June 6, 2003 letter, Mr. Schaedler included in bold the following validation notice:

Unless you notify us within 30 days after receiving this notice that you dispute the validity of the debt, or any portion thereof, we shall assume this debt is valid. If you notify us in writing within 30 days after receiving this notice (1) that this debt or any portion thereof is disputed or (2) that you request the name and address of the original creditor, we will obtain verification of this debt, a copy of the judgment (if a judgment is involved), or the name of the original creditor, if different from the current creditor, and will mail a copy and/or provide the name of the creditor to you.³

(Emphasis in original.)

CONCLUSIONS OF LAW

Applying the summary judgment standard to the issues presented by the parties, we make the following conclusions of law:

² June 6, 2003 Letter, Exhibit A to Complaint.

³ June 6, 2003 Letter, Exhibit A to Complaint.

1. Defendants Richard J. Schaedler and the Law Offices were "debt collectors" under the FDCPA.⁴
2. Plaintiff Harry E. Brown was a "consumer" under the FDCPA.⁵
3. The sentence of the June 6, 2003 letter stating "If payment in full is not received by me, or if a satisfactory arrangement for prompt payment is not made through my office within five (5) days from receipt of this letter, appropriate legal proceedings may begin"⁶ violates 15 U.S.C. §§ 1692e(10) and 1692g.

DISCUSSION

The only disputed issue is whether defendants' June 6, 2003 letter to plaintiff violates the FDCPA. The first sentence of the second paragraph of that letter states, "If payment in full is not received by me, or if a satisfactory arrangement for prompt payment is not made through my office within five (5) days from receipt of this letter, appropriate legal proceedings may begin." For the reasons stated below, we find that defendants violated 15 U.S.C. §§ 1692e(10) and 1692g by including that

⁴ Letter from Kevin J. Kelleher to Jason M. Rapa dated March 2, 2004, Exhibit B to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Plaintiff's Memorandum").

⁵ Defendants' Reply to Plaintiff's Request for Admissions at ¶ 1, Exhibit C to Plaintiff's Memorandum.

⁶ June 6, 2003 Letter, Exhibit A to Complaint.

sentence in the June 6, 2003 letter to plaintiff.

I. Liability

Plaintiff argues that the language used by defendants in the June 6, 2003 letter violates the FDCPA because it:

1) manifests defendants' use of false, deceptive and misleading representations or means to collect a debt; 2) threatens to take action defendants cannot legally take or action defendants do not intend to take; and 3) contradicts and overshadows plaintiff's rights under the FDCPA. Plaintiff argues that such actions violate 15 U.S.C. §§ 1692e, 1692e(5), 1692e(10), 1692g(a)(3), and 1692g(a)(4).

Defendants maintain that the June 6, 2003 letter fully complies with the FDCPA because it includes the required validation notice in bold at the bottom of the page and because it does not threaten immediate legal action. Specifically, because the letter states that "legal proceedings may begin" if plaintiff fails to make payment arrangements within five days, defendants argue that the language can be read only as stating that litigation may or may not begin at some indefinite point in the future if plaintiff fails to pay within five days. (Emphasis added.)

Section 1692e of the FDCPA provides in pertinent part that:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

. . .

(5) The threat to take any action that cannot be legally taken or that is not intended to be taken.

. . .

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

Section 1692g of the FDCPA requires a debt collector to send written notice to a consumer containing the following information:

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original

creditor, if different from the current creditor.

Initially, we note that Count I of plaintiff's Complaint alleges a violation of 15 U.S.C. § 1692e. Counts II and III of the Complaint allege violations of subsections (5) and (10) of 15 U.S.C. § 1692e. Because any violation of subsections (5) or (10) would necessarily violate the larger Section 1692e within which these subsections are included, we find Count I of the Complaint to be duplicative of Counts II and III unless Count I alleges the violation of any subsection other than subsections (5) and (10).

Plaintiff has presented no evidence implicating any other subsection of 15 U.S.C. § 1692e. Thus, we find no genuine dispute of any material fact preventing this court from entering judgment on Count I and we find that defendants are entitled to judgment as a matter of law on Count I of the Complaint. Therefore, we grant defendants' motion and deny plaintiff's cross-motion insofar as those motions address Count I of the Complaint. Accordingly, we enter judgment in defendants' favor on Count I.

In Count II of the Complaint, plaintiff alleges that the June 6, 2003 letter violated 15 U.S.C. § 1692e(5) by threatening to take legal action defendants never intended to take. Subsection (5) makes it a violation of the FDCPA to threaten "to take any action that cannot be legally taken or that

is not intended to be taken." Because defendants failed to take any legal action against plaintiff to recover the alleged debt as of the date plaintiff filed his Complaint, plaintiff argues that defendants had no intention of taking any legal action against plaintiff to collect the debt.

However, plaintiff has presented no evidence that defendants failed to take any legal action to date or any other evidence indicating defendants' "intention" not to take legal action. Because plaintiff can present no evidence of defendants' intentions, plaintiff cannot prove a prima facie violation of 15 U.S.C. § 1692e(5). Thus, we enter judgment in defendants' favor on Count II of the Complaint.

In Count III of his Complaint, plaintiff alleges that defendants' statement in the June 6, 2003 letter violates subsection (10) of 15 U.S.C. § 1692e. Subsection (10) prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

The United States Court of Appeals for the Third Circuit in Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991), determined that the demand for payment within ten days in a debt collection letter which contradicted the statutory notice allowing a consumer thirty days to dispute a debt was a violation of 15 U.S.C. § 1692e(10). We find that the June 6, 2003 letter at issue here similarly violates 15 U.S.C. § 1692e(10) by

demanding payment within five days in contradiction of the validation notice allowing him thirty days to dispute the alleged debt. Thus, we enter judgment in plaintiff's favor on Count III of the Complaint.

In Counts IV and V of the Complaint, plaintiff argues that defendants violated the statutory notice requirements of 15 U.S.C. § 1692g(a)(3) and (4). Specifically, plaintiff argues that defendants' demand for payment within five days overshadows and contradicts the statutory notice provided concerning plaintiff's right to dispute the debt within thirty days. We agree.

There is no issue as to whether the June 6, 2003 letter on its face satisfies 15 U.S.C. § 1692g. The issue presented is whether that notice is nullified by the allegedly overshadowing and contradictory five-day demand for payment. To comply with 15 U.S.C. § 1692g, the statutory notice provided to a consumer must be effectively communicated. "[T]he notice must not be overshadowed or contradicted by accompanying messages from the debt collector." Graziano, 950 F.2d at 111.

In determining whether a validation notice is overshadowed or contradicted by any accompanying message from a debt collector, the court must consider whether the accompanying message "would make the least sophisticated debtor uncertain as to her rights." Wilson v. Quadramed Corporation, 225 F.3d 350, 354 (3d Cir. 2000) (quoting Russell v. Equifax A.R.S., 74 F.3d

30, 35 (2d Cir. 1996)). In Graziano, the Third Circuit found that "[t]here is a reasonable probability that the least sophisticated debtor, faced with a demand for payment within ten days and a threat of immediate legal action if payment is not made in that time, would be induced to overlook his statutory right to dispute the debt within thirty days." 950 F.2d at 111.

We find that the least sophisticated debtor would be uncertain of his rights upon reading defendants' June 6, 2003 letter. Specifically, the June 6, 2003 letter states that "[i]f payment in full is not received by me, or if a satisfactory arrangement for prompt payment is not made through my office within five (5) days from receipt of this letter, appropriate legal proceedings may begin." Defendants avoided specifically stating that legal action will be taken immediately if payment is not received within five days by their intentional use of the word "may" and their artful placement of commas.

There is a reasonable probability that these subtle grammatical nuances, however, would be lost on the least sophisticated debtor and that he would be uncertain of his rights after reading the June 6, 2003 letter. Thus, we find that defendants failed to provide plaintiff with the requisite validation notice in violation of 15 U.S.C. § 1692g. Therefore, we enter judgment in plaintiff's favor on Counts IV and V of the

Complaint.⁷

II. Damages

The award of damages for violations of the FDCPA is controlled by 15 U.S.C. § 1692k. Specifically, Section 1692k requires this court to award to any successful plaintiff:

1) actual damages; 2) "such additional damages as the court may allow, but not exceeding \$1,000.00"; and 3) costs, including reasonable attorney's fees.

Initially, we find that plaintiff has presented the court with no evidence of actual damages. Therefore, we decline to award any actual damages to plaintiff.

Next, we consider statutory damages. In determining the amount of statutory damages to award pursuant to 15 U.S.C. § 1692k(a)(2)(A), this court must consider the following factors: "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional". 15 U.S.C. § 1692k(b)(1).

We note that plaintiff has presented no evidence from which this court could find that defendants' conduct was

⁷ By entering judgment in plaintiff's favor on both Counts IV and V of the Complaint, we in no way find two separate violations of 15 U.S.C. § 1692g. The Third Circuit treats a debt collector's failure to provide a valid validation notice to a consumer as violative of 15 U.S.C. § 1692g. Graziano, 950 F.2d at 111. This court declines to parse the five subsections of 15 U.S.C. § 1692g as separate violations, despite plaintiff's decision to allege this violation as two violations under two distinct counts of the Complaint.

frequent, persistent or intentional. We have, however, found two distinct violations of the FDCPA by defendants - 15 U.S.C.

§§ 1692e(10) and 1692g.⁸ Thus, we award plaintiff a total of \$100.00 in statutory damages pursuant to 15 U.S.C.

§ 1692k(a)(2)(A) because there is no evidence of frequent, persistent or intentional conduct on defendants' part, but there were two distinct violations of the FDCPA.

Finally, we find that plaintiff is entitled to an award of his costs and attorney's fees in pursuing this action. We direct plaintiff to file all appropriate affidavits documenting plaintiff's costs and attorney's fees relating to this civil action within ten days of the date of the attached Order. Defendants are directed to file any opposition challenging the amount of costs and attorney's fees sought by plaintiff within ten days of service of plaintiff's affidavits.

CONCLUSION

For all the foregoing reasons, we grant defendants' motion for summary judgment to the extent that it seeks judgment on Counts I and II of the Complaint. In all other respects,

⁸ Plaintiff seeks a \$1,000.00 award in statutory damages for each violation of the FDCPA. Although the Third Circuit has not yet ruled on this issue, other appellate courts have concluded that 15 U.S.C. § 1692k(a)(2)(A) limits statutory damages to \$1,000.00 per civil action, rather than per violation. White v. Bruck, 927 F. Supp. 1168, 1170 (W.D. Wis. 1996) (citing Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647, 651 (6th Cir. 1994) and Harper v. Better Business Services, Inc., 961 F.2d 1561, 1563 (11th Cir. 1992)). Thus, we will consider only a single award of statutory damages capped at \$1,000.00 for both violations of the FDCPA.

defendants' motion is denied. Moreover, we grant plaintiff's cross-motion for summary judgment to the extent that it seeks judgment on Counts III, IV and V of the Complaint. In all other respects, plaintiff's cross-motion is denied. We enter judgment in favor of defendants on Counts I and II of the Complaint and in favor of plaintiff on Counts III, IV and V of the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY E. BROWN,)
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) Civil Action
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 Plaintiff,)
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) No. 03-CV-05850
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 vs.)
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 LAW OFFICES OF BUTTERFIELD,)
)
 JOACHIM, SCHAEGLER & KELLEHER,)
)
 and RICHARD J. SCHAEGLER,)
)
)
)
 Defendants.)

O R D E R

NOW, this 24th day of May 2004, upon consideration of Defendants' Motion for Summary Judgment Under Rule 56(b) and Defendants' Memorandum of Law in Support of Motion for Summary Judgment Under Rule 56(b), which motion and brief were filed on March 9, 2004; Plaintiff's Cross Motion for Summary Judgment and Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment, which cross-motion and brief were filed on March 15, 2004; and Defendants' Answer to Plaintiff's Cross

Motion for Summary Judgment and Defendants' Memorandum of Law in Opposition to Plaintiff's Cross Motion for Summary Judgment, which answer and brief were filed on April 5, 2004;⁹ and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion is granted in part and denied in part.

IT IS FURTHER ORDERED that defendants' motion is granted to the extent it seeks judgment on Counts I and II of the Complaint. In all other respects, defendants' motion is denied.

IT IS FURTHER ORDERED that plaintiff's cross-motion is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's cross-motion is granted to the extent it seeks judgment on Counts III, IV and V of the Complaint. In all other respects, plaintiff's cross-motion is denied.

IT IS FURTHER ORDERED that judgment is entered in favor

⁹ We note that defendants' answer and brief in opposition to plaintiff's cross-motion were filed twenty-one days after the filing of plaintiff's cross-motion. Assuming plaintiff served his answer and brief upon defendant via first-class mail on the March 15, 2004 filing date, defendants' opposition brief would have been due by April 1, 2004. Under these circumstances, defendants' opposition brief would be untimely.

On that ground alone, the court would be empowered to grant plaintiff's cross-motion as uncontested pursuant to Rule 7.1(c) of the Rules of Civil Procedure of the United States District Court for the Eastern

(Footnote 1 continues.)

(Footnote 1 continues.)

District of Pennsylvania. Because plaintiff failed to file a certificate of service with his cross-motion, however, the court is unable to determine when defendants were served with the cross-motion. Thus, we are unable to deem defendants' opposition brief untimely and we will fully consider defendants' answer and brief.

of defendants Law Offices of Butterfield, Joachim, Schaedler & Kelleher and Richard J. Schaedler and against plaintiff Harry E. Brown on Counts I and II of the Complaint.

IT IS FURTHER ORDERED that judgment is entered in the amount of \$100.00 in favor of plaintiff Harry E. Brown and against defendants Law Offices of Butterfield, Joachim, Schaedler & Kelleher and Richard J. Schaedler on Counts III, IV and V of the Complaint.

IT IS FURTHER ORDERED that plaintiff shall have ten days from the date of this Order to file all appropriate affidavits documenting plaintiff's costs and attorney's fees relating to this civil action.

IT IS FURTHER ORDERED that defendants shall file any opposition challenging the amount of costs and attorney's fees sought by plaintiff within ten days of service of plaintiff's affidavits demonstrating his costs and attorney's fees.

BY THE COURT:

James Knoll Gardner
United States District Judge