

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

GLORIA JONES : CIVIL ACTION  
 :  
 v. : 05-5774  
 :  
 WOLPOFF & ABRAMSON, L.L.P. and :  
 MBNA AMERICA BANK, N.A. :

MEMORANDUM AND ORDER

JOYNER, J.

January 31, 2006

Via the motions now pending before this Court, Defendants, Wolpoff & Abramson, L.L.P. and MBNA America Bank, N.A. ("Defendants") move separately to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons outlined below, both motions shall be GRANTED.

Factual Background

Plaintiff Gloria Jones ("Plaintiff") brings suit against Defendants for violations of the Federal Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"), the Pennsylvania Fair Credit Extension Uniformity Act, 73 P.S. § 2270.1, et seq. ("PFCEUA"), and the Pennsylvania Consumer Protection and Unfair Trade Practices Law, 73 P.S. § 201-1, et seq. ("PCPUTPL").<sup>1</sup> (Pl.'s Compl. at ¶¶ 1, 20, 24.)

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<sup>1</sup>Plaintiff's Introduction to her complaint indicates that she brings claims under the Pennsylvania consumer Protection and Unfair Trade Practices Law, 73 P.S. § 201-1, et seq. ("PCPUTPL"). Plaintiff's actual citation to "73 P.S. § 202-2" references a portion of the law dealing with fuel and motor vehicles. The Court assumes for the purpose of considering this motion that Plaintiff intended to cite § 201-1, et seq., which provides remedies for unfair trade practices. Although Plaintiff does not specifically plead for relief under PCPUTPL, the PFCEUA provides

Plaintiff held a credit card issued by Defendant MBNA America Bank, N.A. ("MBNA"). MBNA hired Defendant Wolpoff & Abramson, L.L.P. ("W&A") to assist in the collection of an outstanding balance on Plaintiff's credit account. (Pl.'s Compl. Ex. A.) As part of this effort, W&A initiated arbitration proceedings in the National Arbitration Forum against Plaintiff pursuant to the credit card agreement between Plaintiff and MBNA. Id. An arbitration award in favor of MBNA for \$10,219.87 (the "Arbitration Award") was entered on August 27, 2003. Id. On February 17, 2004, W&A filed a suit against Plaintiff in the Court of Common Pleas of Philadelphia County on behalf of MBNA. (Pl.'s Compl. Ex. B (the "State Court Complaint").) This suit sought to recover the amount of the arbitration award plus eighteen percent interest calculated from the date of the Arbitration Award.<sup>2</sup> (Pl.'s Compl. Ex. B at ¶¶ 12, 13.) The suit

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that an unfair or deceptive debt collection act or practice under the PFCEUA "shall constitute a violation of [PCPUTPL]." 73 P.S. § 2270.5(a). Because it appears that Plaintiff seeks redress for the alleged violations of PFCEUA under PCPUTPL, we will consider whether a claim under PCPUTPL can survive these motions.

<sup>2</sup>Plaintiff's Complaint alleges that MBNA's state court complaint "does not ask the Court to confirm the award of the arbitrators but instead makes it appear as if it is a new lawsuit." Plaintiff further asserts, in responding to Defendants' motions, that "Exhibit A does not reference the arbitration." The referenced "Exhibit A" is the state court complaint that was attached to Plaintiff's Complaint as Exhibit B. Even the most cursory reading of the State Court Complaint reveals that Plaintiff's statement - that the State Court Complaint does not reference the arbitration - is false. As set forth above, the State Court Complaint explicitly references and even attaches the Arbitration Award. Although this Court must consider the allegations of the Complaint to be true, it need not

noted that the same matter was referred to arbitration pursuant to the credit card agreement. (Pl.'s Compl. Ex. B at ¶¶ 7, 8.) The State Court Complaint further states that ". . . an Arbitration Award was entered against [Ms. Jones] and in favor of [MBNA] for the outstanding balance due" and indicates that a copy of that award is attached as an exhibit. (Pl.'s Compl. Ex. B at ¶ 8.)

Service of the State Court Complaint was effected by personal service on March 2, 2004. Docket Entry of Mar. 16, 2004 3:21 PM in MBNA America Bank, N.A. v. Jones, No. 04-2784 (Ct. of C.P. of Philadelphia County). Default judgment was entered against Ms. Jones on April 12, 2004. Docket Entry of Apr. 12, 2004 2:33 PM in MBNA America Bank, N.A. v. Jones, No. 04-2784 (Ct. of C.P. of Philadelphia County).<sup>3</sup>

Ms. Jones filed for Chapter 7 Bankruptcy protection on August 20, 2004. (Pl.'s Compl. at ¶ 14.) Ms. Jones's Schedule B filing included a listing of contingent personal property entitled "FDCPA Claim v. Wolpoff and Abramson" valued at

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consider as true allegations proven false by Plaintiff's own exhibits. See, e.g., Assoc. Builders, Inc. v. Alabama Power Company, 505 F.2d 97, 100 (5th Cir. 1974) (noting that for a motion to dismiss, "unwarranted deductions of fact are not admitted as true, . . . especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint").

<sup>3</sup>The Court takes judicial notice of certain facts as reported on electronic dockets of the Court of Common Pleas of Philadelphia County and the Bankruptcy Court for the Eastern District of Pennsylvania.

\$2,500.00. (Pl.'s Compl. at ¶ 16, Debtor's Am. Schedule B, In re Jones, No. 04-31346 (E.D. Pa. Bankr. Nov. 1, 2004).) Ms. Jones's Schedule B does not list any other contingent claims. Id. Ms. Jones received a discharge from Chapter 7 bankruptcy and her case was closed on March 30, 2005. (Pl.'s Compl. at ¶ 15.) Despite the apparent discharge of Plaintiff's debt, Plaintiff received a letter from W&A seeking to collect monies owed to MBNA. (Pl.'s Compl. at ¶ 17.)

#### **Standards Governing Rule 12(b)(6) Motions to Dismiss**

Generally speaking, in considering motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted); see also Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition

Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

#### **W&A's Motion to Dismiss<sup>4</sup>**

W&A seeks dismissal of both Plaintiff's FDCPA claims and her state law claims under the PFCEUA and PCPUTPL. W&A argues that Plaintiff's FDCPA claims are barred by the statute of limitations. W&A further argues that Plaintiff's complaint fails to set forth factual allegations giving rise to a claim under the FDCPA or, alternatively, that any claims asserted are preempted by the Bankruptcy Code. W&A also asserts that Plaintiff has

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<sup>4</sup>MBNA and W&A filed separate motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff responded to both motions in a single memorandum of law. (Pl.'s Mem. in Supp. of Opp. to Mot. of Defs. to Dismiss ("Pl.'s Resp.")) Because these motions present different arguments for dismissal, Defendants' motions are considered separately.

failed to set forth factual allegations giving rise to a claim under state law.

### **FDCPA Claims Against W&A**

#### *Statute of Limitations*

W&A first argues that Plaintiff's FDCPA claims are barred by the statute of limitations. Civil actions for violation of the FDCPA must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Plaintiff alleges two separate violations of the FDCPA (1) the filing of a lawsuit in state court, and (2) the post-discharge mailing of a dunning letter.

Courts disagree as to when the statute begins to run where the alleged violation is the filing of a lawsuit. Compare Johnson v. Riddle, 305 F.3d 1107, \*1113-15 (10th Cir. 2002) (holding that the statute of limitations begins to run only once a defendant has been served with notice of a lawsuit) with Naas v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997) (finding that the statute of limitations begins to run on the date a lawsuit is filed). We need not resolve this discord, because Plaintiff's FDCPA claims were filed more than one year from either of the dates suggested in these cases. The instant suit was filed on November 2, 2005. The State Court Complaint was filed on February 17, 2004, personal service was made on March 2, 2004, and a default judgment was entered on April 12, 2004. Thus, even counting from the entry of default, Plaintiff's Complaint was

filed long after the statute of limitations had run. Plaintiff's FDCPA claims based on the State Court Complaint must therefore be dismissed.

The alleged dunning letter, however, was dated July 7, 2005. (Pl.'s Resp. Ex. B.) Thus, the FDCPA statute of limitations had not yet run when the instant action was filed, and Plaintiff's FDCPA claim based on the letter is not barred by the statute of limitations.

#### *Bankruptcy Preemption*

W&A argues that Plaintiff's FDCPA claims, to the extent they are based upon the alleged dunning letter, are preempted by the protections of the Bankruptcy Code. It is undisputed that Plaintiff's remaining claim - that W&A sent her a dunning letter subsequent to her Chapter 7 bankruptcy discharge - is based on an alleged violation of the discharge injunction under 11 U.S.C. § 524. (Pl.'s Resp. at ¶¶ IV.B, IV.A.)

The Ninth Circuit addressed this specific issue in Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509-10 (9th Cir. 2002). In Walls, a debtor sued her mortgage company for its post-discharge collection attempts. Id. at 504. The debtor asserted that she had the right to sue for violation of the §524 discharge injunction and for violation of the FDCPA. Id. The Walls court determined that § 524 does not - implicitly or through the enforcement provisions of 11 U.S.C. § 105(a) - give rise to any private right of action. Id. at 507-509. The court further

found that, because § 524 does not provide a private right of action, a debtor cannot bring an FDCPA claim based on post-discharge collection attempts because “[t]o permit a simultaneous claim under the FDCPA would allow through the back door what Walls cannot accomplish through the front door -- a private right of action.” Id. at 509-10.

The Third Circuit has not addressed the specific issue of whether the Bankruptcy Code preempts an FDCPA claim. The Third Circuit has, however, explicitly approved of the reasoning of Walls, and extended that reasoning to an attempt to bring a private action based on a violation of 11 U.S.C. § 506(b). In re Joubert, 411 F.3d 452, 456 (3d Cir. 2005) (noting with regards to Walls and other cases declining to imply a private right of action under § 524, that “[w]e agree with the reasoning of these cases”). Because the Third Circuit has clearly adopted the reasoning of Walls, we see no reason to allow an FDCPA claim access to this Court “through the back door” where Walls would not. Plaintiff’s FDCPA claim against W&A is, therefore, preempted by the Bankruptcy Code and must be dismissed.

#### **State Law Claims Against W&A**

In light of our determination that Plaintiff’s Complaint fails to state a valid claim against either W&A or MBNA (see infra) under federal law, we decline to exercise supplemental jurisdiction over Plaintiff’s state law claims asserted under the PFCEUA and PCPUTPL. 28 U.S.C. § 1367(c)(3).

### **MBNA's Motion to Dismiss**

MBNA seeks dismissal of both Plaintiff's FDCPA claims and her state law claims under the PFCEUA and PCPUTPL. MBNA argues that the FDCPA does not apply because MBNA is a creditor, not a debt collector. MBNA also asserts that Plaintiff has not stated any cognizable claim under the state statutes.

### **FDCPA Claims Against MBNA**

MBNA argues that Plaintiff's claims under the FDCPA must be dismissed because MBNA is not a "debt collector" under the FDCPA and is therefore beyond the scope of the statute. MBNA correctly notes that Plaintiff does not allege that MBNA attempted to collect the debt of another. (MBNA's Mem. of Law in Supp. of Mot. to Dismiss at 4.) Collecting the debt of another is not, however, the only means by which one becomes a debt collector under the FDCPA.

The FDCPA defines "debt collector" generally as

. . . any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). The definition of "debt collector" also specifically includes "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." Id. Thus, courts have interpreted the definition of "debt collector" to apply to a creditor collecting

its own debts when either (a) the principal purpose of the creditor's business is the collection of debts or (b) a creditor uses a different name in collecting its own debts that misleadingly indicates the involvement of a third party. See, e.g., Ray v. Citibank (South Dakota), N.A., 187 F. Supp. 2d 719, 722 (W.D. Ky. 2001).

Plaintiff does not allege that the principal purpose of MBNA's business is the collection of debts. Plaintiff, in fact, makes no claims with regards to the nature of MBNA's business, despite the fact that Plaintiff does so with regards to W&A.<sup>5</sup> Courts generally do not consider debt collection to be the "principal purpose" of a credit card company such as MBNA. See Flamm v. Sarnier & Associates, P.C., Civ. A. No. 02-4302, 2002 U.S. Dist. LEXIS 22255, \* 9-12 (E.D. Pa. 2002) (discussing the high level of involvement and control necessary for a creditor to be a "debt collector" under the FDCPA); Ray, 187 F. Supp. 2d at 722; see also DiPrinzio v. MBNA America Bank, N.A., Civ. A. No. 04-872, 2005 U.S. Dist. LEXIS 18002, \*32 n.11 (E.D. Pa. Aug. 24, 2005) (noting that MBNA is not a "debt collector" under the FDCPA). Thus, Plaintiff cannot establish that MBNA's principal purpose is the collection of debts.

Plaintiff does not allege that MBNA acted under any misleading name in attempting to collect its own debt.

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<sup>5</sup>Plaintiff's Complaint presents only two parties; Plaintiff, and W&A. (Pl.'s Compl. at ¶¶ 3, 4.)

Plaintiff's claims set out two allegedly wrongful collection actions - (1) the filing of the State Court Complaint and (2) W&A's mailing of a dunning letter after Plaintiff's debt was discharged through her Chapter 7 bankruptcy case. The State Court Suit was filed on behalf of "MBNA America Bank, N.A." as plaintiff - the same name used during arbitration, in the credit card agreement, and by Plaintiff in her bankruptcy filings. (Pl.'s Compl. Ex. A, Debtor's Am. Schedule F, In re Jones, No. 04-31346 (E.D. Pa. Bankr. Nov. 1, 2004).) Plaintiff's accusations regarding the dunning letter refer only to actions of W&A in collecting MBNA's debt, and not to MBNA's attempts to collect its own debt. Because, based on Plaintiff's own evidence, the actions alleged to be attributable to MBNA's collection of its own debts were clearly taken in MBNA's name, Plaintiff cannot support an allegation that the allegedly illegal collection actions were taken under a different and misleading name.

Because MBNA is neither a debt collection business nor a creditor using a different and misleading name, MBNA is not a "debt collector" under the FDCPA and Plaintiff's FDCPA claim against MBNA must be dismissed.<sup>6</sup>

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<sup>6</sup>Furthermore, because MBNA is not itself a "debt collector," it is not subject to vicarious liability under the FDCPA for actions of its attorneys. See Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 404 (3d Cir. 2000) (finding that the client of an attorney who is a debt collector may be vicariously liable under the FDCPA for the actions of that attorney where the client is itself a debt collector under the FDCPA).

### **State Law Claims Against MBNA**

In light of our determination that Plaintiff's Complaint fails to state a valid claim against either MBNA or W&A under federal law, we decline to exercise supplemental jurisdiction over Plaintiff's state law claims asserted under the PFCEUA and PCPUTPL. 28 U.S.C. § 1367(c)(3).

For all of the reasons set forth above, Defendants' motions to dismiss are granted pursuant to the attached order.

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 MBNA AMERICA BANK, N.A. :

ORDER

AND NOW, this 31st day of January, 2006, upon consideration of the Defendants' Motions to Dismiss Plaintiff's Complaint (Docs. No. 2 and 3), and all responses in opposition and support thereof (Docs. No. 6, 7, and 8), it is hereby ORDERED that both motions are GRANTED and Plaintiff's Complaint is DISMISSED.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.