

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

AMY B. LANDGRAFF	:	CIVIL ACTION
	:	
v.	:	
	:	
GEMB a/k/a GEMB/BEST BUY a/k/a GEMB/BEST BUYS and GEMB/JC PENNEY a/k/a GEMB/JCP	: : : :	NO. 06-1703
NORMA L. SHAPIRO, S.J.		APRIL 10, 2007

MEMORANDUM AND ORDER

This is a Fair Credit Reporting Act (“FCRA”) action filed by plaintiff, Amy B. Landgraff (“Landgraff”), against defendants GEMB and GEMB/JC Penney (collectively “GEMB”). Landgraff has filed a motion to amend her complaint to assert a class action against GEMB. For the following reasons, the motion to amend will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2006, plaintiff Amy B. Landgraff (“Landgraff”) filed a complaint against defendants Trans Union, LLC, Equifax Information Services LLC, Experian Information Services, Inc., GEMB, GEMB/JC Penney, WFNNB/Lane Bryant, claiming violations of FCRA, 15 U.S.C. § 1681, *et seq.* Defendants Trans Union, LLC, Equifax Information Services LLC, Experian Information Services, Inc., and WFNNB/Lane Bryant have all been dismissed pursuant to Local Rule 41.1(b). Only GEMB remains in this action as defendant.

In her complaint, Landgraff avers that her consumer credit reports contain inaccurate information. (Compl. ¶¶ 11-14.) According to Landgraff, she disputed this inaccurate information with GEMB, but GEMB failed to conduct timely and reasonable investigations regarding her disputes, continued to report the inaccurate information to credit reporting

agencies, did not report Landgraff's accounts as disputed, and failed to conduct reinvestigations. (Compl. ¶¶ 19-20.) Landgraff alleges violations of FCRA, 15 U.S.C. § 1681s-2(b), including GEMB's failure to investigate the inaccurate information that Landgraff disputed, and failure to provide credit reporting agencies with information that Landgraff submitted to GEMB.¹ (Compl. ¶ 38.)

The court scheduled the final day of discovery for March 15, 2007. On February 23, 2007, ten months after filing her original complaint, Landgraff filed a motion to amend/correct the complaint to assert a class action against GEMB and GEMB/JC Penney. No proposed amended complaint was attached to the motion.

In the motion to amend/correct the complaint, Landgraff asserted that on February 13, 2007, at the Fed.R.Civ.P. 30(b)(6) deposition of GEMB's representative, Martha Koehler, Landgraff learned for the first time that GEMB had a corporate-wide policy regarding accounts

¹ The Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b), states in relevant part:

“(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall –

- (A) conduct an investigation with respect to the disputed information; . . .
- (C) report the results of the investigation to the consumer reporting agency;
- (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
- (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly –
 - (i) modify that item of information;
 - (ii) delete that item of information; or
 - (iii) permanently block the reporting of that item of information . . .”

which GEMB had sold or transferred. (Mem. of Law in Supp. of Pl.'s Mot. for Leave to Amend

Compl. 2.) The most relevant portion of Martha Koehler's testimony follows:

- Q. If we are talking about the scenario now where an account was sold, but GE Money Bank does have notes on its computer database entered there by a vender or by GEMB's own associate that that account has been included in a bankruptcy, what will the associate who's handling the ACDV do in responding to that ACDV where the consumer says it's included in a bankruptcy, you should update it?
- A. And we are talking about the scenario where the bankruptcy filing date is after the sale date; is that correct?
- Q. Yes.
- ...
- A. Okay. The appropriate response would be to verify the status, when I was talking about that account historical information, would be to verify that we are reporting the account as sold or transferred.
- ...
- Q. So in that scenario that you just testified about, you're telling me that the appropriate response would be not to include the account in bankruptcy, but that the account was sold; is that correct?
- A. Correct.
- ...
- Q. But for that type of scenario, the accurate reporting, according to GE Money Bank, would not be to update the account to be included in bankruptcy?
- A. No, not if the bankruptcy filing date was after the sale date. That's correct.
- Q. All right. If the bankruptcy date was before the sale date, you're telling me that the accurate response to that dispute would be to say that it's included in bankruptcy?
- A. Well, that entails a different scenario.
- Q. Right. When the scenario is different and an account is not sold, or certainly not sold before a bankruptcy, what is the proper response to that ACDV dispute?
- A. Well, then some additional research would need to be done if our records did not have a note input by one of our vendors who handles our bankruptcy petitions. In other words, if we didn't have records that the customer had filed bankruptcy, but the ACDV is received that says the account should be reflecting a status of included in bankruptcy, then some additional research would need to be done.

(Koehler Dep. 105:3-109:2, Feb. 13, 2007.)

Based on this deposition testimony, Landgraff argues that under GEMB's policy, GEMB does not investigate disputes regarding sold or transferred accounts, but instead informs credit reporting agencies that the account has been "sold" or "transferred." (Mem. of Law in Supp. of Pl.'s Mot. for Leave to Amend Compl. 2.) Landgraff also argues that GEMB's policy is to refuse to mark accounts as "included in bankruptcy," despite GEMB's own records showing the accounts were discharged in bankruptcy. *Id.* at 4. Landgraff alleges that because GEMB acted pursuant to a policy, and because GEMB sells accounts in bulk, "[t]here could be no doubt that hundreds and probably thousands of similarly situated consumers are also subjected to this unlawful practice." *Id.* Landgraff requests an additional ninety (90) days of class certification discovery. *Id.* at 1.

On March 9, 2007, Landgraff filed a supplemental submission to her motion to amend. The supplemental submission included a proposed amended complaint asserting a class action claim under FCRA, 15 U.S.C. § 1681s-2(b). The proposed amended complaint clarified Landgraff's factual allegations: GEMB issued Landgraff two credit cards for use at Best Buy and JC Penney; GEMB reported Landgraff's credit information with consumer reporting agencies; GEMB then sold or transferred Landgraff's credit card accounts to one or more third party creditors; GEMB continued to provide information concerning Landgraff's credit cards to consumer reporting agencies; on June 2, 2004, Landgraff discharged her Best Buy and JC Penney credit card obligations in bankruptcy; GEMB entered Landgraff's bankruptcy in its computer databases; GEMB received notices from consumer reporting agencies that Landgraff disputed the accuracy of GEMB's reporting; GEMB responded that Landgraff's accounts had been "sold" or "transferred" rather than reporting them "included in bankruptcy." (Supplemental Submission in

Further Supp. of Mot. Leave Amend Compl., Ex. B ¶¶ 6-17.)

Landgraff's proposed class consists of:

"All persons in the United States and its territories, beginning two years prior to the filing of the original Complaint in this matter and continuing through the time of judgment of this action for whom:

- (a) GEMB received an ACDV dispute through any consumer reporting agency disputing the reporting of a GEMB account discharged through bankruptcy; and
- (b) GEMB responded to that ACDV dispute to the consumer reporting agency that the disputed account has been sold or transferred without also noting that the account was 'included in bankruptcy,' even though GEMB's records reflected that the disputed account was included in a bankruptcy."

(Supplemental Submission in Further Supp. of Mot. Leave Amend Compl., Ex. B ¶ 29.)

Landgraff claims this case should be maintained as a class action because: (1) based upon information and belief, the class will number in the hundreds if not thousands; (2) questions of law and fact common to the class predominate because the principal question is whether GEMB violated FCRA, 15 U.S.C. § 1681s-2(b), by failing to comply with investigation requirements; (3) Landgraff's claims are typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories; and (4) Landgraff "is committed to vigorously litigating this matter" and "has retained counsel highly experienced in class action litigation." (Supplemental Submission in Further Supp. of Mot. Leave Amend Compl., Ex. B ¶¶ 30-33.)

In GEMB's answer to Landgraff's motion to amend her complaint, GEMB argues the proposed amendment would be futile because Landgraff's claim fails as a matter of law. GEMB also filed a motion for judgment on the pleadings or, in the alternative, for summary

judgment, on the ground that it had no legal obligation to report Landgraff's bankruptcy because it occurred after GEMB sold Landgraff's accounts. (Mem. in Supp. of Def.'s Mot. J. Pleadings 6.)

II. DISCUSSION

Generally, under Fed.R.Civ.P. 15(a), a party may amend its pleading by leave of court, and "leave shall be freely given when justice so requires." If the underlying facts or circumstances relied upon by plaintiff may be a proper subject for relief, she should be afforded an opportunity to test her claim on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962). But if there is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of the amendment, then leave to amend shall not be freely given. See id. Where a proposed amendment to assert a class action fails to allege facts from which the court could reasonably infer the mandatory prerequisites of Fed.R.Civ.P. 23(a) have been met, the motion for leave to amend should be denied. See Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1033 (6th Cir. 1992); see also Dong v. Board of Educ. of Rochester Cmty. Sch., 197 F.3d 793, 804 (6th Cir. 1999). Under Fed.R.Civ.P. 23(a), a class action may be maintained only if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

In Smith, plaintiff claimed defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, in part because defendant sent him two computer-generated

collection letters that demanded an amount in excess of the amount actually owed, and falsely affiliated defendant with the state of Ohio. Smith, 953 F.2d at 1027. Plaintiff filed a motion for leave to add a class action claim. He argued that because defendant's forms were computer generated: (1) "hundreds, if not thousands" of consumers were recipients of the forms; (2) there were common questions of law and fact because the forms were all of the same "boilerplate" language; (3) his claims and defenses were typical of those of the class because the proposed class members must have received the same types of correspondence from the defendant under the same circumstances; and (4) he would fairly and adequately protect the interests of the class, and has retained competent class counsel. Id. at 1033. The Sixth Circuit Court of Appeals found plaintiff's motion to amend was properly denied because the proposed amendment failed to allege facts from which the district court could reasonably infer that the mandatory prerequisites of Fed.R.Civ.P. 23(a) had been met. Id.

Landgraff claims there are common questions of law and fact because the principal question is whether GEMB violated 15 U.S.C. § 1681s-2(b), and her claims were typical of the class claims because they arise from the same operative facts and are based upon the same legal theories. The putative class consists of all individuals, from two years prior to the filing of Landgraff's original complaint to the time of judgment, for whom: "(a) GEMB received an ACDV dispute through any consumer reporting agency disputing the reporting of a GEMB account discharged through bankruptcy; and (b) GEMB responded to that ACDV dispute to the consumer reporting agency that the disputed account has been sold or transferred without also noting that the account was 'included in bankruptcy,' even though GEMB's records reflected that the disputed account was included in a bankruptcy." But the individual circumstances of the sale

of accounts differ among the putative class members. The language encompassing the putative class includes both individuals whose accounts were discharged in bankruptcy before they were sold by GEMB, *and* individuals, like Landgraff, whose accounts were sold by GEMB before they were discharged in bankruptcy. The differences in these two circumstances are relevant to the merits of this action. It will be necessary for this court to consider whether a furnisher of information has the legal duty to investigate and report discharge in bankruptcy with respect to accounts sold to third parties before they were discharged in bankruptcy; this is distinct from any legal duty of a furnisher of information to investigate and report discharge in bankruptcy with respect to accounts that were discharged in bankruptcy before they were sold to third parties. Moreover, the deposition testimony of Martha Koehler reveals that GEMB distinguishes among individuals whose accounts were sold before they were discharged in bankruptcy, and individuals whose accounts were discharged in bankruptcy before they were sold: GEMB reports the former accounts as “sold” or “transferred,” but conducts further research for the latter accounts. Common questions of law and fact do not predominate, Landgraff’s claims are not typical of the claims of the entire class, and Landgraff would not fairly and adequately protect the interests of the entire class. The court cannot reasonably infer that the mandatory prerequisites of Fed.R.Civ.P. 23(a) have been met.

GEMB’s motion for judgment on the pleadings or, in the alternative, for summary judgment, is not yet ripe for decision.

III. CONCLUSION

Landgraff’s motion to amend/correct her complaint to assert a class action claim against GEMB will be **DENIED**.

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GEMB/BEST BUYS and GEMB/JC	:	
PENNEY a/k/a GEMB/JCP	:	NO. 06-1703

ORDER

AND NOW, this 10th day of April, 2007, upon consideration of plaintiff's motion to amend/correct complaint and defendants' response, for the reasons stated in the accompanying memorandum, it is **ORDERED** that plaintiff's motion to amend/correct complaint (paper no. 35) is **DENIED**.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.