

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

<hr/> <b>SIMONA ROBINSON,</b>	:	
<b>Plaintiff,</b>	:	
	:	<b>CIVIL ACTION</b>
<b>v.</b>	:	
	:	<b>NO. 12-151</b>
<b>PHELAN, HALLINAN &amp; SCHMIEG, LLP</b>	:	
<b>Defendant.</b>	:	
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**ORDER**

Presently before the Court are Defendant Phelan, Hallinan & Schmieg LLP (“Phelan”)’s Motion to Dismiss the First Amended Complaint and Plaintiff Simona Robinson’s Motion for Leave to Amend Complaint, which requests leave to file a Second Amended Complaint.

**I. FACTUAL AND PROCEDURAL HISTORY**

In the proposed Second Amended Complaint, Robinson alleges the following facts. In 2003, GMAC Mortgage (“GMAC”) was the servicer of a mortgage on Robinson’s home, on which Plaintiff defaulted. In December 2003, GMAC filed a foreclosure action against Robinson in the Philadelphia Court of Common Pleas (the “Foreclosure Action”). In September 2005, Plaintiff filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania (the “Bankruptcy Court”). Defendant Phelan represented GMAC in both the Bankruptcy Court and the Foreclosure Action.

In March 2011, while Robinson’s bankruptcy remained pending, GMAC filed a stipulation of default in the Bankruptcy Court alleging that Robinson had failed to make her February and March 2011 payments. On March 17, 2011, Phelan sent Robinson a letter stating that Robinson’s failure to make her February and March 2011 payments had placed her in default. Robinson emerged from bankruptcy in July 2011 and made her monthly payments for

the period of February through August 2011, although her payments were often untimely. On September 8, 2011, GMAC returned Robinson's payments for February through August 2011 on the grounds that these payments were less than the amount that Phelan had determined was necessary to reinstate Robinson's mortgage.

On September 21, 2011, at Robinson's request, Phelan sent Robinson a letter stating that her mortgage was in arrears from September 2010 onward, and therefore 14 monthly payments were required to reinstate the loan (the "September Letter"). The September Letter also stated that Robinson was required to pay an additional \$3,636.55 in costs and fees to bring the loan current.<sup>1</sup> On October 5, 2011, Robinson's counsel sent Phelan an email making three allegations: 1) Robinson had made her payments for February through August 2011, accompanied by proof of her payments from March through August 2011; 2) the Foreclosure Action docket did not contain any activity to justify Phelan's request for \$3,636.55 in costs and fees; and 3) Phelan had mistakenly accused Robinson of being in default of her post-petition mortgage obligations numerous times during the bankruptcy. On November 17, 2011, again at Robinson's request, Phelan sent Robinson a letter (the "November letter") stating that 16 monthly payments were required to reinstate Robinson's mortgage.

On January 12, 2012, Robinson filed a complaint against GMAC and Phelan in this Court, alleging violation of the FDCPA and state law against all parties, and a Real Estate Settlement Procedures Act ("RESPA")<sup>2</sup> claim against GMAC. Robinson subsequently filed a first amended complaint raising the same claims. Phelan then filed the motion to dismiss the first amended complaint now at issue, which, *inter alia*, raised a statute of limitations defense. Shortly thereafter, the Court received notice of GMAC's bankruptcy and, on August 9, 2012, the Court

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<sup>1</sup> Exh. 1 to Proposed Second Am. Compl.

<sup>2</sup> 12 U.S.C. § 2601 *et seq.*

stayed this case pending resolution of the GMAC bankruptcy. On June 4, 2014, Robinson filed a motion pursuant to Federal Rule of Civil Procedure 41(a) to dismiss GMAC from the case by agreement of the parties and the Court subsequently ordered that the case be returned to active status.

On July 8, 2014, Robinson moved for leave to file an amended complaint in order to address Phelan's statute of limitations defense and remove GMAC as a defendant.<sup>3</sup> For the purposes of the motion, Robinson states that the sole basis for her FDCPA claim is the September Letter.<sup>4</sup> The proposed second amended complaint alleges that the September Letter constitutes a false representation of the character, amount or legal status of a debt in violation of 15 U.S.C. § 1692e(2)(A) and unfair or unconscionable means to collect a debt in violation of 15 U.S.C. § 1692f. The proposed second amended complaint further contends that Phelan engaged in abuse of process in the Foreclosure Action by mailing the September and November 2011 Letters and by "continuing the foreclosure action of record."<sup>5</sup> Phelan opposes amendment on futility grounds.

## **II. STANDARD OF REVIEW**

The standards of review for Phelan's Motion to Dismiss the First Amended Complaint and Robinson's Motion to Dismiss are closely related. Under Rule 15(a)(2), leave to amend should be "freely give[n] when justice so requires." Leave to amend may be denied on grounds

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<sup>3</sup> Following Phelan's initial response, Robinson filed a praecipe to file a new proposed second amended complaint that removed GMAC and the RESPA claim against it. Phelan was subsequently granted leave to file a sur-reply brief and made no objection to the filing of the new proposed second amended complaint. Thus, this Court will treat the proposed second amended complaint filed with the praecipe as the operative complaint for the purposes of Robinson's motion for leave to amend.

<sup>4</sup> See Pl.'s Mot. for Leave to Amend Compl. at ¶ 4-6.

<sup>5</sup> Proposed Second. Am. Compl. at ¶ 56.

including undue delay, bad faith, dilatory motive, prejudice, and futility.<sup>6</sup> Amendment is futile when “the complaint, as amended, would fail to state a claim upon which relief could be granted.”<sup>7</sup> Futility is assessed using the same standard applied in the face of a motion to dismiss under Rule 12(b)(6).<sup>8</sup> An adequate complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief”<sup>9</sup> and states facts sufficient to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>10</sup> The complaint contains sufficient factual matter when, if those facts are accepted as true, the complaint states “a claim to relief that is plausible on its face.”<sup>11</sup> In deciding a motion to dismiss, the Court may consider exhibits attached to the complaint as well as the allegations of the complaint itself.<sup>12</sup>

### III. DISCUSSION

The Court will consider Robinson’s motion for leave to amend first, because it may render Phelan’s motion to dismiss moot.

#### A. FDCPA Claim

Debt collectors must comply with the overlapping protections of §§ 1692e(2)(A) and 1692f when interacting with consumers. Section 1692e(2)(A) prohibits debt collectors from making any “false representation of the character, amount or legal status of any debt.” False

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<sup>6</sup> *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000).

<sup>7</sup> *Id.* (internal quotations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

<sup>10</sup> Fed. R. Civ. P. 8(a)(2).

<sup>11</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

<sup>12</sup> *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

representations as to the amount of a debt may include false representations that fees are owed.<sup>13</sup> In order to violate the FDCPA, a false statement must have the effect of confusing, misleading, or deceiving the least sophisticated debtor.<sup>14</sup> Section 1692f prohibits the use of any unfair practice in debt collection, including the attempt to collect any fee unless “expressly authorized by the agreement creating the debt or permitted by law.”<sup>15</sup>

The proposed second amended complaint sufficiently alleges that the September Letter was a false statement of Robinson’s repayment obligations and an unfair collection practice. The allegation that in March 2011 Phelan earlier represented to Robinson that she had defaulted starting in February, only seven months before the September Letter, permits a plausible inference that the September Letter’s statement that Robinson owed 14 monthly payments was false. In addition, the allegation that the docket of the Foreclosure Action did not reflect any activity to justify \$3,636.55 in costs and fees permits a plausible inference that the September Letter falsely stated the amount of fees that Robinson owed and that Phelan was not entitled to collect these costs and fees. Leave to amend the FDCPA claim will therefore be granted.<sup>16</sup>

#### *B. Abuse of Process*

“To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process

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<sup>13</sup> *Martsof v. JBC Legal Group, P.C.*, 2008 WL 275719 at \*7 (M.D. Pa. Jan. 30, 2008).

<sup>14</sup> *Brown v. Card Service Center*, 464 F.3d 450, 454 (3d Cir. 2006) (holding that least sophisticated debtor standard applies to all lender-debtor communications under the FDCPA).

<sup>15</sup> 15 U.S.C. § 1692f(1).

<sup>16</sup> Although Phelan acknowledges that the Third Circuit has not held that misstatements must be material in order to be actionable under the FDCPA, Phelan contends that leave to amend should be denied because any misstatements contained in the September Letter are merely “technically false” because Robinson was aware that the September 2011 Letter was false. Def.’s Mem. In Opp. at 7. Phelan relies upon district court cases dismissing an FDCPA claim alleging that collection notice was technically false in some trivial respect, such as naming the wrong Court Clerk. *See, e.g., Jensen v. Pressler & Pressler, LLP*, 2014 WL 1745042 at \*5 (D.N.J. Apr. 29, 2014). Regardless of Robinson’s knowledge, the alleged misstatement of the amount of a debt by thousands of dollars, however, is no mere technicality and Phelan’s argument is therefore without merit.

was not designed; and (3) harm has been caused to the plaintiff.”<sup>17</sup> In order to show “use” of process, the plaintiff must allege “some definite act or threat not authorized by the process.”<sup>18</sup> Under Pennsylvania law, actionable process “includes the entire range of procedures incident to the litigation process,” such as “discovery proceedings, the noticing of depositions and the issuing of subpoenas.”<sup>19</sup> As these examples illustrate, the tort of abuse of process is therefore limited to “misuse of *the court’s power* of process” and therefore “[a]ctions taken without the use of the court’s process power fail to state a claim.”<sup>20</sup>

Robinson contends that Phelan took two actions in the Foreclosure Action that constitute abuse of process because they were designed to extort mortgage payments and fees to which Phelan was not entitled: 1) mailing the September and November Letters; and 2) “continuing the foreclosure action of record.”<sup>21</sup> The September and November Letters, read in the light most favorable to Robinson, are merely offers by Phelan to reinstate Robinson’s mortgage if she pays the specified amounts.<sup>22</sup> The September and November Letters therefore are not “process” in the sense required for an abuse of process claim because the Letters do not purport to use the court’s power in any fashion.

The facts as plead in the second proposed amended complaint permit a plausible inference that continuing the Foreclosure Action of record was abuse of process. In order for

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<sup>17</sup> *Rosen v. Am. Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. Ct. 1993).

<sup>18</sup> *Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Super. Ct. 1998) (internal quotations omitted).

<sup>19</sup> *Rosen*, 627 A.2d at 192 (internal quotations omitted).

<sup>20</sup> *Morris v. Scardelletti*, 1994 WL 675461 at \*11 (E.D. Pa. Nov. 23, 1994) (emphasis added); see also *Restatement (Second) of Torts* § 682, Reporter’s Note (citing *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17 (E.D. Tenn. 1972) *aff’d* 477 F.2d 598 (6th Cir. 1973); *Barquis v. Merchants Collection Ass’n*, 496 P.2d 817 (Cal. 1972) (holding that a complaint knowingly filed in an inconvenient venue is actionable process); *Jones v. Brockton Public Markets, Inc.*, 340 N.E.2d 484 (Mass. 1975)).

<sup>21</sup> Proposed Second Am. Compl. at ¶ 56.

<sup>22</sup> See Exh. 1, 3 to Proposed Second Am. Compl.

continuing to pursue the Foreclosure Action to be an act not authorized by the foreclosure process, Phelan had to be under a legal obligation to dismiss the Foreclosure Action. The October 5, 2011 email from Robinson's counsel informed Phelan that Robinson had made the payments due from February 2011, the date of her purported default, until August 2011, and provided evidence of these payments. Although far from conclusive, the October 5, 2011 email is sufficient to permit a plausible inference that Phelan had no good faith basis to continue the Foreclosure Action.

Phelan contends that the allegation that Phelan "continued the foreclosure allegation of record" is insufficient as a matter of law because "[a]n attorney cannot be liable for doing more than carrying out the process to its authorized conclusion."<sup>23</sup> However, for the same reasons that the October 5, 2011 email permits a plausible inference that Phelan had no good faith basis to continue the Foreclosure Action, the October 5, 2011 email permits a plausible inference that Phelan was attempting to extract funds from Robinson in a manner unauthorized by the foreclosure process. Leave to amend will therefore be granted.

#### IV. CONCLUSION

For the reasons stated above, Robinson's motion for leave to file a second amended complaint will be granted. Because Robinson will be granted leave to file a second amended complaint, Phelan's pending motion to dismiss the first amended complaint will be dismissed as moot.

**AND NOW**, this 25<sup>th</sup> day of March 2015, upon consideration of Plaintiff's Motion for Leave to Amend Complaint [Doc. No. 59], and Defendant's Motion to Dismiss the Amended Complaint [Doc. No. 10], it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**. The

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<sup>23</sup> *Hart v. O'Malley*, 647 A.2d 542, 553 (Pa. Super. Ct. 1994).

Clerk of Court shall **FILE** the proposed second amended complaint attached to Robinson's praecipe [Doc. No. 62-1] as a separate entry on the docket.

It is further **ORDERED** that Defendant's Motion is **DISMISSED** without prejudice as **MOOT**. Defendant shall **ANSWER** or otherwise respond to the Second Amended Complaint within 21 days of the date of this Order.

It is so **ORDERED**.

**BY THE COURT:**

*/s/ Cynthia M. Rufe*

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**CYNTHIA M. RUFÉ, J.**