

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

JANET LAWRENCE NELSON,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 97-3503
	:	
FIRST CARD, d/b/a	:	
FCC NATIONAL BANK, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

MARCH 9, 1998

Before this Court is Defendant First Card's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This case involves claims arising from a credit card debt allegedly owed to First Card by the Plaintiff. For the reasons that follow, First Card's Motion will be granted in part and denied in part.

Background

The Plaintiff, Janet Lawrence Nelson, married her first husband, George E. Lawrence, Jr., in 1970. Prior to marrying the Plaintiff, Lawrence had a BankAmericard credit card account. After their marriage, Lawrence claims he had the Plaintiff added to the BankAmericard account and that the Plaintiff also carried her own charge plate for the account. The Plaintiff does not recall whether or not this is correct. Eventually, the BankAmericard became a Visa account, and the issuer of the

account was First Card.

The billing statements produced by Lawrence and First Card contain the names of both Lawrence and the Plaintiff. Lawrence and the Plaintiff agree that they both paid the bills from First Card. During their marriage, the couple obtained joint accounts from other credit issuers, including two MasterCard accounts.

The Plaintiff and Lawrence separated in August of 1986. Use of the First Card account essentially ceased at that time, with only a single charge made on the account after the separation. As of November 15, 1987, the outstanding balance on the First Card account was \$4,589.59. Interest continued to accrue on the balance at the annual interest rate of 19.8%.

The Plaintiff and Lawrence did not formally divorce until March of 1989. They entered a divorce agreement dividing their obligations. A section of the Divorce Agreement entitled "Cooperation As To Credit Cards" provided:

The parties agree that Husband [George Lawrence] shall assume payment of the Visa, MasterCard, Wanamaker, Strawbridge & Clothier and Gulf credit card debts in full. Wife [Janet Lawrence Nelson] will assume payment of the Sears, J.C. Penney and Discover credit card debts in full. Husband and wife shall each take all necessary steps to have the other party's name removed from the credit card accounts for which he or she is not liable.

(Def.'s Mot. Summ. J. Ex. F.) The only Visa account owned by the couple was the First Card account. Lawrence made a telephone

inquiry to First Card about having the Plaintiff's name removed from the account, but was told that a divorced spouse could only be removed from an account after the outstanding balance had been paid.

By May, 1990, the balance on the First Card account had grown to over \$4,700, as no payments had been made in some time. In July of 1990, First Card sent a notice to the Plaintiff and Lawrence that the account would be charged off as a bad debt, and that collection or further legal action would be taken if the overdue balance was not paid. No payments were made on the account after this notice was sent.

In June of 1995, the Plaintiff received a letter from the Law Office of Mitchell N. Kay ("Kay") attempting to collect the First Card account. The Plaintiff sent a letter in response stating that, based upon her divorce agreement, Lawrence was responsible for the debt. She also requested verification of the debt. In response, Kay sent her a copy of the First Card bill from August of 1990. The Plaintiff suggested that Kay contact Lawrence.

Several months later, the Plaintiff applied for a credit card from MBNA America Bank. MBNA rejected the Plaintiff's application based on a history of delinquency with creditors. On inquiring, the Plaintiff learned from MBNA that there were negative reports on her credit report from First Card

as well as two other banks. Nevertheless, approximately eight months later, the Plaintiff obtained a credit card account with another issuer.

The Plaintiff brought this action seeking declaratory and injunctive relief, as well as damages for defamation, violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), and against three credit reporting agencies under the Fair Credit Reporting Act. First Card now moves for summary judgment on all claims.

Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this case, the Plaintiff, as the

nonmoving party, is entitled to have all reasonable inferences drawn in her favor. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991).

Discussion

Unfair Trade Practices

The Plaintiff contends that by attempting to collect the credit card debt from the Plaintiff, First Card violated the UTPCPL because the debt was unenforceable and collection was attempted through "out-of-state counsel." (Compl. ¶ 40.) The UTPCPL provides a private action for "Any person who . . . suffers any ascertainable loss of money or property . . . as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act [pertaining to "unfair or deceptive acts or practices]." 73 P.S. § 201-9.2(a). The Plaintiff must show that the Defendant violated the UTPCPL and that as a result, the Plaintiff sustained actual, damages. The damages must be out-of-pocket losses, as recovery for emotional distress is not permitted under the UTPCPL. In re Bryant, 111 B.R. 474, 479 (Bankr. E.D. Pa. 1990); In re Clark, 96 B.R. 569, 582-83 (Bankr. E.D. Pa. 1989).

Proceeding on the assumption that First Card engaged in acts prohibited by the UTPCPL, the Plaintiff's claim is deficient. The Plaintiff argues that she made a long distance

telephone call to Kay in response to the collection attempt. But the Plaintiff offers no support for the allegation that she was forced to pay for this call. Indeed, in the Plaintiff's Answers to First Card's Interrogatories and Document Requests, she states that the only item of special damages is psychological counseling. (Reply To Pl.'s Answer To Mot. Summ. J. Ex. F.) Further, Kay's letter provides a toll-free telephone number for the office. Thus, even if the Plaintiff had produced evidence of a long distance telephone call, she has not established that such expenses were caused by the Defendants. Therefore, the Plaintiff has failed to establish any financial or property losses compensable under the statute due to the actions of Kay, and cannot recover under the UTPCPL.

Defamation

First Card argues that the Plaintiff's defamation claim fails because any statements made by First Card regarding the Plaintiff were true. First Card contends that Illinois law should apply to the Plaintiff's defamation claim, while the Plaintiff argues in favor of Pennsylvania law. For purposes of this Motion, I do not find it necessary to make a determination as to the applicable law because both states recognize truth as a defense to defamation. See Fort Washington Resources, Inc. v. Tannen, 901 F. Supp. 932, 942 (E.D. Pa. 1995) (stating that truth is a defense to defamation under Pennsylvania law); Lemons v.

Chronicle Publ'g Co., 625 N.E.2d 789, 791 (Ill. App. 1993) (stating that Illinois recognizes truth as a defense to a defamation action).

Alternatively, First Card argues that any statements it made regarding the Plaintiff were privileged. As with the defense of truth, both Pennsylvania and Illinois recognize a conditional privilege when: (1) some interest of the publisher of the defamatory matter is involved; (2) some interest of the recipient of the matter, or a third party is involved; or (3) a recognized interest of the public is involved. See Elia v. Erie Ins. Exchange, 634 A.2d 657, 660 (Pa. Super. 1993); Gibson v. Philip Morris, Inc., 685 N.E.2d 638, 645 (Ill. App. 1997). If a communication was conditionally privileged, a plaintiff must show that the privilege was abused in order to recover. Under Pennsylvania law, the privilege may be abused if the defendant acted out of malice, if the statement was published to persons other than those needed to accomplish the purpose of the privilege, if the statement was published for other reasons than to accomplish the purpose of the privilege, if the statement contained unnecessary information, or if the statement was made negligently. Jones v. Hinton, 847 F. Supp. 41, 43 (E.D. Pa. 1994). Illinois, in contrast, requires reckless disregard of the plaintiff's rights or the consequences which may result to her. Gibson, 685 N.E.2d at 645. Both parties agree that the

statements here were conditionally privileged.

First Card contends that there is abundant evidence indicating that the Plaintiff was a joint owner of the First Card account. Alternatively, First Card argues that the Plaintiff has produced no evidence that First Card abused the conditional privilege. Plaintiff contests that the account was held jointly, and that First Card's reporting of this information amounts to an abuse of the conditional privilege. Drawing all reasonable inferences in favor of the Plaintiff, these material issues of fact preclude summary judgment on this claim.

Conclusion

In summary, because the Plaintiff is unable to establish any actual financial or property losses as a result of alleged violations of the UTPCPL, First Card's Motion will be granted with regard to the Plaintiff's claim for Unfair Trade Practices. As to all other claims, First Card's Motion will be denied.

An appropriate Order follows.

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

JANET LAWRENCE NELSON,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 97-3503
	:	
FIRST CARD, d/b/a	:	
FCC NATIONAL BANK, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 9th day of March, 1998, upon consideration of Defendant First Card's Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that:

1. the Motion is GRANTED in part and DENIED in part;
2. with regard to Count 3, First Card's Motion is GRANTED as to the claim based upon unfair trade practices;
3. with regard to Counts 1 and 2, First Card's Motion is DENIED.

BY THE COURT:

Robert F. Kelly,

J.