UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 09-9070-GW(AJWx) Date November 15, 2010

Title *Lourdes Jiminez v. Accounts Receivable Management, Inc.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Wil Wilcox	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs: Mahadhi Corzano

Attorneys Present for Defendants: Christopher D. Holt

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (filed 09/27/10)

Court hears oral argument. The tentative circulated is hereby adopted as the Court's final ruling (attached). Defendant's Motion for Summary Judgment is **granted.** Counsel for defendant will file a proposed judgment by November 19, 2010.

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Initials of Preparer JG

Jiminez v. Accounts Receivable, Inc., Case No. CV-09-9070
Tentative Ruling on Motion for Summary Judgment

INTRODUCTION

On December 10, 2009, Plaintiff Lourdes Jiminez ("Plaintiff") filed a Complaint against Defendant Accounts Receivable Management, Inc. ("ARM") alleging that ARM violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., and the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788 et seq., based on the following three categories of alleged violations: 1) that ARM repeatedly and continuously called Plaintiff with the intent to annoy, harass, and abuse her in violation of 15 U.S.C. § 1692d(5) and Cal. Civ. Code § 1788.11(d)-(e); 2) that ARM contacted Plaintiff and failed to provide meaningful disclosure of its identity or to disclose that the calls were from a debt collector in violation of 15 U.S.C. § 1692d(6) and Cal. Civ. Code § 1788.11(b) or used deceptive means to collect a debt in violation of 15 U.S.C. § 1692e(1); and 3) that ARM failed to provide appropriate notice of the debt within 5 days of its initial communication in violation of 15 U.S.C. § 1692g(a)(1)-(5).[1] In addition, Plaintiff alleged that ARM violated Cal. Civ. Code § 1788.17, which requires a debt collector to comply with certain provisions of the FDCPA.[2]

Defendant now moves for summary judgment as to all of Plaintiff's claims. For the following reasons, the Court's tentative ruling would be to grant summary judgment.

BACKGROUND

Notwithstanding some unnecessary bickering about Plaintiff's misidentification of a phone number at which she supposedly received some of the calls from Defendant, there is no significant dispute about the underlying facts of this case. Sometime at the beginning of 2008, Plaintiff opened the account at issue in this case (the "Account") with HSBC Card Services. Defendant's Statement of Uncontroverted Facts ("SUF") No. 1; Plaintiff's Statement of Genuine Issues of Material Fact ("SGI") No. 1. Sometime thereafter, Plaintiff incurred the debt at issue in this case ("Debt") by borrowing approximately $200 on the Account. SUF No. 2; SGI No. 2. In or about January 2009, Plaintiff stopped making payments on the Account. SUF No. 3; SGI No. 3. ARM caused three collection letters, dated July 6, 2009, August 5, 2009, and October 8, 2009,

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[1] Plaintiff indicates in her Opposition that she is no longer pursuing her claims under Section 1692g(a)(1-5) or "§ 1692e(11)" (sic).

[2] RFDCPA (Cal. Civ. Code at § 1788.17 states that "[n]otwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code." See Cal Civ Code § 1788.17. Plaintiff does not appear to dispute that if summary judgment is granted with respect to all of the alleged violations of the FDCPA in her Complaint, she cannot proceed under this section. "[I]f [defendants] haven't violated federal law, they haven't violated California law"). Chan v. N. Am. Collectors, Inc, 2006 U.S. Dist. LEXIS 13353 *5 (N.D. Cal Mar 24, 2006).

respectively, to be sent to Plaintiff. SUF No. 15. Those letters specifically informed Plaintiff of her rights under the FDCPA and the RFDCPA and that debt collectors: 1) "may not contact you before 8:00 a.m. or after 9:00 p.m.," 2) "may not harass you by using threats of violence or arrest or by using obscene language," 3) "may not use false or misleading statements," 4) may not "call you at work if they know or have reason to know that you may not receive personal calls at work," and 5) "may not tell another person, other than your attorney or spouse, about your debt." Id.

ARM first attempted to contact Plaintiff via telephone on July 7, 2009, and made its last attempt to contact Plaintiff via telephone some 115 days later, on October 29, 2009. SUF Nos. 12, 13; SGI Nos. 12, 13. During this period, ARM used its "predictive dialer," Castel Ajility Dialing System (the "Castel System"), to attempt to contact Plaintiff by telephone. SUF No. 14; SGI No. 14.[3]

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[3] Although the following facts set out in ARM's MSJ are not contained in its Separate Statement, they can be considered evidence of a lack of intent by ARM to annoy, harass, or abuse Plaintiff (but they need not be considered in order to find that there is an absence of evidence of such intent):

> ARM's procedures with respect to Castel are described as follows: At or around 5 a.m. (EST) daily, ARM's employees manually review files of accounts downloaded from [ARM's debt record system, known as the Columbia Ultimate Business System ("CUBS")] to determine which accounts should be sent to Castel for dialing. [Novak Dec. ¶ 13]. If CUBS systematically reflects that a payment has been made on an account or that a cease and desist letter has been received, the account will not be sent to Castel for dialing. [Novak Dec. ¶ 13]. If, however, the account is available for collection, an employee will download the account file to Castel for dialing. [Novak Dec. ¶ 13]. Once an account file is downloaded to Castel, Castel automatically dials the consumer's telephone number on record in an attempt to contact the consumer. [Novak Dec. ¶ 14]. Castel is programmed not place a call unless and until a live analyst is available to take the call should the consumer answer. [Novak Dec. ¶ 14]. Castel is programmed not to call a consumer more than three times a day. [Novak Dec. ¶ 14]. In addition, Castel is programmed not to call a consumer more than one time in two hours, unless the system receives a busy signal, in which case Castel will make a second attempt approximately fifteen minutes after receiving the busy signal. [Novak Dec. ¶ 14]. Castel is programmed to place calls exclusively between the hours of 8:00 a.m. and 9:00 p.m. in the time zone in which the consumer whom Castel is attempting to contact resides. [Novak Dec. ¶ 15]. If a consumer answers a call, Castel will transfer the call to a live analyst. [Novak Dec. ¶ 15]. If a call does not ring, stops ringing or is disconnected by the recipient of the call, Castel will hang up. [Novak Dec. ¶ 15]. If a call results in a Special Information Tone, which is a recurring beep that indicates a non-working number, Castel will hang up and automatically remove the dead number from the system. [Novak Dec. ¶ 15]. All attempts to contact a consumer, as well as the number called (either residence or alternate),

ARM's debt record system indicates that ARM made sixty-nine (69) telephone call attempts to Plaintiff over a one hundred fifteen (115) day period. SUF No. 16. All attempts were made exclusively to telephone numbers (xxx) xxx-4195 ("ARM Phone #1") or (xxx) xxx-6047 (ARM Phone #2). Id. All attempts to reach Plaintiff by telephone were unsuccessful, and ARM therefore never spoke with Plaintiff or any other party in connection with its collection efforts. Id. All call attempts were made between 8:00 a.m. and 6:00 p.m. (Plaintiff's local time). ARM attempted to contact Plaintiff more than two times in a single day on only one occasion, when it made three calls. Id.

On five occasions, the Castel System reached an answering machine. See SUF No. 17 n.3. On one of these occasions, ARM left a voicemail message with content for Plaintiff. SUF No. 17; SGI No. 17 (indicating that item is "[n]either disputed nor undisputed"). The message was from a live analyst and provided a disclaimer that the message was for Lourdes Jiminez, that it was personal and confidential, and that it should not be played in the presence of third parties. The message directed any third parties not authorized to hear the call to immediately disconnect the message, and provided a brief pause to do so. Id. The analyst provided her name, the name of the entity on whose behalf she was calling (ARM), her contact number, and indicated that the call was an attempt to collect a debt and that any information obtained would be used for that purpose. Id. ARM did not call back on the same day the message was left. Id.

In her opposition papers, Plaintiff purports to dispute ARM's evidence regarding the number of calls that were made by referring to her deposition testimony stating that ARM called her twice daily. Defendant notes that Plaintiff later clarified that this was an estimate of the number of calls she received. The only written record kept by Plaintiff is a handwritten log of one week's worth of calls from August 10-17, and this log itself does not reflect any calls made on August 10, 14, 15, 16, or 17, see Defendant's Appendix of Evidence in Support of Motion for Summary Judgment Plaintiff ("AE") Exh. 7. Plaintiff also states that she specifically recollects three calls that do not appear in Defendant's records. See SGI No. 37. These calls were apparently among the only six calls that Plaintiff specifically recollected.[4] Plaintiff has not shown that there is any reason to doubt the accuracy of Defendant's records (AE, Exh. 4), and has not objected to their admission. Moreover, whether ARM called Plaintiff 69 times or (assuming the truth of Plaintiff's partial recollections) 72 times over 115 days would not affect the Court's determination that the evidence in this case is not sufficient to show an intent to annoy, harass, or abuse Plaintiff.

> the time and date of the call, and the results of the attempt, are automatically stamped into CUBS by Castel so that ARM has an accurate and comprehensive record of its collection activity. [Novak Dec. ¶ 16].

MSJ pp. 5-6; see also Novak Dec. at ¶¶ 12-16 (Doc. No. 28-5).

[4] In her Amended Response to Interrogatory No. 1, Plaintiff states: "Plaintiff received numerous telephone calls from Defendant without any specificity. Specifically, Plaintiff only recollects calls made to her on August 11, 2009, at 8:38 AM, 11:47 PM; August 12, 2009 at 9:37 AM and 1:57 PM, and August 13, 2009 at 8:36 AM." See AE, Exh. 10.

ANALYSIS

A. Arguments Concerning the Nature of the Debt

ARM argues that, because Plaintiff's intent in incurring the Debt was to take the bar examination so that she could practice law - i.e., that it was for a business or professional purpose, it is not a "debt" within the meaning of he FDCPA or a "consumer debt" within the meaning of the RFDCPA.

Under the FDCPA, a "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money . . . which [is] the subject of the transaction [is] primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). Under the RFDCPA, a "consumer debt" is defined as "money...due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction," and, in turn, a "consumer credit transaction" is defined as "a transaction between a natural person and another person in which . . . money is acquired . . . primarily for personal, family, or household purposes." Cal. Civ. Code § 1788.2(e)-(f).

No case authority has been provided that suggests that a debt incurred for the purpose of taking the bar examination is not subject to the FDCPA or RFDCPA. If for no other reason than the fact that Defendant is entitled to summary judgment on other grounds, the Court would decline to make a finding that the Debt is outside of the purview of those statutes.

B. 15 U.S.C. § 1692d(5) and Cal. Civ. Code § 1788.11(d)-(e)

Section 1692d of the FDCPA provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The FDCPA prohibits a debt collector from "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." Section 1692d(5). Similarly, the Rosenthal Act prohibits a debt collector from "[c]ausing a telephone to ring repeatedly or continuously to annoy the person called," Cal. Civ. Code § 1788.11(d), or "[c]ommunicating, by telephone or in person, with the debtor with such frequency as to be unreasonable and to constitute an harassment to the debtor under the circumstances," id. §1788.11(e).[5] To prove a claim under these sections, a plaintiff must show that the repeated calls were made with the intent to annoy, abuse, or harass. See Gorman v. Wolpoff & Abramson, LLP, 435 F. Supp. 2d 1004, 1012 (N.D. Cal. 2006), rev'd on other grounds, 584 F.3d 1147 (9th Cir. 2009). "In determining liability under § 1692d(5), courts often consider the volume and pattern of calls made to the debtor." Krapf v. Nationwide Credit, Inc., 2010 U.S. Dist. LEXIS 57849 *6-8 (C.D. Cal. May 21, 2010) (citing cases).

Although Defendant argues persuasively that, based on these undisputed facts, no reasonable jury could find that Defendant had the requisite intent "to annoy, abuse, or harass" the Plaintiff herein, courts have reached different results in this regard. A survey of cases was

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[5] As discussed below, ARM argues persuasively that, because there was only a single voice mail message left on Plaintiff's answering machine (i.e., only one "communication") and Plaintiff does not contend that it contained any content that might be construed as harassing , Plaintiff cannot possibly maintain a claim under this section.

recently undertaken by Judge Selna in Krapf, another case in which the defendant sought summary judgment based on the argument that plaintiff lacked sufficient evidence of malicious intent. See id. at *6. Noting the impossibility of harmonizing the relevant findings, Judge Selna observed understatedly that "courts . . . take different views as to the amount and pattern of calls sufficient to raise a triable issue of fact of intent."[6] Id. at *9.

Among the cases discussed by Judge Selna were Sanchez v. Client Servs., Inc., 520 F. Supp. 2d 1149, 1161 (N.D. Cal. 2007), where summary judgment was granted in favor of an FDCPA plaintiff upon evidence that the defendant made 54 calls to the plaintiff at her work over a six-month period - including a day where six calls were made (Id. at 1160-61), and Akalwadi v. Risk Mgmt. Alternatives, Inc., 336 F. Supp. 2d 492, 505-506 (D. Md. 2004), in which the court found that it was a jury question whether 26 or 28 calls over a two-month period was reasonable. See generally Krapf, 2010 U.S. Dist. LEXIS 57849 at *7-8. By contrast, in Tucker v. The CBE Group, Inc.,710 F. Supp. 2d 1301 (M.D. Fla. 2010), the trial court found that it was not reasonable to infer an intent to harass where the defendant made 57 calls to the plaintiff over an unspecified period (including 7 calls in one day); and in Saltzman v. I.C. Sys., Inc., 2009 U.S. Dist. LEXIS 90681 (E.D. Mich. Sept. 30, 2009), a court granted summary judgment for a defendant who made 20 to 50 unsuccessful calls and 10 to 20 successful calls over roughly a month. In Saltzman the court noted that the "significant disparity between the number of telephone calls placed by Defendant and the number of actual successful conversations with Plaintiff . . . suggest[s] a 'difficulty of reaching Plaintiff, rather than an intent to harass.'" 2009 U.S. Dist. LEXIS 90681 (quoting Millsap v. CCB Credit Services, Inc., 2008 U.S. Dist. LEXIS 110149 at *24 (E.D. Mich. Sept. 30, 2008)).

On November 3, 2010, Plaintiff herein filed a "Motion to File Supplemental Authority" (to which Defendant has now objected) in which she asked the Court to consider the recent case of Brown v. Hosto & Buchan, PLLC, 2010 U.S. Dist. LEXIS 116759 (W.D. Tenn. Nov. 2, 2010). In Brown, the court found that allegations of seventeen calls in a one month period were sufficient to plausibly allege a claim under § 1692d(5) for purposes of a motion to dismiss. The Brown court, too noted the existence of disparate case authority, but purported to distinguish cases involving "conclusory allegations or allegations that simply recite the elements of § 1692d(5)." Id. at *11. Among the cases cited as favoring a denial of the defendant's motion to dismiss were Valentine v. Brock & Scott, PLLC, 2010 U.S. Dist. LEXIS 40532 *11 (D. S.C. Apr. 26, 2010), in which the court found allegations that the defendant called plaintiff eleven times over a period of nineteen days, with two calls occurring on the same day to be sufficient to state a claim for relief, and Langdon v. Credit Mgmt., LP, 2010 U.S. Dist. LEXIS 16138 *5 (N.D. Cal. Feb. 24, 2010) (finding that a plaintiff's allegations that defendant often placed two

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[6] In Krapf, Judge Selna held that it was a jury issue as to whether the debt collection agency intended to harass when the evidence was that, from May to June 2009, the defendant called on the average between four to eight times per day (including instances where the calls were only three minutes apart and where the defendant called even after the plaintiff had picked up the phone and talked to the defendant's representative). See 2010 U.S. Dist. LEXIS 57849 at *4-5.

"or more" collection calls per day "may" state a plausible claim under § 1692d).[7]

Here, of course, the case is well past the pleading stage and the material facts are not in dispute. Thus, it would not be inappropriate for the Court to conclude as a matter of law that there is insufficient evidence of Defendant's intent "to annoy, abuse, or harass" Plaintiff. In Katz v. Capital One, 2010 U.S. Dist. LEXIS 25579 (E.D. Va. Mar. 18, 2010), the court granted summary judgment in favor of a bill collector that called plaintiff 15-17 times after her lawyer had faxed a letter to the original creditor disputing the debt and stating that the bill collector was not to contact her. Id. at *4. The court found that "[w]ithout any indicia of an unacceptable pattern of calls, this does not constitute harassment." Id. at * 13 (citing Saltzman, 2009 U.S. Dist. LEXIS 90681, and Udell v. Kansas Counselors, Inc., 313 F.Supp.2d 1135, 1143 (D.Kan. 2004). Similarly, in Arteaga v. Asset Acceptance, LLC, 2010 U.S. Dist. LEXIS 86541 (E.D. Cal. Aug. 23, 2010), the court granted summary judgment in favor of a bill collector on claims brought under § 1692d(5) of the FDCPA and 1788.11(d) of the Rosenthal Act despite testimony from the plaintiff that the bill collector called her "daily" or "nearly daily."

Here, as in Katz, Arteaga, and Salzman, there is no evidence of an "unacceptable pattern of calls." All of ARM's call attempts were made between the hours of 8:00 a.m. and 9:00 p.m. On most days, ARM attempted to contact Plaintiff only a single time, and on many days there were no calls at all. There was only one day on which more than two calls were made and on that day only three calls were made. Unless a busy signal was received, no phone calls were made on the same day within two hours of each other. There is no evidence that the calls were ever made after Plaintiff had spoken to one of Defendant's agents or had deliberately hung up on an agent. ARM left only one message on Plaintiff's recording device out of all of the calls, and Plaintiff does not contend that it was improper in any way. On the day the message was left, it was the only call that was made to Plaintiff. Further, there was no improper calls to Plaintiff's place of work. There is no evidence that Plaintiff ever disputed the Debt (indeed, she does not allege that the debt was disputed), or requested that the calls to her cease. Further, it its written notices to Plaintiff, the Defendant specifically informed her of the RFDCPA and the FDCPA, and notified her of both the telephone number and the webb site address for the Federal Trade Commission. Based on these facts, the Court concludes that any reasonable juror would only find that Plaintiff placed its calls to Plaintiff with the intent to reach her to collect the Debt, and not because it intended to annoy, abuse, or harass her.

C. 15 U.S.C. §§ 1692d(6) and 1692e(10) and Cal. Civ. Code § 1788.11(b)

Plaintiff asserts claims against ARM under sections 1692d(6) and 1692e(10) of the FDCPA and section 1788.11(b) of the RFDCPA. Sections 1692d(6) of the FDCPA and 1788.11(b) of the RFDCPA prohibit a debt collector from placing telephone calls without meaningful disclosure of the caller's identity. 15 U.S.C. § 1692d(6); Cal. Civ. Code § 1788.11(b). Section 1692e(10) of the FDCPA prohibits the use by a debt collector of any false

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[7] In Langdon, the allegations included claims that: "defendant often places two or more collection calls to plaintiff in a single day;" defendant continued to place such calls even after it had received a letter from plaintiff to cease such calls; and "defendant often places collection calls to plaintiff and hangs up when plaintiff or his answering machine answer." Id. at *2-3.

representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. 15 U.S.C. § 1692e(10).[8]

Based on the evidence submitted by the parties, the only actual voice communication that occurred in the course of ARM's attempts to collect the debt came in the form of a single voicemail message, which fully disclosed the caller's name, the name of the entity on whose behalf she was calling, and the purpose of the call. See SUF No. 17. In light of this fact, ARM contends that Plaintiff's allegation that ARM violated section 1692d(6) of the FDCPA and section 1788.11(b) of the RFDCPA by placing telephone calls without meaningful disclosure of the caller's identity is "absurd." MSJ 20:25.

In Langdon, 2010 U.S. Dist. LEXIS 16138, the court (albeit in the context of a motion to dismiss under Rule 12(b)(6)) wrote:

> If, as plaintiff alleges, defendant calls plaintiff and hangs up the phone, common sense dictates that defendant has not provided meaningful disclosure under FDCPA section 1692d(6) or disclosure under RFDCPA section 1788.11(b). See Hosseinzadeh v. M R S Associates, Inc, 387 F. Supp. 2d 1104, 1112 (C.D. Cal 2005) ("'[M]eaningful disclosure' presumably requires that the caller must state his or her name and capacity, and disclose enough information so as not to mislead the recipient as to the purpose of the call or the reason the questions are being asked."). Plaintiff's allegations thus sufficiently state claims under FDCPA section 1692d(6) and RFDCPA section 1788.11(b).

Id. at *6-7. The court also found that such allegations were sufficient to support a claim under sections 1692e(10-11) of the FDCPA. See id. This Court would decline to follow the reasoning of the court in Langdon as to phone calls made and ended when the plaintiff (or any other person) fails to answer the phone versus the situation where the caller hangs up after the phone is answered.

As ARM observes, the ruling in Langdon was in connection with a motion to dismiss, not a motion for summary judgment. Moreover, the Langdon court ostensibly relied on Hosseinzadeh to support its holding, but that case does not provide that a collector who calls and hangs up without leaving a voicemail message violates the FDCPA. Rather, it simply provides that if a collector decides to leave a voicemail message, the collector must disclose its identity and the nature of its business in the message. Id. at 1112. A debt collector is not required to leave a voicemail message under the FDCPA. See, e.g., Udell v. Kansas Counselors, Inc., 313 F. Supp. 2d 1135, 1143 (D. Kan. 2004). Again, it is not impossible to imagine some scenario in

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[8] In order to succeed on a section 1692e(10) claim, a plaintiff must establish that a party used a "false representation or deceptive means" to collect or attempt to collect a debt. 15 U.S.C. § 1692e(10). Plaintiff's Complaint is completely devoid of any allegations regarding the use of false representations or deceptive means by ARM in connection with its collection efforts, and ARM is obviously entitled to summary judgment with respect to this claim. Plaintiff's Opposition provides that Plaintiff is voluntarily withdrawing her claim under section 1692e(11) of the FDCPA. However, Plaintiff does not assert a claim under section 1692e(11). Presumably, this was a scrivener's error and Plaintiff intended to withdraw her claim under section 1692e(10).

which a debt collector's hanging up without leaving any identifying information might entail a violation of the statute (for example, if the debt collector used some form of caller identification blocking device), this is not such a case.

CONCLUSION

Defendant's Motion for Summary Judgment would be GRANTED.