IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHELE JONES,

Plaintiff,

v.

RASH CURTIS & ASSOCIATES,

Defendant.
/

No. C 10-00225 JSW

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Now before the Court is defendant Rash Curtis & Associates ("Rash Curtis")'s motion for summary judgment. This motion is now fully briefed and ripe for decision. The Court finds that the motion is appropriate for disposition without oral argument and the matter is deemed submitted. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for January 7, 2011 is HEREBY VACATED. Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court HEREBY GRANTS Rash Curtis's motion for summary judgment.

BACKGROUND

Plaintiff Michele Jones, a debtor, sues Defendant Rash Curtis, a debt collector, asserting violations of the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA" or "the Act") and the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788 et seq. ("RFDCPA"). After three iterations of her complaint, Plaintiff finally alleges that: (1) Rash Curtis constantly and continuously placed collection calls to Plaintiff seeking payment for an alleged debt; (2) Rash Curtis placed approximately 200 collection calls to Plaintiff in 2009;

(3) Rash Curtis contacted Plaintiff's mother and disclosed the nature and existence of an alleged consumer debt to her; (4) Rash Curtis failed to identify itself as a debt collector; and (5) Rash Curtis placed collection calls to Plaintiff from blocked and private numbers. (Second Amended Complaint ("SAC") at ¶¶ 11-15.) Plaintiff seeks only statutory damages in the amount of $1,000 as well as costs and reasonable attorneys' fees. (*Id.* at ¶¶ 17, 18, 22, 23.)

It is undisputed that Rash Curtis placed approximately 179 calls to Plaintiff in 2009 in an effort to try to reach her and resolve the numerous outstanding debts owed by Plaintiff to Rash Curtis's creditor clients. Rash Curtis contends that the number, pattern, and frequency of the call do not constitute harassment, abuse or oppression, especially considering that Plaintiff did not complain about the content of the calls, rarely answered the calls, and never instructed Rash Curtis to stop calling.

The Court shall address additional facts in the remainder of its order.

ANALYSIS

A. Legal Standard on Summary Judgment.

Summary judgment is appropriate when the record demonstrates "that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. The party moving for summary judgment bears the initial responsibility of identifying those portions of the record which demonstrate the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323.

Once the moving party meets this initial burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party

fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. First Cause of Action for Violation of Fair Debt Collection Practices Act.

The FDCPA provides that "any debt collector who fails to comply with any provision of the [the Act] with respect to any person is liable to such person...." 15 U.S.C. § 1692(k). The Act creates liability for "conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. The "natural consequences" of such conduct is evaluated according to their likely effect on the least sophisticated consumer. *See Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982); *see also Clark v. Capital Credit & Collection Servs. Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006). This objective standard "ensure[s] that the FDCPA protects all consumers, the gullible as well as the shrewd ... the ignorant, the unthinking and the credulous." *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2d Cir. 1993).

Abusive conduct under section 1692d includes, but is not limited to, "[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." 15 U.S.C. § 1692d(5). A plaintiff carries the burden of demonstrating that a defendant debt collector placed abusive telephone calls. *See, e.g., Harvey v. United Adjusters*, 509 F. Supp. 1218, 1221 (D. Or. 1981). Intent to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of phone calls, or the place to which the calls are made. *See, e.g., Joseph v. J.J. Mac Intyre Cos., LLC*, 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002) ("Whether there is actionable harassment of annoyance turns not only on the volume of calls made, but also on the pattern of calls."); *Arteaga v. Asset Acceptance, LLC*, 2010 WL 3310259, *5 (E.D. Cal. 2010) (finding no harassment although calls were allegedly daily or more often than daily, and holding that "[a]lthough there is no bright-line rule, certain conduct generally is found to either constitute harassment, or raise an issue of fact was to whether the conduct constitutes harassment, while other conduct fails to establish harassment as a matter of law."). A debt collector may be found to harass a debtor by immediately recalling a debtor after the debtor has hung up the phone. *See*

Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 873 (N.D. Cal. 1981). A debt collector may be found to harass a debtor by continually calling the debtor after the debtor has requested that the debt collector cease and desist communication. *See Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516-17 (9th Cir. 1994). "Intent to annoy, abuse, or harass may be inferred from the frequency of calls, or the place to which the phone calls are made." *Kerwin v. Remittance Assistance Corp.*, 559 F. Supp. 2d 1117, 1124 (D. Nev. 2008).

Here, although it is uncontested that Rash Curtis placed approximately 179 calls in 2009 to resolve the alleged debt owed by Plaintiff to various creditors (Plaintiff approximates 200), there is no genuine issue of fact that Plaintiff asked the collectors to stop calling, or asked them to refrain from calling at all or specifically at work, or complained about the number of calls received. Beside the frequency of the calls, there is nothing in the record to sustain a claim for intentional harassment. There is no evidence that Rash Curtis was calling immediately after Plaintiff hung up the telephone. There is no evidence that Rash Curtis used unprofessional or misleading language when speaking with Plaintiff. There is no evidence of improper timing or calls to a known inconvenient place. Under the undisputed facts of this case, the Court finds that Rash Curtis's conduct did not rise to the level of harassment under Section 1692d, and fails to raise a triable issue as to whether the phone calls were initiated with the intent to harass in violation of Section 1692d(5). Accordingly, the Court GRANTS summary judgment as to Count 1, paragraph 16, subsections (e) and (f).[1]

Second, Plaintiff contends that she was confused by Rash Curtis and believed that they may have been a law firm intent on garnishing wages from her. Plaintiff alleges that her rights were violated both by the debt collector's failure to identify itself and somehow her misunderstanding that they might have been a law firm. There is not even a scintilla of evidence provided to the Court demonstrating that Rash Curtis made any representation about performing the role of a law firm. There is similarly no evidence that Plaintiff misunderstood the fact that Rash Curtis was a debt collector intent on securing a number of debts on their

[1] In her opposition papers, Plaintiff voluntarily withdraws her Section 1692b(2) and 1692d(6) claims, thereby eliminating Count 1, paragraph 16, subsections (b) and (g) from the case. (Opp. Br. at 1 n.1.)

clients' behalf. In fact, Plaintiff had so designated Rash Curtis's number on her cell phone to alert her that the debt collector was calling and to refrain from answering the calls. (Declaration of Andrew Steinheimer, Ex. D (Plaintiff deposition) at 48:15-49:11; 68:3-9.) Accordingly, the Court GRANTS summary judgment as to Count 1, paragraph 13, subsections (h) and (i).

Third, Plaintiff alleges that her rights were violated by Rash Curtis contacting her mother, a third party, to communicate about the debt. Although it is undisputed that Rash Curtis contacted Plaintiff's mother based on contact information provided by its clients, who indicated that Plaintiff had at one time, lived in her mother's home, there is no admissible evidence regarding the content of the communications with Plaintiff's mother. Rash Curtis was entitled to attempt to contact Plaintiff at any number provided by her creditors, but there is nothing in the record to indicate that the content of any such communications were improper. (*See id*. at 10:10-23; 61:7-9.) Accordingly, the Court GRANTS summary judgment as to Count 1, paragraph 13, subsections (a) and (d).

Lastly, Plaintiff alleges that Rash Curtis violated her rights by contacting Plaintiff at a time and place known to be inconvenient. Although there is adequate evidence in the record indicating that Rash Curtis attempted to contact Plaintiff at a variety of numbers, including her previous workplace, there is no evidence that Plaintiff ever informed Rash Curtis that the calls were inconvenient. (*See id*. at 37:20-38:8; 50:18-51:2, 60:16-19.)[2] Accordingly, the Court GRANTS summary judgment as to Count 1, paragraph 13, subsection (c).

In sum, the Court finds that Rash Curtis is not liable for violating the FDCPA and its motion for summary judgment as to Count 1 is GRANTED in its entirety.

C. Second Cause of Action for Violation of the Rosenthal Act.

Plaintiff's claims under the Rosenthal Act are practically identical to the federal claims and fail for all of the same reasons. As Plaintiff has argued, "if the court finds that Defendant has violated any of the FDCPA provisions discussed herein, it must also find that the Defendant

[2] In addition, although the third amended complaint omits any reference to it, there is some evidence that Rash Curtis may have called once at an inconvenient time. However, after three iterations of the complaint and a fully-briefed motion for summary judgment pending, the Court denies Plaintiff's late request to conform the pleadings to the evidence. (Opp. Br. at 9 n.3.) Regardless, the questionable evidence of a single inconvenient call is insufficient to alter the Court's conclusions.

has violated the RFDCPA." (Opp. Br. at 21-22, citing *Costa v. Nat'l Action Financial Servs., Inc.*, 641 F. Supp. 2d 1069 (E.D. Cal. 2007).) As the Court has found no merit to the federal claims, it dismisses the state claim on the same bases.[3]

CONCLUSION

For the foregoing reasons, the Court GRANTS Rash Curtis's motion for summary judgment. A separate judgment shall issue and the Clerk shall close the file.

IT IS SO ORDERED.

Dated: January 3, 2011

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

[3] Plaintiff also makes an additional claim under the Rosenthal Act, Section 1788.12(c), regarding putting her name on a deadbeat list. However, there is neither supporting evidence nor supporting argument to sustain such a claim and it is dismissed as well.