UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-80012-CIV-RYSKAMP/VITUNAC

SHEMAE JOHNSON,

Plaintiff,

v.

LORNE S. CABINSKY,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court pursuant to Defendant's motion for summary judgment, filed December 3, 2010 **[DE 35]**. Plaintiff responded and filed a cross-motion for summary judgment on January 20, 2011 **[DE 44]**.[1] Defendant responded to Plaintiff's summary judgment motion on December 29, 2010 **[DE 40]**. Plaintiff replied to Defendant's response on December 31, 2010 **[DE 41]**. The Court held a hearing on the motions on February 4, 2011. These motions are ripe for adjudication.

I. BACKGROUND

This lawsuit involves a claim by Plaintiff, Shemae Johnson ("Johnson") against Defendant Lorne S. Cabinsky, Esq. ("Cabinsky") for an alleged violation of the Fair Debt

[1] The Court allowed Plaintiff to refile her motion for ministerial reasons. The original motion was filed on December 6, 2010.

Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*. Johnson's claims stem from Cabinsky's action as an attorney representing his client, St. Mary's Hospital ("St. Mary's"), in Florida state court to collect a debt allegedly due St. Mary's as a result of medical services provided to Johnson. Cabinsky has represented St. Mary's for ten years.

Johnson received medical treatment at St. Mary's on or about February 8 through 10, 2007 and June 2, 2007. The February instance involved Johnson being admitted and treated on account of attempted suicide. Johnson testified at her deposition that she did not sign any payment guaranty at the time she received treatment for her attempted suicide. (Johnson Depo. p. 39-40.) Johnson testified as follows:

> ...I didn't sign anything saying I was going to pay. I wasn't – if I'm not mistaken from what I can remember, I don't think I was coherent enough. I had taken a bottle of pills....From what I can remember, my husband carried me to the car. I didn't even want to live, let alone read a piece of paper.

(Johnson Depo., p. 39-40.) Ralston Brown, Johnson's husband, signed the February 2007 guaranty. That form indicated services rendered in the amount of $1,200.00. Plaintiff signed the June 2007 guaranty. That form indicated services rendered in the amount of $550.00.

Syndicated Office Systems, Inc. d/b/a Central Financial Control ("Syndicated"), St. Mary's collection arm, attempted to collect the alleged debt from Johnson. Johnson filed a lawsuit in the United States District Court for the Southern District of Florida, captioned Shemae S. Johnson v. Syndicated Office Systems, Inc. d/b/a Central Financial Control, Case No. 08-80258–CIV-HURLEY ("First FDCPA Lawsuit") on March 11, 2008. Cabinsky represented Syndicated. The First FDCPA complaint against alleged that Syndicated left voice mail

messages that failed to disclose that Syndicated was a debt collector and that such non-disclosure violated 15 U.S.C. §1692e(11), 15 U.S.C. §1692d(6) and the Florida Consumer Collection Practices Act. Syndicated and Johnson settled the First FDCPA Lawsuit on June 12, 2008. The Court dismissed the action with prejudice two days later.

On or about July 24, 2008, St. Mary's, through Cabinsky, filed its lawsuit against Johnson in the County Court of the Fifteenth Judicial Circuit in and for Palm Beach County, St. Mary's Hospital, Inc. d/b/a St. Mary's Medical Center v. Shemae S. Johnson, Case No. 50 2008 SC 010439 XXXX MB. Although Johnson was properly served, she failed to answer the Complaint or to appear at two court hearings for which she received notices to appear. St. Mary's moved for entry of a default judgment. The state court granted St. Mary's default and scheduled a trial to determine damages. Cabinsky submitted an affidavit of proof and costs, which he executed. The affidavit provides as follows:

> BEFORE ME, the undersigned authority, personally appeared, LORNE S. CABINSKY, ESQUIRE, who having been fully sworn on oath by me deposes and says:
>
> 1. I am the Representative for Plaintiff in the above-styled cause and am sui juris.
>
> 2. The aforementioned memoranda, reports, records and data compilations are kept in the course of a regular practice of the Plaintiffs to make said memoranda, reports, records and data compilations.
>
> 3. I have personal knowledge from the aforementioned memoranda, reports, records and data compilations as well as knowledge gained from my personal participation in the handling of this account, the following facts:
>
> (a) Defendant was admitted and treated at

Plaintiff's facility on February 8 - 10, 2007 and June 2, 2007. Defendant was financially responsible for her own medical bills, and signed a guarantee of payment.

(b) As a result of a breach of this agreement, damages were incurred in the amount of $1,750.00.

(c) No part of the remaining balance as specified in the previous paragraph has been paid by SHEMAE S. JOHNSON.

4. I am aware that this Affidavit is for the purpose of litigation in the above-captioned action.

5. The costs incurred in the filing of this lawsuit consisted of the filing fee in the amount of $175.00 and the fees for service of process in the amount of $35.00, there being a total amount of $210.00 in costs incurred.

FURTHER AFFIANT SAITH NAUGHT.

_____/S/_____

THE FOREGOING INSTRUMENT was acknowledged before me this 9 day of January, 2009, by LORNE S. CABINSKY, who is personally known to me and who did take an oath.

_____/S/_____

NOTARY PUBLIC

St. Mary's claimed the affidavit was admissible as a business record. The state court said that the affidavit was not a business record because Cabinsky is not St. Mary's records custodian. The state court did not find that the affidavit was untruthful or misleading. The state court entered default judgment in the amount of $3,752.08.

Johnson's attorney subsequently entered an appearance and moved to vacate the default

judgment. Johnson testified that she had given the papers relating to the St. Mary's action to her workers' compensation attorney, believing that counsel also handled the St. Mary's matter. The state court vacated the default judgment, held a bench trial and ultimately ruled that Johnson was not responsible for any of the $1.750.00. Johnson was not responsible for the $1,200.00 because she did not sign the guaranty. Johnson was not responsible for the $550.00 because St. Mary's did not demonstrate that the charge was reasonable.

This action is based on the affidavit Cabinsky signed and submitted in the state court action. Johnson contends that because Cabinsky was an attorney of record for St. Mary's rather than an employee of St. Mary's, he lacked personal knowledge of the facts stated in the affidavit. Johnson also claims that the affidavit was false and misleading because $1,200.00 of the alleged debt was attributable to her husband.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) requires entry of summary judgment when the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment should be granted when the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. See Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The non-moving party must go beyond the pleadings and present affirmative evidence showing that there is a genuine issue of material fact for trial. Id. at 252, 106 S.Ct. at 2512. It is not sufficient for the non-moving party to show a mere "scintilla" of

evidence, or evidence that is merely colorable or not significantly probative, in support of its position. Id. Additionally, conclusory allegations and conjecture are not sufficient to overcome a motion for summary judgment. See Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996).

III. DISCUSSION

The purpose of the FDCPA, as stated in §1692(e), is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." That language indicates that Congress intended to regulate the unscrupulous practices of debt collectors and level the playing field for debt collectors who do not use abusive practices. See McKnight v. Benitez, 176 F.Supp.2d 1301, 1305 (M.D. Fla. 2001). To prevail on a FDCPA claim, the plaintiff must prove: "(1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA." Kaplan v. Assetcare, Inc., 88 F.Supp.2d 1355, 1360-61 (S.D. Fla. 20002).[2] Johnson's claim is based on 15 U.S.C. § 1692(e)(2)(A), which prohibits a debt collector from using "any false, deceptive or misleading representation or means in connection with the collection of any debt," more specifically, a "false representation of the character, amount or legal status of any debt."

[2] Cabinsky admits, for purposes of this case only, that he is a "debt collector" as defined by 15 U.S.C. § 1692(a)(6).

Johnson claims that because Cabinsky was not an employee of St. Mary's, he cannot submit an affidavit stating, *inter alia*, that (a) Plaintiff was treated at St. Mary's on February 8 – 10, 2007 and June 2, 2007; (b) the amount St. Mary's believes it is owed for the medical services provided to Johnson; and (c) that the records St. Mary's has pertaining to the billing for medical services are the type of records routinely generated and maintained by his client.

The Sixth Circuit recently rejected this theory of liability in Lee vs. Javitch, Block and Rathbone, LLP, 601 F.3d 654 (6th Cir. 2010). In Lee, Defendant, a debt collection law firm, had one of its attorneys prepare and file an affidavit stating that it had "reasonable basis to believe that [Lee] may have personal earnings of [Lee] that is not exempt under the laws of this state or the United States." Id. at 655. The state court initially garnished money from Lee's bank account based on this affidavit. The court returned the money after Lee proved that the account contained only social security disability payments, which are exempt funds. Lee then sued Javitch claiming that he did not have reasonable basis claimed in the affidavit and, thus, his signing of the affidavit violated the FDCPA. The case went to a jury, which determined that when Javitch signed the affidavit, he did not have a reasonable basis to believe that Lee's bank account may have contained funds that were not exempt from garnishment. The Sixth Circuit overturned the jury verdict because, under the circumstances and as a matter of law, Javitch had a reasonable basis to believe that Lee's bank account may have contained funds other than personal earnings that were not exempt from garnishment. Reasonableness did not require that Javitch subpoena the relevant bank records. As long as the attorney had a reasonable basis to believe the accuracy of the statements contained within the affidavit, the affidavit was true. Id. at 657, n.2.

Whether Cabinsky's inquiry was reasonable is not dispositive, however, given that

Johnson is unable to identify anything in the affidavit that is false. Johnson claims that the affidavit is untruthful because it states that she is responsible for the full $1,750.00 even though her husband signed the guaranty for the $1,200.00 bill. The affidavit does not assert that Johnson signed both guarantees. Rather, it correctly states that "[Johnson] signed a guarantee of payment." Furthermore, although Johnson may not have signed both guarantees, she was still liable for the entirety of the $1,750.00 since she received the medical services provided to her. Metropolitan Dade County v. P.L. Dodge Foundations, Inc., 509 So.2d 1170, 1171-72 (Fla. 3d DCA 1987), which the state court never cited, involved the involuntarily hospitalization of an "out of it," suicidal individual. The Court held that the individual was "a person who may be liable to the hospital for the payment of its bill," reasoning that "where one supplies services to a mentally impaired person, even though acting without his knowledge or consent, the supplier is entitled to restitution." Id. at 1172-73.

Johnson has failed to identify any other component of the affidavit that is false and has failed to explain how it is that Cabinsky allegedly lacks personal knowledge of the contents of the affidavit. As a result of his ten years representing St. Mary's, Cabinsky was familiar with St. Mary's billing practices, procedures and records before he executed the affidavit at issue. In addition to his general knowledge of St. Mary's billing records and record keeping policies, Cabinsky, as a result of his representation of Syndicated in the First FDCPA lawsuit, was specifically familiar with the bills that St. Mary's was attempting to collect in the state court action. Cabinsky had a reasonable basis to believe that the statements in the affidavit were true. Lee, 601 F.3d at 657. During her deposition, Johnson admitted that all of the factual averments contained in the affidavit were either true or she lacked knowledge to know if they were true.

Absent a showing that an affidavit contains false statements, there is no violation of 15 U.S.C. § 1692e. Id., at 657 n.2.

Granting Defendant's Motion for Summary Judgment is consistent with this Court's decisions in Gonzalez v. Erskine, No. 08-20893-CIV-SEITZ, 2008 WL 6822207 (S.D. Fla. Aug. 7, 2008) and Sierra v. Rubin & Debski, No. 10-21866-CIV-COOKE, 2010 WL 4384216 (S.D. Fla., Oct. 28, 2010). Gonzalez held that merely filing an unsuccessful lawsuit for a client is not an FDCPA violation: "the act of filing a verified lawsuit, without more, does not violate the FDCPA." 2008 WL 6822207, at *1. Sierra is particularly instructive, as it held that "[t]he filing of a lawsuit supported by an affidavit attesting to the existence of the amount of debt, without more documentation, is not a false representation, nor unfair or unconscionable." Sierra, 2010 WL 4384216, at *3 (citing Deere v. Javitch, Black & Rathbone LLP, 413 F.Supp.2d 886, 890-91 (S.D. Ohio. 2006)).

Johnson cites Midland Funding LLC v. Brent, 644 F.Supp.2d 961 (N.D. Ohio 2009). In Midland Funding, Plaintiff alleged a violation of the FDCPA premised on an affidavit submitted in connection with a debt collection lawsuit in which the affiant admitted he had no knowledge regarding any of the matters set forth in the affidavit. Id. at 967. According to deposition testimony, he merely signed an affidavit without making any inquiry as to any of the statements and whether they were accurate. Id. at 967-68. There is no evidence to suggest that Cabinsky failed to make inquiries to determine the truthfulness of the statements made in the affidavit. Johnson also cites Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000), but the issue in Gearing was whether the debt collection company was a subrogee to the company that originally held the debt. There is no allegation that St. Mary's was not the original holder of the

debt, or was in any way a subrogee to another. Johnson also relies on Russell v. Equifax A.R.S, 74 F.3d 30 (2d Cir. 1996). The FDCPA violation in Russell came from statements made in debt collection notices, which are not at issue here. Finally, Johnson cites Delawader v. Platinum Fin. Servs. Corp., 443 F.Supp.2d 942 (S.D. Ohio 2005) for the proposition that submission of an affidavit not based on personal knowledge constitutes an FDCPA violation. Delawader contains no discussion of personal knowledge in the context of FDCPA affidavits.

Johnson claims that Cabinsky is not entitled to assert the bona fide error defense to an FDCPA violation. See 15 U.S.C. § 1692k(c) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."). Cabinksy raises no such argument. Rather, he argues that his affidavit did not violate the FDCPA.

Even assuming that the affidavit was inadmissible in state court, the inadmissibility of same is separate and distinct from its truthfulness or untruthfulness. The state court never ruled that the affidavit was false or misleading. Whether the affidavit met the evidentiary requirements to satisfy Florida's business records exception to the hearsay rule is not an FDCPA question.

IV. CONCLUSION

THE COURT, having considered the record and being otherwise fully advised, hereby ORDERS AND ADJUDGES that Defendant's motion for summary judgment, filed December 3, 2010 **[DE 35]**, is GRANTED. It is further

ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment, filed January 20, 2011 **[DE 44]**, is DENIED. Final judgment shall issue by separate order.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 10th day of March, 2011.

S/Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE