

Fraley v Webcollex, LLC

2023 NY Slip Op 31865(U)

April 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 521609/22

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Consumer Debt Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2023.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

SCOTT FRALEY,

Plaintiff,

-against-

WEBCOLLEX, LLC; dba CKS FINANCIAL,

Defendant.

-----X

DECISION, ORDER, AND JUDGMENT

Index No. 521609/22

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation,
Memorandum of Law, and Exhibits Annexed _____
Affirmation in Opposition,
Memorandum of Law, and Exhibits Annexed _____
Reply Memorandum of Law _____

1-2, 5-9
12-14
16

In this action brought under the Fair Debt Collection Practices Act ("FDCPA"), 15 USC § 1692 et seq., to recover statutory damages, costs, and attorney's fees under 15 USC § 1692k, defendant Webcollex, LLC, dba CKS Financial ("defendant"), moves, pre-answer, for an order, pursuant to CPLR 3211 (a) (7), dismissing the unverified complaint of Scott Fraley ("plaintiff") for failure to state a cause of action under the FDCPA. For the reasons stated below, plaintiff's objection to the motion is overruled, and the motion is granted, *without prejudice to plaintiff*, if he be so advised, to file and serve,

subject to 15 USC § 1692k (a) (3),¹ his amended verified complaint no later than thirty (30) days after electronic service of this decision, order, and judgment by defendant's counsel on plaintiff's counsel with notice of entry. For the sake of brevity, the Court's rationale for granting the instant motion is encapsulated in three major points.

First, inasmuch as it is undisputed that plaintiff is a consumer and that defendant is a debt collector, the only question before the Court is whether plaintiff's three-count complaint states a cause of action for violation of the FDCPA; more particularly, 15 USC §§ 1692e, 1692e (2) (A), and 1692e (10) (collectively, the "FDCPA provisions"). Counts I and II of the complaint (¶¶ 52-73 and 74-107, respectively) – as predicated on plaintiff's allegation that because he does not recognize Velocity Investments LLC as his current creditor, he cannot owe any debt to it – both fail to state a cause of action under any/all of the FDCPA provisions (*see Rosenberg v Frontline Asset Strategies, LLC*, 556 F Supp 3d 157, 158 [ED NY 2021]).² Count III of the complaint (¶¶ 108-120) – as predicated on plaintiff's allegation that defendant's letter to him, being in the form of a settlement offer, "does not state 'we are not obligated to renew this offer,' nor does it include any kind of

¹ 15 USC § 1692k (a) (3) provides, in relevant part, that:

"On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the *defendant* attorney's fees reasonable in relation to the work expended and costs" (emphasis added).

² *See also Johnson v Cawley & Bergmann, LLC*, 2021 WL 9219036, *3-4 (ED NY 2021); *Rogers v LVNV Funding, LLC*, 2021 WL 7906549, *4 (ED NY 2021), *report & recommendation adopted* 2022 WL 2292836 (ED NY 2022); *Solovyova v Grossman & Karaszewski PLLC*, 2021 WL 535209, *5 (ED NY 2021); *Taylor v American Coradius Intl., LLC*, 2020 WL 4504657, *3 (ED NY 2020); *see further Durden v DNF Assoc. LLC*, 2023 WL 2482638, *3 (WD NY 2023), *report & recommendation adopted* 2023 WL 2480961 (WD NY 2023); *Ortiz v Frontline Asset Strategies, LLC*, 2022 WL 939771, *2 (ED NY 2022).

substantially similar language” – fails to state a cause of action under the FDCPA’s “least sophisticated consumer” standard which “is an objective analysis that seeks to protect ‘the naive’ from abusive practices, while simultaneously shielding debt collectors from liability [as is the case here] for ‘bizarre or idiosyncratic interpretations’ of debt collection letters” (*Greco v Trauner, Cohen & Thomas, LLP*, 412 F3d 360, 363 [2d Cir 2005] [internal citation omitted]; see *Kraus v Professional Bur. of Collections of Maryland, Inc.*, 281 F Supp 3d 312, 320-321 [ED NY 2017] [“A consumer is not so misled by a letter truthfully informing her that she can satisfy her debt in full by paying a specified amount by a specified date.”]).

Second, plaintiff’s reliance on the short-form orders to the contrary issued in *Sandel v UHG I, LLC & Eastpoint Recovery Group, Inc.*, index No. 505660/2022 (Sup Ct, Kings County, Nov. 14, 2022, Rothenberg, J.), and in *Werberger v Halstead Fin. Servs., LLC and LVNV Funding, LLC*, index No. 522833/2022 (Sup Ct, Kings County, Dec. 13, 2022, Toussaint, J.), is misplaced, as neither order is binding on this Court (see *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). Conversely, the well-reasoned decisions/orders in *Hotzer v ATG Credit, LLC and LVNV Funding, LLC*, index No. EF002369-2022 (Sup Ct, Orange County, Aug. 26, 2022, Brown, J.), and in *Wollner v Pressler, Felt & Warshaw, LLP and LVNV Funding, LLC*, index No. EF003862-2022 (Sup Ct, Orange County, Nov. 22, 2022, Hyer, J.), though not binding on this Court, correctly interpret the FRCPA as a debtor’s remedy (rather than as a creditor’s collection tool) and corroborate the Court’s determination in this case.

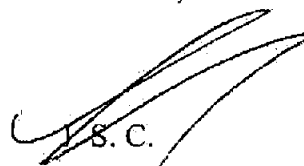
Third and finally, the parties' vigorous dispute over the legal issue of whether plaintiff possesses the requisite standing to maintain this action in state (as opposed to federal) court is irrelevant at this time because defendant has moved to dismiss the complaint for failure to state a cause of action under CPLR 3211 (a) (7), rather than for (or in addition to) lack of standing under CPLR 3211 (a) (3). The two provisions are not interchangeable. Should plaintiff (if he be so advised) timely file and serve his amended verified complaint, defendant (if it be so advised) would have an opportunity to raise both (as well as any other) CPLR 3211 (a) provisions in its renewed motion to dismiss such complaint.

* * *

Defendant's counsel is directed to electronically serve a copy of this decision, order, and judgment on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the decision, order, and judgment of this Court.

ENTER,



J.S.C.

**HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE**