IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CURTIS JACOBSON,

Plaintiff,

v.

CONSUMER PORTFOLIO SERVICES, INC.
and WILLIFORD GRAY,

Defendants.

OPINION AND ORDER

10-cv-643-bbc

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Plaintiff Curtis Jacobson brings this civil action under the Wisconsin Consumer Act and the common law torts of private nuisance and invasion of privacy. He alleges that employees of defendant Consumer Portfolio Services, Inc., including defendant Williford Gray, "engaged in an abusive debt collection campaign against" him. Am. Cpt. ¶ 1, dkt. #7. In particular, plaintiff alleges that defendant Gray and other employees began calling his home in the spring of 2008 regarding a car loan of plaintiff's sister-in-law, who was living in plaintiff's house at the time. According to plaintiff, defendants' calls "included frequent and repeated swearing, sexually l[ewd] comments . . ., threats of violence and destruction of property. . . and false threats of [defendants'] intention and rights to repossess the vehicle."

Id. at ¶ 12. For example, defendants allegedly called plaintiff or a family member a "lying bastard," a "bitch," a "whore," a "pussy" and a "low-life." Id. at ¶ 14. They threatened to "fuck up" plaintiff and told him that they had had sex with his sister-in-law in his house. Id.

Defendant Consumer Portfolio Services has filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the amended complaint for plaintiff's failure to state a claim upon which relief may be granted. Dkt. #12. Defendant Gray, who is appearing pro se, has filed a document in which he requests "that th[is] frivolous lawsui[t] be dismissed." Dkt. #27. I am construing this document as a motion to dismiss and I am denying it because Gray fails to support his request with any argument. (Because it is unnecessary to discuss Gray's motion further, I will refer to defendant Consumer Portfolio Services as "defendant" for the remainder of the opinion.)

Defendant argues that each of plaintiff's claims is barred by the relevant statute of limitations and that efforts to collect a debt cannot give a rise to a nuisance claim. I agree with defendant that plaintiff's claims invasion of privacy and private nuisance are governed by a two-year statute of limitations and that those two claims against defendant must be dismissed with respect to any conduct occurring before September 24, 2008. I am denying defendant's motion in all other respects.

OPINION

A. Subject Matter Jurisdiction

The first question in every case in federal court is whether subject matter jurisdiction is present. In its notice of removal, defendant relied on 28 U.S.C. § 1332 as a basis for jurisdiction. Under that statute, the proponent of jurisdiction must show complete diversity of citizenship between the plaintiffs and defendants and an amount controversy greater than $75,000.

With respect to diversity of citizenship, defendant says in its notice of removal that it is a citizen of California and plaintiff is a citizen of Wisconsin. Defendant Gray's citizenship is not included in the notice of removal because plaintiff did not name him as a defendant until the case was proceeding in federal court. However, in another pending case against the same defendants, the parties submitted a stipulation that defendant Gray is domiciled in Illinois. Jones v. Consumer Portfolio Services, Inc., No. 10-cv-797-bbc, dkt. #18 (Feb. 18, 2011). That is sufficient to establish diversity at this stage of the proceedings. Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1172-73 (7th Cir. 2010) ("We can take judicial notice of prior proceedings in a case involving the same litigant.").

With respect to the amount in controversy, defendant attached a settlement letter from plaintiff in which he asked for $125,000. "When the jurisdictional threshold is uncontested, we generally will accept the plaintiff's good faith allegation of the amount in

controversy unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount." McMillian v. Sheraton Chi. Hotel & Towers, 567 F.3d 839, 844 (7th Cir. 2009) (internal quotations omitted). Further, because plaintiff is asking for punitive damages and damages for emotional distress, it is reasonable to infer that the amount in controversy is greater than $75,000. Accordingly, I conclude that jurisdiction under § 1332 is present for the purpose of deciding defendant's motion to dismiss.

B. Wisconsin Consumer Act

The parties dispute which statute of limitation should apply to plaintiff's claim under the Wisconsin Consumer Act. Defendant says it is one year from the last alleged violation, citing Wis. Stat. § 425.307:

> Any action brought by a customer to enforce rights pursuant to chs. 421 to 427 shall be commenced within one year after the date of the last violation of chs. 421 to 427, 2 years after consummation of the agreement or one year after last payment, whichever is later, except with respect to transactions pursuant to open-end credit plans which shall be commenced within 2 years after the date of the last violation; but no action may be commenced more than 6 years after the date of the last violation.

This statute is included in the chapter called "Consumer Transactions—Remedies and Penalties" and in a subchapter called "Customer's Remedies."

Plaintiff points out that, on its face, § 425.307 applies to "customers" only. Under Wis. Stat. § 421.301(17) , a "customer" is "a person other than an organization . . . who

seeks or acquires real or personal property, services, money or credit for personal, family or household purposes or, for purposes of ch. 427 only, for agricultural purposes." Plaintiff says that he does not meet that definition because he did not buy anything from defendants or seek to do so, which means that he is not subject to the one-year limitations period for customers. However, he says that he still has a right to sue for violations of the Wisconsin Consumer Act under Wis. Stat. § 427.105(1), which applies to any "person." Id. ("A person injured by violation of [the chapter on prohibited debt collection practices] may recover actual damages and the penalty provided in s. 425.304."). Further, he points to several prohibited debt collection practices under Wis. Stat. § 427.104 that are not limited to conduct against the customer. E.g., Wis. Stat. § 427.104(1)(h) (prohibiting "other conduct which can reasonably be expected to threaten or harass the customer or a person related to the customer").

If plaintiff is correct that he has a right to sue because he is a person injured by a violation, but that he is not subject to the one-year limitations period in § 425.307, this raises the question of what the appropriate limitations period is for plaintiff's claim under the Wisconsin Consumer Act. Plaintiff says that it is six years, under either of two different theories. First, plaintiff says that the last clause in § 425.307, "no action may be commenced more than 6 years after the date of the last violation," may be interpreted as a "catch-all" limitations period for any claim under the Act not covered by other portions of the provision.

In the alternative, plaintiff says that the Act may not include a statute of limitations for non-customers, which means that Wis. Stat. § 893.93(1)(a) would apply. That statute imposes a six-year limitations period "when a different limitation is not prescribed by law." Id.

Defendant does not argue in its reply brief that plaintiff meets the definition of "customer" under § 421.301(17) or that plaintiff's status as a non-customer prevents him from suing under the Act. Thus, under the plain language of § 425.307, plaintiff is not subject to the one-year limitations period.

Generally, the plain language of the statute controls: "[w]hen examining the statutory language, if the plain meaning is clear, a court need not look to the rules of statutory construction or to extrinsic sources of interpretation." Tammi v. Porsche Cars North America, Inc., 2009 WI 83, ¶ 27, 320 Wis. 2d 45, 60, 768 N.W.2d 783, 791. See also State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[T]he court is not at liberty to disregard the plain, clear words of the statute."). Further, courts "presume that the legislature chose the statutory words carefully." In re Commitment of Franklin, 2004 WI 38, ¶ 13, 270 Wis. 2d 271, 282, 677 N.W.2d 276, 281. Thus, I must presume that the Wisconsin legislature intended to use the broad term "person" in § 427.105 and the narrower term "customer" in § 425.307. That is, if the legislature had wanted the limitations period to apply to everyone, it could have used the term "person" instead of customer or defined "customer" more broadly. It did neither.

There is a counter-canon in which courts read statutory language to avoid "absurd" results. In re Susan H., 2010 WI App 82, ¶ 10, 326 Wis. 2d 246, 254, 785 N.W.2d 677, 681. Defendant does not invoke this canon, but it seems to hint at it when it says that there "is no cogent reason why the debt collection conduct alleged here would be actionable for one year if Plaintiff owed the debt, but actionable for six years if the debt was not his." Dft.'s Br., dkt. #26, at 2.

Defendant has a point. It is not immediately apparent why the legislature would make a non-customer's statute of limitations six times longer than a customer's. However, questioning the legislature's reasons for making a distinction is a far cry from a conclusion that the distinction is absurd. Courts may not disregard the language chosen by the legislature simply because another result might seem more reasonable. "Allowing the 'correction' of substantive problems would make too much inroad on the legislative power, because judges tend to see as 'absurd' propositions with which they disagree." Owner-Operator Independent Drivers Association, Inc. v. Mayflower Transit, LLC, 615 F.3d 790, 792-93 (7th Cir. 2010). In this case, plaintiff suggests that non-customers may have more time because they have no control over the "date of last payment" or the "date of the consummation of the agreement," which are two events in § 425.307 that trigger the statute of limitations for "customers." That may not be the most obvious explanation, but I am reluctant to call "absurd" a simple choice between limitation periods. Id. ("Whether a

four-year period applies to § 14704(a)(2) and a two-year period to § 14704(b), or the reverse, neither outcome is absurd.")

The situations in which Wisconsin courts court have rejected an interpretation as "absurd" usually involve a result that is unworkable or contrary to clear legislative intent. E.g., State v. Tomaszewski, 2010 WI App 51, 324 Wis. 2d 433, 439, 782 N.W.2d 725, 728 (declining to include knowledge requirement into statute that requires drivers to use "multiple-beam headlamps . . . so that the glaring rays are not reflected into the eyes of the operator of the other vehicle" because there is no way for driver to know whether headlights are actually reflected into eyes of another driver); Watton v. Hegerty, 2008 WI 74, ¶ 25, 311 Wis.2d 52, 74, 751 N.W.2d 369, 380- 81 (rejecting interpretation of privacy provision that would allow dissemination of information so long as it was not stored at treatment facility because "[s]uch an interpretation would not protect the confidentiality of mental health information about individuals"); Orion Flight Services, Inc. v. Basler Flight Service, 2006 WI 51, 290 Wis. 2d 421, 442, 714 N.W.2d 130, 140 (rejecting interpretation of "motor vehicle fuel" as absurd because it would create conflict between two different statutes).

Even when "the meaning of the statute appears to be plain but that meaning produces absurd results," this simply gives a court the authority to "consult legislative history . . . to verify that the legislature did not intend these unreasonable or unthinkable results."

Teschendorf v. State Farm Ins. Companies, 2006 WI 89, ¶ 15, 293 Wis.2d 123, 135, 717 N.W.2d 258, 263. Defendant has not cited any legislative history supporting his view that the legislature intended the term "customer" in § 425.307 to have a broader meaning than the definition provided in § 421.301(17). Defendant points to a number of remedies in Wisconsin chapter 425 that are limited to "customers" and suggests that this is evidence of the legislature's intent to equate "customer" with "anyone who files a lawsuit under the Wisconsin Consumer Act." However, it is not necessarily "absurd" to give the primary beneficiaries of a statute a wider range of remedies than others who might be adversely affected as well.

Defendant cites Derksen v. Rausch Strum Israel & Hornik, SC, 2010 WL 3835097, *3 (E.D. Wis. 2010) (Stadtmueller, J.), for the proposition that "it has already been held that the one-year statute of limitations applies to a non-customer's claim under the WCA's debt collection statute." Dft.'s Br., dkt. #26, at 2. This is not accurate. Although the court did apply a one-year limitations period to a non-customer in Derksen, it did not consider the question whether the word "customer" in § 425.307 should be interpreted to mean non-customers as well. Because the court did not provide any reasoning for its decision, it is not persuasive.

It may be that the Wisconsin legislature made a mistake in limiting the one-year limitations period to "customers" or in granting a right to sue to non-customers. However,

"that doesn't mean [a court] can (or should) do anything about this error. Judges do not read between the lines when a statute's text is clear and its structure is coherent. . . . Even if [the legislature] made a mistake, [i]t is beyond our province to rescue [the legislature] from its drafting errors, and to provide for what [the court] might think . . . is the preferred result." United States v. Head, 552 F.3d 640, 643 (7th Cir. 2009) (internal quotations omitted). If defendant believes a drafting error has occurred, it is free to bring that to the attention of the Wisconsin legislature.

Having concluded that the one-year limitations period in § 425.307 does not apply, I need not determine which of plaintiff's alternative suggestions does. Defendant does not point to a possibility other than those proposed by plaintiff and both of plaintiff's suggestions provide a six-year limitations period. Thus, regardless whether § 893.93 or the last clause of § 425.307 applies, I cannot grant defendant's motion to dismiss with respect to this claim.

C. Invasion of Privacy

The parties agree that plaintiff's invasion of privacy claim has a two-year limitations period, but they disagree about when the limitations period began running and when it expired. In plaintiff's original complaint, he alleged that the calls began in "March or April 2008" and "continued for at least six months." Cpt. ¶¶ 9-10, dkt. #1-1. In his amended

complaint, he alleges that the calls continued "at least through the end of 2008." Am. Cpt. ¶¶ 12-13, dkt. #7. Defendant argues that the first complaint should control and that the claim should be dismissed as to any conduct that occurred before September 24, 2008, two years before plaintiff filed his complaint.

Plaintiff argues that the limitations period should not begin running until the "Spring of 2010" because defendant was "hid[ing] the identities of the debt collectors" who called plaintiff. Am. Cpt. ¶ 15, dkt. #7. This argument might be relevant if Williford Gray had raised a statute of limitations defense, but it is a red herring as to Consumer Portfolio Services because plaintiff does not allege in either of his complaints or his brief that he did not know the identity of Consumer Portfolio Services by September 2008. (In fact, such an allegation would be inconsistent with Dragone v. Consumer Portfolio Services, Inc., a case arising out of the same facts as this case that plaintiff's sister-in-law filed in the Circuit Court for Dane County in November 2008.) Accordingly, I conclude that plaintiff's claim for invasion of privacy must be dismissed as to Consumer Portfolio Services with respect to any conduct that occurred before September 24, 2008.

Defendant cites several district court cases for the proposition that courts should disregard allegations in an amended complaint that are inconsistent with the original. Aasen v. DRM, Inc., 2010 WL 2698296 (N.D. Ill. 2010); Kant v. Columbia University, 2010 WL 807442 (S.D.N.Y. 2010); Wallace v. New York City Dept. of Corrections, 1996 WL 586797

(E.D.N.Y. 1996). See also Bradley v. Chiron Corp., 136 F.3d 1317, 1325-26 (Fed. Cir. 1998) ("[T]he court was not required to accept as true the inconsistent allegations in the second amended complaint."). However, the difference identified by defendant is not significant or even inconsistent necessarily. Whether the calls lasted "at least six months" after April 2008 or "at least through the end of 2008," this allows one to draw the reasonable inference that some of the alleged conduct continued after September 24, 2008. Accordingly, I cannot dismiss the invasion of privacy claim in full.

D. Nuisance

1. Merits

"[A] private nuisance [i]s an unreasonable interference with the interests of an individual in the use or enjoyment of land." Abdella v. Smith, 34 Wis. 2d 393, 398, 149 N.W.2d 537, 539 (1967) (internal quotations omitted). Defendant argues that plaintiff cannot state a claim for private nuisance because "there is absolutely no authority under Wisconsin law extending the law of private nuisance to cover unwanted telephone calls, debt collection-related or otherwise." Dft.'s Br., dkt. #13, at 6. This is not a particularly helpful or persuasive observation because defendant does not cite any cases in which Wisconsin courts (or any other court) have considered such a claim. I cannot dismiss a claim simply because Wisconsin courts have not had an opportunity to address similar facts in a previous

case.

Defendant suggests that a nuisance requires harm to a person's property, but that is not the standard: "The tort of nuisance gives legal protection to a person's interest in the unimpaired use and enjoyment of land. This protection extends not only to the preservation of the property itself *but also to its enjoyable use*." Krueger v. Mitchell, 112 Wis. 2d 88, 106, 332 N.W.2d 733, 742 (1983) (emphasis added). Thus, a plaintiff may have a nuisance claim even if the only harm was "annoyance" and "inconvenience," Krueger, 112 Wis. 2d at 107, 332 N.W.2d at 743. In Krueger, the court held that "unreasonable noise levels" may constitute a nuisance. I see no reason why harassing phone calls at one's home would be categorically different. Although a plaintiff must show that the interference with his enjoyment is "substantial," defendant does not argue that plaintiff's complaint is deficient as to that element.

The parties cite only two cases in which the court considered whether telephone calls could constitute a nuisance. Wiggins v Moskins Credit Clothing Store, Inc., 137 F. Supp. 764 (D.S.C. 1956) (applying South Carolina law); Sofka v Thal, 662 S.W.2d 502 (Mo. 1983). Although the courts found liability only in Wiggins, even in Sofka the court assumed that telephone calls could give rise to a nuisance claim under the right circumstances. Accordingly, I conclude that Wisconsin law does not categorically bar private nuisance claims arising out of telephone harassment from debt collectors.

2. Statute of limitations

The limitations period is three years for negligent torts, Wis. Stat. § 893.54, and two years for intentional torts. Wis. Stat. § 893.57. (Section 893.57 was amended effective February 26, 2010 to increase the limitations period to three years, 2009 Wis. Act. 120, but neither side suggests that the amendment has any bearing on this case.) Plaintiff includes claims for intentional and negligent private nuisance, but he fails to explain how a theory of negligence could apply to this case. One does not "accidentally" make harassing phone calls. Accordingly, I conclude that the two-year statute of limitations applies and that this claim must be dismissed as to any conduct occurring before September 24, 2008. Steidl v. Gramley, 151 F.3d 739, 741 (7th Cir. 1998) ("When factual allegations conflict with a legal conclusion, the factual allegations are decisive.").

ORDER

IT IS ORDERED that

1.The motion to dismiss filed by defendant Consumer Portfolio Services, Inc., dkt. #12, is GRANTED with respect to plaintiff Curtis Jacobson's claims against that defendant for invasion of privacy and private nuisance as to any conduct occurring before September 24, 2008. The motion is DENIED in all other respects.

2. Defendant Williford Gray's motion to dismiss, dkt. #27, is DENIED.

Entered this 28th day of February, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge