IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BARBARA TESCH,

Plaintiff,

v.

ONEMAIN FINANCIAL, INC. f/k/a
CITIFINANCIAL, INC.,
BENEFICIAL FINANCIAL I, INC.
successor by merger to BENEFICIAL
WISCONSIN, INC., and U.S. BANK
NATIONAL ASSOCIATION ND,

Defendants.

ORDER

12-cv-273-bbc

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Plaintiff Barbara Tesch has filed a timely motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment in this case. Dkt. #149. In particular, she contends that the court erred when it concluded in the summary judgment opinion that she is not entitled to punitive damages on her claim that U.S. Bank National Association ND failed to conduct a reasonable investigation when she disputed information in her credit report, in violation of 15 U.S.C. § 1681s-2(b) of the Fair Credit Reporting Act. Dkt. #134. (Plaintiff does not challenge the court's conclusion that she is not entitled to damages for economic loss or emotional distress.) Because plaintiff still has not shown that she can meet the standard for punitive damages, I am denying her motion.

In their summary judgment materials, the parties discussed three notices that

defendant received about allegedly inaccurate information on plaintiff's credit report regarding her credit card account with defendant:

- on July 5, 2011, Equifax notified defendant that plaintiff disputed a $100 balance listed on her credit report; she also stated that the account was closed; when the account processor investigated the dispute, he saw a note about a "wis. ch. 128 filing," but he did not know what that meant, so he called defendant's bankruptcy department; the account processor believed that the bankruptcy department told him that a chapter 128 proceeding is the same thing as a Chapter 7 bankruptcy, so the processor updated plaintiff's account to reflect that it was "discharged in Chapter 7 bankruptcy";

- on July 18, 2011, the same account processor for defendant received an inquiry from Experian about plaintiff's account that stated, "Customer states inaccurate information" and "report states the account with US Bank is a 'Charge Off,' this is erroneous information"; after reviewing his notes from the week before, the account processor determined that the account information was correct;

- on an unspecified date, the same account processor for defendant received an inquiry from TransUnion that stated that plaintiff's "account was reaffirmed or not included in a bankruptcy" and "not involved in litigation"; the account processor reviewed his notes again and determined that the account information was correct.

In her motion for reconsideration, plaintiff focuses on the last inquiry, arguing that defendant's response to that inquiry violated 15 U.S.C. § 1681s-2(b), which requires furnishers of information such as defendant to "conduct an investigation with respect to the disputed information" after it receives notice of a dispute about a credit report. In particular, plaintiff says that the account processor should have done more to determine whether the account was included in a bankruptcy. If he had, plaintiff says, he could have discovered that the account was resolved in a proceeding under Wis. Stat. chapter 128, which is distinct from a bankruptcy proceeding.

To recover punitive damages for a violation of § 1681s-2(b), a plaintiff must show that the defendant knowingly or recklessly violated her rights, or, in other words, that defendant knew of an "unjustifiably high" risk that a violation would occur or should have known of such a risk because it was obvious. Safeco Insurance Co. of America v. Burr, 551 U.S. 47, 68 (2007). A "merely careless" application of the law's requirements is not sufficient. Id. at 69.

Plaintiff's argument that she is entitled to punitive damages is premised on the assumption that defendant conducted *no* investigation of the dispute about the bankruptcy reference, but defendant did not simply ignore the notice. Rather, the account processor reviewed his own notes about the account and saw that he had verified previously with the bankruptcy department that plaintiff's account was discharged in bankruptcy. Although the investigation was not extensive, the reasonableness of an investigation under the Fair Credit Reporting Act is context sensitive. Scheel-Baggs v. Bank of America, 575 F. Supp. 2d 1031, 1042 (W.D. Wis. 2008). Plaintiff does not say in her motion what more she believes the account processor should have done, but presumably it is that he should have contacted the bankruptcy department again. However, I cannot say it was obviously unreasonable for the account processor to rely on information that he recently had verified, particularly because the notice he received did not provide any reason to suggest that he would get a different answer from the bankruptcy department if he asked again.

Plaintiff argues that it was unreasonable for the account processor to rely on his notes because he had not previously received a dispute about the bankruptcy issue, but that

argument is not persuasive in the context of this case. Although it was the first time that plaintiff complained about the bankruptcy, it was not the first time the account processor had *verified* plaintiff's bankruptcy. Again, plaintiff does not explain why it would be obviously unreasonable for the account processor to believe that calling the bankruptcy department a second time would generate the same answer he received the first time.

Plaintiff says that the court "erred by holding that Plaintiff was . . . required to explain the difference between Wisconsin Statutes § 128.21 and chapter 7 bankruptcy in her dispute," but this argument misstates the holding in the summary judgment opinion. I did not conclude that plaintiff was required to provide legal argument when she disputed the accuracy of her credit report. Rather, I concluded only that defendant had not knowingly or recklessly disregarded plaintiff's rights because the information defendant received from the credit reporting agency did not make it obvious that defendant should question its previous investigation. Plaintiff does not develop any argument to the contrary.

Finally, plaintiff says that the court "appears to have been influenced" by a conclusion that defendant stopped reporting any information about a bankruptcy about a month after plaintiff complained. In particular, plaintiff cites a parenthetical statement in the opinion's undisputed facts section in which I stated that "defendant was no longer furnishing that information" about bankruptcy. Plaintiff does not point to contrary evidence, but she argues that it is "unknown" whether defendant may have continued to provide incorrect information about the bankruptcy because defendant's evidence shows only that it removed "the" bankruptcy notation from its records rather than "all" bankruptcy notations.

I did not discuss this fact or otherwise rely on it in the context of plaintiff's request for punitive damages, so I need not consider plaintiff's argument on this point. In any event, even if it were relevant whether defendant continued to furnish incorrect information, it is plaintiff's burden to prove her claim, not defendant's burden to disprove it, so the absence of evidence about an element of her claim would not require a conclusion that there was a genuine issue of material fact; it would mean that plaintiff had failed to prove the claim. NLRB v. Louis A. Weiss Memorial Hospital, 172 F.3d 432, 446 (7th Cir. 1999) ("An absence of evidence does not cut in favor of the one who bears the burden of proof on an issue.").

ORDER

IT IS ORDERED that plaintiff Barbara Tesch's motion to alter or amend the judgment, dkt. #149, is DENIED.

Entered this 8th day of July, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge