

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KELLI BANKS,

Plaintiff,

v.

TARGET CORPORATION,  
d/b/a TARGET NATIONAL BANK,

Defendant.  
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OPINION AND ORDER

12-cv-731-bbc

In this civil action, plaintiff Kelli Banks contends that defendant Target National Bank violated the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b), by reporting incomplete information to credit reporting agencies about her debt to defendant. After being notified by a credit reporting agency that plaintiff was repaying her debt pursuant to a receivership under Wis. Stat. § 128.21, defendant continued to report the debt as “charged-off,” “written-off” and “past-due” and did not add a notation that the debt was being repaid through the receivership. In an order entered on March 6, 2013, this court dismissed plaintiff’s claim that the report was inaccurate because she had not alleged that the report was false but declined to dismiss her claim that defendant’s failure to note the receivership rendered its report incomplete in a way that would mislead creditors.

Defendant has filed a motion for summary judgment, dkt. # 17, arguing that it was not required to report the receivership and that plaintiff has failed to allege any damages for

the alleged misreporting. Along with its brief in opposition to the motion for summary judgment, plaintiff filed a motion to amend the complaint, dkt. #27, to allege that it was inaccurate to report plaintiff's account as "past due" because the receivership modified the repayment terms of plaintiff's debt and she was not behind on receivership payments.

I will grant defendant's motion for summary judgment because plaintiff has failed to prove damages for any violations that defendant may have committed. I will deny the motion to amend as futile because plaintiff's proposed amendments would not alter my ruling on the motion for summary judgment.

From the parties' proposed findings of fact, I find the following undisputed facts. I have not considered the "supplemental proposed findings of fact" filed by defendant in response to plaintiff's facts in opposition because they were not permitted by the court's summary judgment procedures and because plaintiff has not had an opportunity to respond to them.

#### UNDISPUTED FACTS

In 2010, plaintiff failed to make her January payment to defendant. Because she was unable to keep up with her bills, she filed a proceeding under Wis. Stat. Ch. 128 in the Circuit Court for Dane County in March 2010. The court appointed Susan A. Schuelke to serve as trustee of the proceeding. In April, the trustee sent defendant a notice of the receivership. The court confirmed the receivership in June.

Sometime in July 2010, defendant charged off plaintiff's account. The trustee

disbursed funds to defendant pursuant to the receivership on July 2 but defendant did not receive its first payment from the trustee in August 2010. (Both facts are undisputed and neither party has explained how to reconcile them.) Between July 2, 2010 and October 29, 2012, the trustee disbursed all funds required to be paid pursuant to the receivership. Defendant received and deposited every check disbursed to it by the trustee under the receivership.

In September 2010, plaintiff submitted a dispute to Experian, a credit reporting agency, about the way in which her consumer credit account with defendant was appearing on her consumer credit report. (Neither party has described the precise content of this dispute.) Experian forwarded plaintiff's dispute to defendant for investigation on September 27, 2010. Experian's notice to defendant about the dispute stated that the "DISPUTE REASON" was

112-Claims inaccurate information. Did not provide specific dispute. Provide complete ID and verify account information. AS OF MAR 2010 DEBT BEING REPAID IN FULL PURSUANT TO RECEIVERSHIP FILED UNDER AUTHORITY OF WI STAT SEC 128.21.

Lyons Aff., Ex. 1, dkt. #24-1 (capitalization in original).

Defendant processed the dispute from Experian regarding plaintiff's account on October 12, 2010. For its investigation, defendant reviewed all relevant information provided by the consumer reporting agency and reviewed all the information in its own account file. There was no information provided to defendant by any consumer reporting agency, by plaintiff or by any other source that defendant did not review. (Plaintiff tried to dispute defendant's proposed finding of facts about its investigation but did not identify any

information that defendant failed to review and plaintiff relied on conclusory declarations by individuals without personal knowledge of defendant's investigation. Plt.'s Resp. to Dft.'s PFOF ## 7, 10, 11, dkt. #39.)

Before responding to Experian, defendant was aware of plaintiff's receivership and had received payments from the trustee. Dft.'s Resp. to Plt.'s PFOF #41, dkt. #40-41. Defendant did not conduct any investigation with respect to the receivership. A filing under Wis. Stat. § 128.21 is a public record that identifies the trustee and her mailing address and lists the date for all important events, such as filing, notice to creditors and court approval for the receivership. Defendant did not contact trustee Schuelke or look to the public records to investigate the nature or status of plaintiff's receivership.

In its response to Experian, defendant updated the amount currently past due, the date of the last payment and the balance date to reflect a payment received in September 2010. It informed Experian that the account was properly listed as having a balance past due and having been charged off and written off. Defendant did not report that plaintiff was paying pursuant to a receivership. (The parties dispute whether the standardized code that defendant used to respond to Experian allowed defendant to report the personal receivership. Dft.'s Resp. to Plt.'s PFOF ## 13-16, 23-25.)

Plaintiff wrote a followup letter to Experian dated October 20, 2010. She said that her accounts with defendant and four other creditors were not "charged off or written off or past due and the balances being reported are not accurate." She listed the balance of each of the accounts and stated that "[a]s of March 2010 these debts are being repaid in full

pursuant to a receivership filed under the authority of Wisconsin Statute sec. 128.21 and under the supervision of Dane County Circuit Court.”

Experian did not change its reporting of plaintiff’s account with defendant. Plaintiff received credit reports from Experian on October 27, 2010, March 11, 2011, December 16, 2011 and June 4, 2012. With respect to her account with defendant, the reports stated, “Account charged off. \$5,963 written off. \$5,289 past due as of Oct 2010.” They further noted that “[t]his item was verified and updated on Oct 2010.”

In December 2010, plaintiff and her husband filed a loan application with Wells Fargo Bank for funds to repair a vehicle that they had purchased with a loan from Wells Fargo. Experian compiled and disclosed a credit report about plaintiff to Wells Fargo. Wells Fargo denied plaintiff’s application, writing:

After careful consideration, we are unable to approve your credit request at this time for the following reason(s):

- Bankruptcy
- Collection action, Judgment, Tax Lien, or Charge Off
- Serious delinquency and public record or collection filed
- Proportion of balances to credit limits on revolving accounts too high

Banks Decl., dkt. #23-1, Ex. 1.

## OPINION

Plaintiff’s sole claim is that defendant violated 15 U.S.C. § 1681s-2(b), which requires furnishers of credit information to conduct an investigation when they receive notice of a dispute from a credit reporting agency. As I explained in the motion to dismiss, to state a claim against under 15 U.S.C. § 1681s-2(b), the consumer must prove that the furnisher

reported information that was inaccurate or incomplete in a way likely to materially mislead future creditors. Chiang v. Verizon New England Inc., 595 F.3d 26, 37-38 (1st Cir. 2010); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir. 1991). In opposition to the motion for summary judgment, plaintiff argues that defendant's failure to note her receivership made its report "incomplete" in a way likely to mislead future creditors. Plaintiff also seeks leave to amend her complaint to allege that it was "inaccurate" for defendant to report her account was past due because the receivership modified her repayment schedule and under the new schedule she was paying on time and as agreed.

I need not resolve either of these issues because plaintiff has presented insufficient evidence that she suffered any damages from defendant's alleged conduct. In her complaint and proposed amended complaint, plaintiff seeks "actual damages in an amount to be determined at trial" and "statutory and punitive damages." "Actual damages" that may be awarded under 15 U.S.C. § 1681o include damages for economic loss and emotional distress. Scheel-Baggs v. Bank of America, 575 F. Supp. 2d 1031, 1042-43 (W.D. Wis. 2008) (citing Cousin v. Trans Union Corp., 246 F.3d 359, 369 n.15 (5th Cir. 2001); Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1333 (9th Cir. 1995)). A plaintiff may also recover punitive damages if she can show that a defendant willfully failed to comply with the Fair Credit Reporting Act. 15 U.S.C. § 1681n(a).

Plaintiff must prove her entitlement to at least one of these three types of damages to sustain her claim. Because I conclude that plaintiff has not made such a showing, it is unnecessary to decide whether defendant violated § 1681s-2.

## 1. Economic loss

In her opposition to the motion for summary judgment, plaintiff claims that defendant's reporting caused Wells Fargo to deny her application for a loan to fix her vehicle. This claim suffers from two problems: she waived her right to claim these damages by failing to raise them in her Rule 26(a) disclosures and she has not provided sufficient evidence that it was defendant's reporting that caused Wells Fargo to deny her application.

In its initial disclosures under Rule 26(a), a party must disclose "a computation of each category of damages claimed" and make available the evidence supporting that computation. Fed. R. Civ. P. 26(a)(1)(A)(iii). In her initial disclosures under Rule 26(a), plaintiff claimed only actual damages for emotional distress, statutory damages and punitive damages and did not mention economic damages. Bailey-Rihn Decl., dkt. #33-4. In her brief in opposition to the motion for summary judgment, plaintiff alleged that Wells Fargo denied her loan application because of defendant's reporting.

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Defendant argued in its opening brief that plaintiff had not claimed economic damages. Dkt. #18, at 16. Although plaintiff was aware that she had not disclosed her claim regarding the Wells Fargo loan application, she did not even attempt to argue in her opposition brief that the disclosure was justified or harmless. On the contrary, she has known about the loan denial since December 2010 and failed to assert it until after

defendant filed its motion for summary judgment on the assumption that she was not seeking to recover economic losses. As a result, defendant was forced to file supplemental proposed findings of fact to respond to her newly claimed economic damages. Because plaintiff's failure to disclose was not justified or harmless, I conclude that she cannot rely on her claimed damages from the Wells Fargo loan application.

Even if plaintiff had not waived her right to claim economic losses, no reasonable jury could conclude that defendant's reporting caused Wells Fargo to deny her loan application. Plaintiff must show that defendant's inaccurate information was a "substantial factor" in Wells Fargo's decision to deny her application. Scheel-Baggs, 575 F. Supp. 2d at 1043; Anderson v. Trans Union, LLC, 345 F. Supp. 2d 963, 975 (W.D. Wis. 2004) (same); Crabill v. Trans Union, L.L.C., 259 F.3d 662, 664 (7th Cir. 2001) (holding that plaintiff failed to show causal relation between alleged statutory violation and loss of credit because he "failed . . . to present evidence that any of the creditors who denied him credit after receiving a report . . . did so because of the . . ." alleged inaccuracy in credit report).

Plaintiff argues that defendant's failure to alter its report that her account was "past due" to reflect her receivership was a substantial factor in Wells Fargo's decision to deny her loan application. Relying on expert testimony, she argues that creditors look more favorably on a credit reports noting a "personal receivership" than reports that a consumer simply defaulted. She contends that standard underwriting principles typically lead creditors to reject applicants with past due credit obligations.

Even accepting that plaintiff's expert is correct as a general matter, plaintiff is merely

speculating when she argues that defendant's report caused Wells Fargo to deny her loan application. Aside from the rejection letter, she has disclosed no admissible evidence about Wells Fargo's decision. In the rejection letter, Wells Fargo cites "Collection action, Judgment, Tax Lien, or Charge Off" and "Serious delinquency and public record or collection filed" as two of its reasons for the denial. Wells Fargo's reference to a "charge off" and "serious delinquency" may have referred to her account with defendant, but plaintiff's credit report also showed that she had an account with HSBC/Household Finance Corp. that was charged off and an account with Capital One that had been closed at the credit grantor's request after being past due for 60 days as of February 2010. Banks Decl., dkt. #23-2. Even if Wells Fargo would have looked "more favorably" on her past due amounts had defendant reported plaintiff's receivership, that does not mean Wells Fargo would have ignored them. Moreover, Wells Fargo cited two other reasons for denying plaintiff's loan application: "Bankruptcy" and "Proportion of balances to credit limits on revolving accounts too high." Plaintiff's surmise that defendant's failure to report the receivership was a substantial factor in Wells Fargo's decision is not sufficient to defeat defendant's motion for summary judgment. Brown v. Advocate South Suburban Hospital, 700 F.3d 1101, 1104 (7th Cir. 2012); Lewis v. Mills, 677 F.3d 324, 331-32 (7th Cir. 2012). Particularly because plaintiff had so many negative items on her credit report that were unrelated to her account with defendant, it would not be reasonable to infer that the comments on her report played a substantial part without more specific evidence.

In the absence of evidence of causation, I must grant defendant's motion for summary

judgment as to plaintiff's damages for economic loss.

## 2. Emotional distress

The court of appeals has made it clear that a plaintiff's "conclusory statements about her emotional distress" are not sufficient to defeat a motion for summary judgment. Ruffin-Thompkins v. Experian Information Solutions, Inc., 422 F.3d 603, 610 (7th Cir. 2005). Rather, "when the injured party's own testimony is the only proof of emotional damages, he must explain the circumstances of his injury in reasonable detail." Denius v. Dunlap, 330 F.3d 919, 929 (7th Cir. 2003). See also Sarver v. Experian Information Solutions, 390 F.3d 969, 971 (7th Cir. 2004) ("We have maintained a strict standard for a finding of emotional damage because [such claims] are so easy to manufacture.") (internal quotations omitted).

With respect to her alleged damages for emotional distress, plaintiff relies on her own testimony and that of her son and her husband. Plaintiff declared that she was "upset emotionally," "irritated" and "angry" that defendant failed to correct her report, that her irritation caused "stress" in her marriage and that defendant's reporting makes her feel hopeless, powerless and embarrassed and "makes [her] feel like [she has] lost confidence in using credit for [her] family." Plt.'s Decl., dkt. #23, ¶¶ 19-23. Plaintiff's husband declared that defendant's reporting caused plaintiff to be angry, irritated and hopeless, interfered with her sleep and led to marital stress. Joseph Banks Decl., dkt. #31, ¶¶ 10-13. Her son explained that he saw that his mother was upset, hopeless and powerless and that she

experienced tension in her relationship with her husband. Trevor Banks Decl., dkt. #31, ¶¶ 7-9.

This testimony is indistinguishable from testimony that courts in other cases have found to be insufficient as a matter of law. Wantz v. Experian Information Solutions, 386 F.3d 829, 834 (7th Cir. 2004) (testimony that plaintiff was “humiliated and embarrassed,” that it is “mentally and emotionally distressful when dealing with credit reporting agencies” and that it is “embarrassing to go somewhere and have them check your credit report and see all that stuff on there”); Bagby v. Experian Information Solutions, Inc., 162 Fed. Appx. 600, 605 (7th Cir. 2006) (testimony that plaintiff “stress[es],” gets tension headaches and clashes with her fiancé not sufficient); Cousin v. TransUnion Corp., 246 F.3d 359, 371 (5th Cir. 2001) (testimony that plaintiff was “very upset” and “angry” was insufficient); Konter v. CSC Credit Services, Inc., 606 F. Supp. 2d 960, 969 (W.D. Wis. 2009) (testimony that plaintiff was “irritable, angry, anxious, depressed and fearful”). Accordingly, I am granting defendant’s summary judgment motion as to plaintiff’s claim for emotional distress as well.

### 3. Punitive damages

To recover punitive damages, plaintiff must show that 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 (2007). A “merely careless” application of the law’s requirements is not sufficient. Id. at 69.

Plaintiff argues that defendant acted recklessly by not performing any investigation before deciding to report her debt as “charged off” and “past due” without also reporting the fact of the receivership. (Plaintiff also asserts that future depositions will support her claim that defendant has made it a practice to “ignore significant portions of the industry-standard investigation response form.” However, plaintiff did not file a motion under Fed. R. Civ. P. 56(d) or supporting affidavits to explain why she waited to depose these witnesses. Such ambiguous, speculative and unsworn assertions do not warrant deferring consideration of defendant’s motion for summary judgment.) It is not clear what investigation plaintiff believes that defendant should have performed. Her position appears to be that defendant should have performed a thorough legal analysis of Wis. Stat. § 128.21 proceedings, but she has cited no legal authorities that would suggest the Fair Credit Reporting Act placed defendant under such an obligation. Moreover, as was revealed in the motion to dismiss and the parties’ summary judgment briefs on liability, there is substantial uncertainty about whether a furnisher must report a receivership under Wis. Stat. § 128.21 and, if so, how to report such a receivership. Only Wisconsin has receiverships of this type; nothing in Chapter 128 explains how to report accounts subject to receiverships; and there are no published or unpublished cases to provide guidance for creditors.

Plaintiff’s attempts to explain why defendant’s reporting was misleading demonstrates the confusion about how to report Chapter 128 receiverships. For instance, plaintiff argues that it was misleading to report her account as “past due” because the receivership modified her repayment schedule and she “was not, and never was, ‘past due’ on the Receivership

payment schedule.” However, neither plaintiff nor her expert witness explained why the fact that plaintiff was making receivership payments means that her account is no longer “past due.” Hendricks Decl., dkt. #29, ¶ 18. Plaintiff’s expert also proposes alternative codes that he believes would have reflected plaintiff’s account status more accurately, but none match her situation exactly. For instance, he argues that defendant could have reported plaintiff’s debt as “Legal Action - Account Payments Assured by Wage Garnishment.” However, Wis. Stat. § 128.21 is not a wage garnishment program and does not insure payment. He argues that defendant could have reported that plaintiff was paying her debt “as agreed” while also reporting that her account had been closed. However, plaintiff was not paying as agreed; defendant was simply prohibited by law from enforcement actions so long as plaintiff made her payments under the receivership.

Even if some alternative report would have reflected plaintiff’s account status more accurately, plaintiff has not identified any reason to think that more investigation would have alerted defendant to the risk that its report was inaccurate or caused it to reach conclusions similar to those of plaintiff’s expert. In light of the lack of legal guidance surrounding the credit reporting for proceedings under Wis. Stat. § 128.21, plaintiff has not shown that defendant knew or should have known of an unjustifiably high risk that its report was inaccurate or incomplete. Because plaintiff has failed to show that any genuine issues of material fact remain with respect to any of her claims for damages, I am granting defendant’s motion for summary judgment in full.

ORDER

IT IS ORDERED that

1. The motion for summary judgment, dkt. #17, filed by defendant Target Corporation doing business as Target National Bank is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

2. Plaintiff Kelli Banks's motion to amend, dkt. #27, is DENIED as moot.

Entered this 21st day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge