

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

DUSTIN WEBER,

Plaintiff,

v.

GREAT LAKES EDUCATIONAL
LOAN SERVICES, INC.,

Defendant.

OPINION & ORDER

13-cv-291-wmc

Defendant Great Lakes Educational Loan Services, Inc. (“Great Lakes”) removed this civil action for violations of the Wisconsin Consumer Act (“WCA”), Wis. Stat. § 427.104, and the Federal Debt Collection Practice Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, from the Circuit Court for Dane County pursuant to 28 U.S.C. § 1331. On May 3, 2013, Great Lakes filed a motion to dismiss three counts of plaintiff Dustin Weber’s complaint, which this court granted in part and denied in part on July 30, 2013. (Dkt. #12.) With only the FDCPA claims and a single claim under the WCA remaining, Weber then sought leave to amend his complaint to add a new defendant, GC Services, Inc., as well as an additional claim against Great Lakes. Great Lakes opposes the amendment, arguing that Weber has offered no good reason for his delay and that the proposed amendments are futile. The court will deny Weber’s motion because (1) his claim against GC Services could not be properly joined in the present action; and (2) his claim of unconscionability is futile.

BACKGROUND

On September 2, 2010, plaintiff Dustin Weber received a Federal Direct Loan from the United States Department of Education. Great Lakes services student loans under the

Direct Loan Program, including Weber's. During the course of collecting loan payments from Weber in June and August of 2012, an employee of Great Lakes twice made contact with Weber's mother, treating her with hostility and sarcasm and repeatedly requesting Weber's phone number. When informed that Weber was represented by Krekeler Strother, S.C., Great Lakes then contacted that law firm in September of 2012, asserting in essence that it was obligated to contact Weber's mother under the Higher Education Act, state law notwithstanding.

In October of 2012, Great Lakes again called Weber's mother, asking for Weber's phone number repeatedly and aggressively. When that, too, failed, Great Lakes ceased collection activities against Weber and returned the account to the Department of Education, but did not inform the Department of Education that Weber had retained an attorney.

In or about January 2013, Weber's file was transferred to GC Services, a different loan servicing organization that collects on student loans for the Department of Education's Direct Loan Program. On June 18, 2013, Weber received a phone call from a GC Services employee. Weber did not receive a written notice stating (1) the amount of the debt, (2) the assumption that the debt is valid absent dispute within thirty days of receipt, or (3) his right to verification of the debt ("validation notice") before this June 18 call.

On August 16, 2013, Weber filed a motion to amend his complaint to add: (1) an FDCPA claim against GC Services for failing to give written notice validating its claim; and (2) a new unconscionability claim against Great Lakes for failing to inform the Department of Education that Weber was represented by an attorney. (Dkt. #15.)

OPINION

Rule 15(a)(2) governs amendment of pleadings falling outside the deadline for amendments as a matter of course. That rule states that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The Rule also states that “[t]he court should freely give leave when justice so requires.” *Id.*

Whether to grant or deny leave to amend rests within the discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). “In the absence of any apparent or declared reason . . . the leave sought should, as the rules require, be ‘freely given.’” *Id.* Even so, courts should not automatically grant leave to amend: “a court may deny a motion to amend because of ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.’” *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1303 (7th Cir. 1993) (quoting *Foman*, 371 U.S. at 182).

I. Claim against GC Services

Weber seeks leave to add GC Services as a defendant for failing to provide the validation notice required by § 1692g of the FDCPA. Rule 15 generally authorizes the addition of new parties by amendment. 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1474, at 629. But before allowing the amendment, the court must also consider Rule 20, relating to permissive joinder of parties. *Chavez v. Ill. State Police*, 251 F.3d 612, 632 n.4 (7th Cir. 2001).

Rule 20 states that persons may be joined as defendants in a single action if “any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrence” and “any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2). Here, Weber asserts no right to relief against GC Services and Great Lakes jointly, severally, or in the alternative. Likewise, the subject matter of the claim against GC Services is so far removed from the claims against Great Lakes that the court can conceive of no common question of law or fact that might arise in litigating these two actions together. The claims against Great Lakes -- both existing and proposed -- focus on alleged harassment, unconscionable conduct, and unauthorized communications with Weber’s mother. In contrast, the proposed claim against GC Services focuses on GC Services’ failure to send the validation notice required after making contact with Weber; it does *not* seek to hold GC Services liable for contacting Weber, rather than Weber’s attorney. (*See* Proposed 2d. Am. Comp. (dkt. #14) ¶¶ 40-42.) As a result, there are no common questions that make joining these two defendants in one suit helpful or appropriate. Accordingly, the motion to amend to add a claim against GC Services will be denied.¹

¹ The court’s decision to deny the present motion does not foreclose plaintiff from bringing a separate suit against GC Services for its conduct. Should he choose to do so, however, plaintiff should closely examine and revise the pleadings to ensure that he has properly pled the elements of 15 U.S.C. § 1692g, which requires that a validation notice be sent “[w]ithin five days *after* the initial communication with a consumer in connection with the collection of any debt.” 15 U.S.C. § 1692g(a) (emphasis added).

II. Claim against Great Lakes

A. Undue Delay

Great Lakes argues that Weber unduly delayed amending his complaint to add a claim of unconscionability before the deadline set by this court's scheduling order (dkt. #9), contending that Weber knew of his loan's transfer to GC Services by January 2013 and, even if he did not, he certainly knew by June 18, 2013, having received a call from GC Services on that date. As a result, Great Lakes argues, Weber had all the necessary facts to amend his complaint before the court's July 12th deadline for amendments. Weber responds that any delay resulted from his need to investigate the relationship between GC Services, the Department of Education and Great Lakes. He also maintains that Great Lakes failed to demonstrate that the delay will prejudice it in any way.

The court agrees with Weber that a "delay" of two months does not justify denying the motion to amend. While Weber would have known by June 18, 2013, that he had been contacted by GC Services, this does not necessarily mean that he had "all of the relevant alleged facts" by that date. (Def.'s Resp. 5 (dkt. #16).) For example, one of the new facts Weber alleges is that Great Lakes failed to inform the Department of Education that Weber was represented by an attorney when it returned his loan -- a fact that certainly would have required some investigation to unearth following the June 18 call.

Furthermore, Weber is correct to point out Great Lakes' failure to argue prejudice. "In most cases, delay alone is not a sufficient reason for denying leave [to amend]." 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1488, at 764 (3d ed. 1998); *see also Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 793 (7th Cir. 2004) ("[D]elay by itself is normally an insufficient reason to deny a motion for leave to amend. Delay must be

coupled with some other reason.”) (internal citation omitted). Moreover, the court could ameliorate any prejudice to Great Lakes from allowing an amendment, by extending the time to file a dispositive motion against the new claim and by extending the time to conduct discovery.

B. Futility

Great Lakes’ argument as to the futility of permitting Weber’s proposed amendments have substantially more merit. Though courts should grant motions under Rule 15(a)(2) freely when justice so requires, the court may deny leave to amend “if the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss.” *Perkins v. Silverstein*, 939 F.2d 463, 472 (7th Cir. 1991) (citing *Foman v. Davis*, 371 U.S. 178, 182(1962)). The applicable standard “is the same standard of legal sufficiency that applies under rule 12(b)(6).” *Gen. Elec. Capital Corp. v. Lease Resolution*, 128 F.3d 1074, 1085 (7th Cir. 1997).

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When evaluating a complaint’s sufficiency, the court construes it in the light most favorable to the party not seeking dismissal, accepts well-pleaded facts as true, and draws all inferences in the plaintiff’s favor. *Reger Dev., LLC v. Nat’l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010). “A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

Weber's newly proposed claim against Great Lakes is premised on its alleged failure to inform the Department of Education that he was represented by an attorney. He argues that the lack of disclosure "set the process in motion for [Weber] to be contacted by a debt collector," and such action "unfairly [took] advantage of [Weber's] lack of knowledge and experience with respect to debt collection, as [he] reasonably expected that the retention of counsel would prohibit debt collectors from contacting him after disclosing that he [is] represented by counsel." (Proposed 2d Am. Compl. (dkt. #14) ¶¶ 37-38.) Therefore, Weber argues, the nondisclosure violates Wis. Stat. § 425.107 and he is entitled to statutory and actual damages.

Subsection 425.107(1) is a general statute prohibiting unconscionability in consumer credit transactions, which in addition to more standard remedies and penalties, requires the court to refuse to enforce unconscionable transactions. Subsection 425.107(2) deems presumptively unconscionable any specific practices in consumer credit transactions and collection of debts forbidden by the Secretary of the Department of Financial Institutions pursuant to § 426.108. Subsection 425.107(3) provides a non-exclusive list of nine factors a court may consider in determining whether "any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable." Wis. Stat. § 425.107(1).

Weber's arguments here are somewhat reminiscent of his arguments defending his original unconscionability claim, which he based on Great Lakes' continued contact with Weber's mother, even after it learned that Weber was represented by counsel. The court dismissed that claim, noting that Great Lakes' contact with Weber's mother was neither an explicitly forbidden practice by statute or rule, nor did it "appear 'unconscionable' even

under the more general considerations listed” by statute. Likewise, Weber’s proposed second amended complaint and supporting brief cites to no statute or promulgated rule explicitly forbidding a collection agency from returning a debt without specifically detailing its efforts to collect, much less advising whether the debtor is represented by an attorney. On the contrary, Webers offers but one general statutory factor to consider in finding unconscionability that might be applicable here: subsection (3)(a) allows the court to consider whether “the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers[.]” Wis. Stat. § 425.107(3)(a).

Great Lakes’ alleged failure to disclose that Weber had an attorney when it returned his outstanding account to the Department of Education, by itself, does not appear to be a practice “unfairly taking advantage” of Weber’s inexperience. At best, Great Lakes’ alleged omission gave rise only to a possibility (apparently realized) that another debt collector would thereafter attempt to contact Weber directly. Merely expecting not to receive any more calls due to his retention of counsel and being disappointed in that expectation does not plausibly suggest that Weber’s lack of knowledge has been “taken advantage of.” On the contrary, Weber apparently *recognized* his right under 15 U.S.C. § 1692c(a)(2) not to be contacted by a debt collector who has been advised that the debtor is represented by an attorney with respect to the subject debt. The court is at a loss to see how that disappointed expectation “took advantage” of his lack of knowledge or experience, and Weber pleads no facts that make such an assertion plausible, much less that it rises to the level of unconscionable conduct.

Of course, this court is not limited to analyzing the factors listed in § 425.107(3). *Drogorub v. Payday Loan Store of Wis.*, No. 2012AP151, 2012 WL 6571696, at ¶ 15 (Wis.

Ct. App. Dec. 18, 2012) (“A court therefore has discretion to consider all of those factors [listed in Wis. Stat. § 425.107(3)], some of them, or none at all.”). Nevertheless, the court does not see how Great Lakes’ alleged conduct rises to the level of unconscionability. Beyond conclusory allegations discussed above -- that having multiple collectors contact him despite his retention of counsel takes advantage of his naïveté -- Weber offers no support for the assertion that “it is unjust for a debtor, after hiring an attorney to avoid collection calls, to continue to receive collection calls based on the failure of one of the collectors to provide proper notification.” (Pl.’s Reply Br. (dkt. #17) 4.)

In particular, Weber provides no support for the proposition that Great Lakes had any legally-recognized *duty* to disclose to the Department of Education the fact that Weber was represented by counsel with regard to his debt. Weber does not even allege, as he did in his original pleading, that the failure to disclose he was represented by an attorney was intended to bully or harass him or cause him to misunderstand the true nature of his debt. Nor does he allege that any of these (or other) consequences arose from the single June 18, 2013, phone call Weber allegedly received from GC Services. Ultimately, his proposed amendment does not “give enough details about the subject-matter of the case to present a story that holds together.” *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)). Thus, this later, amended claim against Great Lakes does not rise to the level of plausibility, and allowing the amendment would be futile.

Finally, the court notes that it is unclear whether Weber would have a claim for relief under § 425.107 even if his newly-asserted claim were plausible. That section requires a court to refuse to enforce the *consumer credit transaction* itself or to limit the application of

any unconscionable aspect or conduct with respect to that transaction “if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable.” Wis. Stat. § 425.107(1). Chapter 427 of the WCA, in contrast, applies to “conduct and practices in connection with the collection of obligations arising from consumer transactions,” that is, debt collection activities. Wis. Stat. § 427.102. The only discernible consumer credit transaction here is the one in which Weber acquired money on credit from the Department of Education in September 2010, but Weber does not seek to limit or void that transaction, nor does he allege that the underlying loan was in some respect unconscionable. Rather, his focus is on the allegedly unconscionable behavior of Great Lakes in seeking to collect on his debt.

While it appears that Wisconsin statutes may contemplate the possibility of debt collection activities being unconscionable, *see* Wis. Stat. § 426.108 (authorizing the administrator to “promulgate rules declaring specific conduct in consumer credit transactions *and the collection of debts arising from consumer credit transactions* to be unconscionable”) (emphasis added), the court has doubts as to whether § 425.107 is the proper vehicle for such a claim.

ORDER

IT IS ORDERED that plaintiff Weber's motion to amend his complaint (dkt. #15) is DENIED.

Entered this 31th day of January, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge