

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

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JASON A. NASMAN,

Plaintiff,

OPINION AND ORDER

v.

11-cv-614-wmc

CHASE HOME FINANCE LLC,  
GRAY & ASSOCIATES, LLP,  
STEVEN E. ZABLOCKI,  
MICHAEL M. RILEY,  
BRIAN QUIRK & ROBERT M. PIETTE,

Defendants.

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In this case, plaintiff Jason Nasman alleges that the above-captioned defendants instituted a foreclosure action on his property without giving proper notice of his alleged debt and failed to verify his debt in violation of the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18, the Wisconsin Consumer Act -- Debt Collection, Wis. Stat. 427.104(j), and Wisconsin Administrative Code Chapter DFI-Bkg 74.14. Defendants Gray & Associates, Zablocki, Riley, Quirk and Piette now move to dismiss the case on the pleadings.

Construing the complaint as an attempt to remove a state court foreclosure action pending in St. Croix County, defendants move to dismiss for failure to timely file notice of removal pursuant to 28 U.S.C. § 1446(b). Construing the complaint, in the alternative, as an action for damages and injunctive relief, defendants move to dismiss for failure to state a basis for subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a cognizable claim pursuant to Fed. R. Civ. P. 12(b)(6). The court

finds that the complaint is a distinct civil action rather than an attempt to remove a state court foreclosure action, but will dismiss all of plaintiff's state law claims and two out of his four federal law claims as insufficiently pled pursuant to Fed. R. Civ. P. 12(b)(6).

#### ALLEGATIONS OF FACT<sup>1</sup>

Plaintiff Jason A. and his wife Robin L. Nasman ("the Nasmans") are residents of New Richmond, Wisconsin. Defendant Chase Home Finance LLC purports to own a note and a mortgage on the Nasmans' real property in New Richmond. On January 19, 2011, Chase filed a foreclosure action in the St. Croix County Circuit Court of Wisconsin, alleging that the Nasmans were delinquent on their monthly mortgage payments. Defendant Gray & Associates and its employees -- defendants Zablocki, Riley, Quirk and Piette -- represent Chase in its debt-collection efforts and in the foreclosure action. The principle business of Gray & Associates is collecting debts for others, including, in this instance, for Chase.

Mr. Nasman maintains that he owes no debt to Chase. He further alleges that defendants knew this and still attempted to obtain money from him. During the foreclosure proceedings, Nasman made his position clear by filing an answer disputing the debt. He alleges that defendants never gave proper notice of his debt before

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<sup>1</sup> The court accepts as true all well-pleaded facts and allegations in the complaint, drawing all reasonable inferences in favor of the plaintiffs. *London v. RBS Citizens, N.A.*, 600 F.3d 742, 745 (7th Cir. 2010). In areas where plaintiff's complaint fails to allege some basic background facts, the court draws upon defendants' responsive assertions of fact to the extent they do not appear to be disputed by plaintiff.

foreclosing, and have not responded to his demand for debt verification, despite repeated requests and the state court's instruction that they do so.

## OPINION

Defendants move to dismiss plaintiff's amended complaint on alternative grounds: (1) failure to timely remove a pending foreclosure action to federal court; (2) lack of federal jurisdiction; or (3) failure to plead adequately a legal cause of action.<sup>2</sup>

### **I. Claimed Removal of the Pending Foreclosure Action to Federal Court**

Defendants suggest that plaintiff's complaint may be an attempt to remove a currently pending state court foreclosure action to this federal court. Plaintiff's response in his brief in opposition indicates that this is not his intention. At any rate, removal would be untimely. *See* 28 U.S.C. § 1446(b) (notice of removal must be filed within thirty days after service of the pleading or state court summons, or from the date on which it may first be ascertained that the case is removable). Since the Nasmans were

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<sup>2</sup> In his brief in opposition to defendants' motions to dismiss, plaintiff raises several objections to defendants' conduct during this litigation, and informally "moves" that defendants' legal briefs be stricken from the record as a sanction. First, plaintiff argues that attorney Mark Clauss is prohibited by Wisconsin's ethics rules from representing Gray & Associates and its employees. To the extent that the argument is intelligible, plaintiff seems to suggest that (i) an attorney may not file a brief or motion until he has filed a formal notice of appearance; (ii) an attorney may never defend a co-worker or his employer in a lawsuit because of an inherent "conflict of interest"; and (iii) only a partner in the Gray & Associates law firm (or the agent appointed to accept service of process for the firm) may act on its behalf in court. Second, plaintiff contends that by making legal arguments that plaintiff disagrees with, Mr. Clauss has violated his ethical duty not to make a false statement of fact or law to a tribunal. All of the above arguments are unsupported by law and are frivolous on their face. Accordingly, the court will deny plaintiff's informal motion to strike.

served with a foreclosure summons on January 21, 2011, over seven months prior to the filing of this federal action, and no change has occurred which would allow a new basis for removal, the issues in the foreclosure action properly remain in state court.

## **II. Subject Matter Jurisdiction**

Defendants have moved to dismiss both for lack of any cognizable claim and lack of subject matter jurisdiction. Because the court finds that plaintiff has adequately pled at least one federal claim, it will deny defendants' motion to dismiss for lack of jurisdiction. *See* 28 U.S.C. § 1331.

## **III. Claimed Failure to State a Legally-Cognizable Claim**

Plaintiff wishes his complaint to be construed as one for civil damages and injunctive relief. Defendants assert that if that is the case, the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a legally-cognizable claim. Courts are encouraged to construe *pro se* complaints generously, *Walker v. Taylorville Corr. Ctr*, 129 F.3d 410, 413 (7th Cir. 1997), but the pleadings still must comport with the basic requirements established by the Federal Rule of Civil Procedure. Rule 8(a)(2) requires that a pleading contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The complaint must also contain sufficient facts to support a plausible claim to relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Although detailed factual allegations are not required, mere “labels and conclusions, or a formulaic recitation of the elements of a cause of action” are not sufficient to survive a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

555 (2007). When evaluating the sufficiency of a complaint, a court must construe all of plaintiff's factual allegations as true and draw all reasonable inferences in plaintiff's favor. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006).

#### **A. State Law Claims**

Plaintiff alleges that defendants have violated the Wisconsin Consumer Act -- Debt Collection, Wis. Stat. § 427, the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18, and Wisconsin Administrative Code DFI-Bkg § 74.14.<sup>3</sup> However, he has not pled enough facts to create a plausible inference that any of these state laws have been violated.

##### **i. Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18**

The Wisconsin Deceptive Trade Practices Act prohibits certain actions in connection with the advertising, distribution or sale of property or services. Wis. Stat. § 100.18. Plaintiff alleges only attempts to collect a debt, and provides no facts suggesting that there has been any "trade" activity governed by this statute

##### **ii. Wisconsin Administrative Code DFI-Bkg § 74.14**

Wisconsin Administrative Code DFI-Bkg Chapter 74 regulates the conduct of collection agencies. Section 74.14 provides:

*Use of alias.* In any oral or written communication with a debtor, any collector or solicitor may use a separate alias. Such alias shall include a first and last name and shall be registered with and approved by the division prior to use. No collector or solicitor may have more than one alias. No

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<sup>3</sup> Plaintiff also appears to allege that defendants have committed state law crimes. Aside from the impropriety of such blanket unsupported claims, the decision to charge an individual with a crime is a prosecutorial function and not a judicial one, and wholly beyond the scope of this civil lawsuit. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

change of alias may be authorized unless good cause is shown. Collectors or solicitors employed by a licensee may not use the same alias. A licensee may forward printed collection notices to a debtor which are unsigned.

Plaintiff does not allege that any defendant employed an alias for the purposes of debt collection, or otherwise violated the proscriptions found in subsection 14.

**iii. Wisconsin Consumer Act -- Debt Collection, Wis. Stat. § 427.104(j)**

Wisconsin Statutes § 427.104(j) prohibits debt collectors from “attempt[ing] or threaten[ing] to enforce a [debt] with knowledge or reason to know that the [debt] does not exist.” “Debt collector’ means any person engaging, directly or indirectly, in debt collection.” Wis. Stat. § 427.103(3). Plaintiff now denies owing a debt to Chase Home Finance, but he does not allege that defendants knew, or had reason to know, that they were pursuing an invalid or nonexistent debt -- as opposed to knowing the debt was in dispute.

**B. Federal Law Claims**

Plaintiff alleges that defendants’ refusal to respond to his debt verification demands constitutes a violation of several provision of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692g(a)(4-5), § 1692g(b), § 1692e(10) and § 1692i(b).<sup>4</sup>

**i. 15 U.S.C. § 1692g(a)(4-5)**

Plaintiff first contends that defendants have failed to provide him with legally adequate notice of debt. The FDCPA provides in relevant part that:

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<sup>4</sup> Plaintiff has explicitly identified some of these sections in his complaint. Others, the court has identified on his behalf.

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-

...

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a)(4-5).

Plaintiff has alleged that “[d]efendants failed to convey the required disclosures.” (Am. Comp. (dkt. # 3) ¶28.) Although minimal, the court finds that this statement is sufficient to put defendants on notice as to plaintiff’s alleged claim and survive a motion to dismiss.

**ii. 15 U.S.C. § 1692g(b)**

Plaintiff next contends that defendants have failed to provide verification of the debt, despite repeated demands. In this regard, the FDCPA provides in relevant part:

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of

the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

15 U.S.C. § 1692g(b).

Plaintiff alleges that none of the defendants have ever responded to his requests for verification. Plaintiff also indicates that the foreclosure action has continued in spite of this failure to verify the debt. Therefore, plaintiff's claims under 15 U.S.C. § 1692g(b) are also cognizable and may proceed.

**iii. 15 U.S.C. § 1692e(10)**

Third, plaintiff contends that defendants have made false or misleading representations to him in violation of 15 U.S.C. § 1692e(10), which states in relevant part that:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

...

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

The complaint lacks any sort of factual allegation that would suggest any of the defendants made a false, deceptive or misleading representation to plaintiff. If plaintiff is simply complaining that defendants have made a "false" communication by suing for a debt that he claims not to owe, this section of the statute is of no use to him, since it

provides relief only for genuinely *misleading* statements, not merely erroneous ones. As long as “a statement would not mislead [someone with rudimentary knowledge about the financial world], it does not violate the FDCPA -- even if it is false in some technical sense.” *Wahl v. Midland Credit Mgmt, Inc.*, 556 F.3d 643, 646 (7th Cir. 2009). If plaintiff is instead complaining that defendants misled him by providing him with a “false” statement of verification, this is flatly contradicted by plaintiff’s allegation that all of his debt verification demands have gone unanswered. (Am. Compl. (dkt. # 3) ¶26.)

**iv. 15 U.S.C. § 1692i(b)**

Finally, plaintiff contends that defendants have violated 15 U.S.C. § 1692i. This section controls the proper venue for originating a debt collection action. There is nothing in the allegations suggesting that defendants’ debt collection action was brought in an improper venue.

**ORDER**

IT IS ORDERED that defendants Gray & Associates LLP, Steven Zablocki, Michael Riley, Brian Quirk and Robert Piette’s motion to dismiss for failure to state a legal claim (dkt. # 7) is DENIED IN PART with respect to plaintiff’s claims arising under 15 U.S.C. § 1692g, and GRANTED IN PART with respect to all other claims.

Entered this 24th day of January, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge