IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY BRUESEWITZ,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-400-S

LAW OFFICES OF GERALD E. MOORE & ASSOCIATES, P.C., DANIELLE HILL and ST. PAUL FIRE AND MARINE

Defendants.

Plaintiff Terry Bruesewitz commenced this action in the Circuit Court for Jefferson County, Wisconsin against defendants Law offices of Gerald E. Moore & Associates, P.C. ("GEMA") and his employee Danielle Hill, alleging that GEMA and Hill violated certain provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et. seq., (FDCPA) and the Wisconsin Consumer Act, Wis. Stat. § 427.104, (WCA) during their attempt to collect a credit card debt from plaintiff. The matter was removed to this court pursuant to 28 U.S.C. §§ 1441(a) and 1331 and is presently before the Court on cross motions for summary judgment. The following facts are undisputed for purposes of the pending motions.

FACTS

Plaintiff failed to make timely payments on his credit card account with MBNA America Bank, N.A. In September 2004 MBNA

assigned plaintiff's account to Worldwide Asset Purchasing, LLC, which retained GEMA, a collection law firm, to pursue collection on the account.

On November 28, 2005 GEMA sent a letter, signed by Hill, to plaintiff. The letter provided in part:

> Name of Creditor: Worldwide Asset Purchasing, LLC, *succesor in interest to* MBNA America Bank, N.A.
> Account Number: 5329033800000477
> Amount of Claim: $5,631.43
> GEMA No. 01106541
>
> **NOTICE OF INTENT TO ARBITRATE & 80%SETTLEMENT OFFER**
>
> Dear TERRY BRUESEWITZ:
>
> It is this firm's understanding that you have sufficient resources with which to make a settlement of this account, but you have failed to do so. Your refusal to make suitable arrangements for settlement has left my client no alternative but the exercise of its remedy under your card member agreement: the submission of this claim to binding arbitration before the National Arbitration Forum.
>
> * * *
>
> ***At this time, my client would like to offer you the opportunity to settle your account for 80% of your current balance as listed above.*** Receipt of these monies within ten (10) days from receipt of this letter will prevent the filing of a claim. If you are unable to take advantage of this one-payment settlement offer, we wish to give you the opportunity to honor your outstanding obligation by making monthly payments. In order to set up acceptable payment arrangements please contact us directly....

On February 8, 2005 plaintiff's counsel sent GEMA a letter advising that it represented the plaintiff and requesting verification of the debt and original creditor. Thereafter GEMA suspended all direct contact with plaintiff.

GEMA routinely initiates arbitration on behalf of its clients and has filed 29,946 arbitration claims since 2004.

MEMORANDUM

Plaintiff's second amended complaint asserts four FDCPA claims all based on the November 28 letter: (1) the letter is a false representation of the amount of the debt, §§ 1692e and 1692f; (2) the threat to arbitrate was not intended to be taken; § 1692e(5); (3) the letter falsely represents that an attorney investigated, reviewed, authorized and approved the letter, § 1692e(3); (4) the letter falsely represents that defendant investigated plaintiff's background, § 1692e(10). Plaintiff's second amended complaint also alleges that the same actions violate the WCA, §§ 427.104(1)(j) and (k). Defendants deny that the letter violates any of these provisions.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (l986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Fair Debt Collection Practices Act

Plaintiff maintains that defendants' letter violates four sections of the FDCPA. Section 1692e of the FDCPA makes it unlawful for a debt collector to use "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f prohibits the use of "unfair or unconscionable means" to collect a debt. Section 1692e(5) makes it unlawful to threaten to take action that is not intended to be taken. Section 1692e(3) makes it unlawful to falsely imply that a communication is from an attorney.

When assessing whether any of these violation occurred the Court views the letter from the standpoint of "the unsophisticated debtor." Sims v. G. C. Services L.P., 445 F.3d 959, 963 (7th Cir.

2006). The unsophisticated debtor standard is an objective one. Id. The unsophisticated debtor is "uninformed, naive, or trusting," but is also considered to have a "rudimentary knowledge of the financial world and is capable of making basis logical deductions and inferences." Id. (citations omitted). Accordingly, the issue before the Court is whether it can be determined as a matter of law that under the unsophisticated debtor standard, the challenged provisions of the letter violate the statutory prohibitions.

Amount of the Debt. The Court finds that the amount of the debt is clearly stated in the letter and is not misleading. Under a reasonable reading of the letter the balance owed on plaintiff's account was $5,631.43 as prominently listed at the top of the letter as "Amount of Claim." Defendants are offering to settle plaintiff's claim for 80% of that amount. Plaintiff advances a strained interpretation that would permit a finding that the amount of claim listed at the top is 80% of the total account balance. Plaintiff offers no objective evidence of confusion.

> Where it is apparent that a collection letter would not confuse a significant fraction of the population, summary judgment should be granted in favor of the defendant unless the plaintiff has presented "objective evidence of confusion."

Id. at 963. Because the collection letter does not appear to be confusing to an ordinary reader and plaintiff has provided no objective evidence of confusion, defendants are entitled to summary judgment in their favor on that claim.

Intent to Arbitrate. Plaintiff contends that defendants' threat to commence arbitration proceedings violates § 1692(e)(5) because defendants did not intend to initiate arbitration on the claim. In support of this argument plaintiff offers only the fact that defendant did not actually initiate arbitration notwithstanding plaintiff's failure to respond or pay. Although the defendant did not commence an arbitration proceeding the undisputed evidence is overwhelming that it intended to do so when the letter was sent. First, it is undisputed that defendants routinely initiate arbitration proceedings for their collection clients and have done so in 29,946 cases since 2004. GEMA presently has 2,858 arbitration cases pending. There is nothing to suggest that defendants were not following their ordinary procedure in this case, which includes the initiation of arbitration if other collection efforts are unsuccessful. Defendants deviated from their ordinary procedure only as a result of the intervention in the case by plaintiff's attorney.

Plaintiff offers the additional argument that the letter threatens immediate arbitration at the end of the ten day opportunity for settlement. The language of the letter does not support a time restriction. The letter provides that an 80% payment within ten days "will prevent the filing of a claim." The plain meaning of that sentence is that the 80% settlement offer is closed after ten days. It says nothing about when arbitration

might be initiated in the event the offer is not accepted. Accordingly, the threat to commence an arbitration proceeding was clearly intended to be carried out in the ordinary course but the ordinary process was interrupted by the intervention of plaintiff's counsel. Summary judgment in defendants' favor is appropriate.

Plaintiff's Wisconsin consumer Act claims based on the identical conduct are found not to be misleading or to threaten action not intended are likewise dismissed.

Misleading representations. The two remaining claims concerning misleading representations of attorney involvement and investigation were added by plaintiff's second amended complaint which was filed on October 25, 2006. Neither party has moved for summary judgment on these two claims. Accordingly, they remain for trial.

Also presently before the court are cross motions for summary judgment on plaintiff's claim for a declaration that plaintiff may recover multiple statutory penalties in a single action and may recover statutory damages under the FDCPA and the WCA for the same conduct if it violates both acts. As plaintiff concedes, the law has been long established that FDCPA plaintiff's may recover only one statutory penalty per action, Barber v. National Revenue Corp., 932 F.Supp. 1153, 1155-56 (W.D. Wis. 1996), and that a plaintiff may not recover under both the FDCPA and the WCA for the same conduct. Associates Financial Services Co. v. Hornik, 114 Wis. 2d 163, 172-73, 336 N.W.2d 395 (Ct. App. 1983). Nothing in

plaintiff's submission persuades the Court that these holdings should be abandoned or altered. Neither is there any basis on the facts of this case, particularly in light of the Court's rulings with respect to claims one and two, that the presence of two defendants associated with a single collection letter could justify multiple statutory penalties. Accordingly, defendant's motion for summary judgment on the issue is granted.

Defendant is also entitled to summary judgment that plaintiff may not recover punitive damages for violation of the FDCPA. Randolf v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2001). Nor does the WCA provide for punitive damages. See § 427.105(1), Wis. Stat. Moreover, even were punitive damages available in theory, the remaining claims allege only that defendants sent a single letter to collect a legitimate debt while implicitly misrepresenting the amount of investigation they conducted prior to sending the letter. That conduct could not possibly rise to the standard for recovery of punitive damages.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is DENIED.

Entered this 15th day of November, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge