IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEBORAH M. SOWL
and KERRY T. SOWL,

OPINION AND ORDER

Plaintiffs,

10-cv-203-bbc

v.

ONEWEST BANK, FSB,

Defendant.

- -

Plaintiffs Deborah M. Sowl and Kerry T. Sowl bring this civil action against defendant OneWest Bank, FSB, contending that defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g, by attempting to collect a debt without providing required information. Jurisdiction is present under 28 U.S.C. § 1331.

The case is before the court on defendant's motion for summary judgment. Defendant argues that the Fair Debt Collection Practices Act does not apply to the notice at issue because it was not sent "in connection with the collection of any debt," as required by § 1692g. I agree and will grant defendant's motion. This makes it unnecessary to consider defendant's alternative argument that plaintiffs named the wrong corporate entity.

From the proposed findings of fact submitted by the parties and from the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

On August 13, 2004, plaintiffs Deborah Sowl and Kerry Sowl executed a $192,000 note and mortgage to IndyMac Bank, FSB, using their property located at 4733 Buss Road, Cottage Grove, Wisconsin, as collateral. To secure the indebtedness on the note, plaintiffs executed a mortgage to Mortgage Electronic Registrations Systems, Inc., as nominee for IndyMac Bank, FSB.

On July 11, 2008, IndyMac went into federal receivership, becoming IndyMac Federal Bank, FSB. A few months later, beginning with their December 2008 payment, plaintiffs defaulted under the terms and conditions of their note and mortgage by failing to make timely mortgage payments.

On March 19, 2009, IndyMac Federal merged with defendant, OneWest Bank, FSB, which acquired most of IndyMac Federal's assets and mortgage-servicing rights from the Federal Deposit Insurance Corporation. Indymac Mortgage Services, a division of defendant, assumed IndyMac Federal's mortgage-servicing responsibilities, including those for plaintiff's mortgage. On the day of the merger, IndyMac Federal began foreclosure proceedings in state court on plaintiffs' collateral property.

On or around April 14, 2009, plaintiffs received a letter on IndyMac Federal letterhead. It was titled "Notice of Assignment, Sale or Transfer of Servicing Rights" and was required by the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(b)(1). Page one includes the following language:

NOTICE OF ASSIGNMENT, SALE OR TRANSFER
OF SERVICING RIGHTS

> You are hereby notified that, effective March 19, 2009, the servicing of your mortgage loan, that is, the right to collect payments from you, was assigned, sold or transferred from IndyMac Federal Bank, FSB to Indymac Mortgage Services, a division of OneWest Bank, FSB.
>
> This assignment, sale or transfer of the servicing of the mortgage loan does not affect any term or condition of the mortgage documents, other than terms directly relating to the servicing of your loan.
>
> In the instance that the transfer of servicing is preceded by the appointment of the FDIC as receiver, as in this case, the law requires that your present servicer or new servicer send you this notice no more than 30 days after the effective date of transfer.
>
> **PLEASE NOTE: Except for the change in the servicer's name as instructed below, this transfer does not require any changes on your part at this time. For now, all contact numbers and mailing addresses for the servicer are unchanged. We will advise you of any future charges to the telephone numbers, addresses or other contact information.**
>
> Your new servicer will be Indymac Mortgage Services, a division of OneWest Bank, FSB.
>
> If you have questions relating to this transfer of servicing rights, please call Indymac Mortgage Services Customer Care Department at the following toll free telephone

number:

1-800-781-7399
Monday - Friday, 7:00 am to 8:00 pm, Central Time

For all payments due on or after March 19, 2009, your checks should be made payable to Indymac Mortgage Services.

Payment Address	**Correspondence Address**
Indymac Mortgage Services	Indymac Mortgage Services
P.O. Box 78826	P.O. Box 4045
Phoenix, AZ 85062	Kalamazoo, MI 49003

You should also be aware of the following information, which is set out in more detail in Section 6 of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2605).

The notice did not include information regarding the amount of the debt owed, the creditor to whom the debt was owed, procedures for disputing the debt, or a statement verifying that the debt was valid. Plaintiffs did not receive this information within five days of receiving the notice.

OPINION

Congress enacted the Fair Debt Collection Practices Act "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Among its many provisions, the Act requires debt collectors to send consumers

5

certain information about their debt"[w]ithin five days after the initial communication." 15 U.S.C. § 1692g(a). This information includes the amount of the debt, the name of the creditor to whom the debt is owed and the consequences of disputing the debt or failing to dispute it. Id.

The requirements in § 1692g(a) do not apply unless the notice was sent by a "debt collector" and "in connection with the collection of any debt." The parties do not dispute that defendant is a debt collector; the question is whether defendant sent the notice "in connection with the collection" of plaintiffs' debt. Courts must consider three factors in making this determination: 1) whether the communication demands payment; 2) the nature of the parties' relationship; and 3) the objective purpose and context of the communication. Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 384 (7th Cir. 2010). This is an objective test that does not turn on "what the unsophisticated consumer might think." Ruth v. Triumph Partnerships, 577 F.3d 790, 798 (7th Cir. 2009). However, the application of the test is a question of fact, id., which means that summary judgment in favor of defendant is appropriate only if no reasonable jury could find in plaintiffs' favor.

A. Whether the Communication Demands Payment

The first factor for consideration is whether the communication in question demands payment on a debt. Defendant argues that the letter it sent was nothing more than a notice

that a new entity was servicing plaintiffs' loan and that it did not include a demand for payment. Plaintiffs argue that the notice they received from defendant implicitly demanded payment on their defaulted loan because "it does direct the plaintiffs to make payments and directs them how to make payments." Plts.' Resp. Br., dkt. # 20, at 3. In particular, the notice included the language, "Your checks should be made payable to IndyMac Mortgage Services" and listed the address where plaintiffs should send their checks.

Information relating to payment is not necessarily a demand for payment. Bailey v. Security National Servicing Corporation, 154 F.3d 384 (7th Cir. 1998), is instructive on this point. In Bailey, the court held that a communication that merely provided an account status without implying that anything was overdue did not demand payment and therefore was not sent "in connection" with the collection of a debt. Id. at 388-89. The communication in question was a letter listing the next four payments due on the debtors' forbearance agreement and expressing the loan servicer's willingness to "work with" the debtors to resolve their debt. Id. at 386. In finding that this letter was not a demand for payment, the court emphasized the prospective nature of the letter. At most, the letter warned the debtors that failure to pay future payments would nullify their forbearance agreement; "[a] warning that something bad might happen if payment is not kept current is not a dun, nor does it seek to collect any debt, but rather the opposite because it tries to prevent the circumstance wherein payments are missed and a real dun must be mailed." Id.

at 389.

Like the communication in Bailey, the notice at issue in this case was nothing more than an account status update. Although the notice included information about payment, so did the notice in Bailey, which means that more is required to qualify as an effort to collect a debt under § 1692g. Like Bailey, the notice in this case gave plaintiffs information for making payments in the future. It is true that the date of the notice is April 14, 2009 and the notice refers to "payments due on or after March 19, 2009," but that distinction is not important because the letter did not treat any payments as past due.

Plaintiffs do not even attempt to distinguish Bailey from this case. Their only discussion of it is to note that the court concluded that the defendant was not a "debt collector" within the meaning of the Act. Plts.' Resp. Br., dkt. #20, at 4. To the extent plaintiffs mean to argue that the court's discussion of the meaning of the phrase "in connection with the collection of any debt" is dicta, that is not persuasive. Even if the discussion was not necessary to the resolution of the case, it is "considered dicta," which generally "provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it." Reich v. Continental Casualty Co., 33 F.3d 754, 757 (7th Cir. 1994).

B. The Nature of the Parties' Relationship

The nature of the parties' relationship must be considered when determining whether the communication was sent "in connection" with the collection of a debt. Gburek, 614 F.3d at 385. Both parties rely on a pair of sentences in Ruth, 577 F.3d at 799: "The only relationship the defendants had with the plaintiffs arose out of Triumph Partnership's ownership of the plaintiffs' defaulted debt. In sum, the defendants would not have sent this combination of materials to the plaintiffs if they had not been attempting to collect a debt." Plaintiffs read this to mean that a communication is more likely to be characterized as having been sent "in connection" with the collection of a debt whenever the debtor is in default. This is not a sensible way to read the sentences. Defendant's reading is more persuasive: when the basis for the parties' relationship is a debt that is in default, it is more likely that a communication will be found to have been sent "in connection" with the collection of that debt.

The facts of Ruth supports defendant's interpretation. In that case the defendants were a debt collection agency and a company that purchased defaulted debts and attempts to recover them. The debt-purchasing company owned the plaintiffs' defaulted debts and had hired the debt collection agency to collect them. The relationship between the parties would not have existed had the plaintiffs' debts not been in default and in need of debt

collection. A reasonable inference to draw from this default-dependent relationship is that the communication sent from the defendants to the plaintiffs is more likely "in connection" with the collection of a debt when the sole basis for the relationship is collection of a defaulted debt.

In this case, the nature of the parties' relationship leads to the oppositive conclusion. It was merely fortuitous that the parties' relationship existed only while plaintiffs were in default; it did not come about because plaintiffs were in default. When defendant merged with IndyMac Federal, defendant acquired "IndyMac Federal's assets and mortgage-servicing rights from the FDIC," not solely those debts in default. Thus, with respect to the notice, plaintiffs' relationship with defendant was the same relationship it had with anyone else who had a loan that defendant was servicing.

C. The Objective Purpose and Context of the Communication

The last factors for a court to review are "the purpose and context of the communication—viewed objectively." Gburek, 614 F.3d at 385. Even if a communication does not explicitly demand payment, it may have been sent "in connection" with the collection of a debt if its objective purpose was "specifically to induce the debtor to settle [his or] her debt." Id. (citing Horkey v. J.D.V.B. & Associates, 333 F.3d 769 (7th Cir. 2003)).

The parties disagree about the notice's purpose. Defendant argues that it was sent to comply with the Real Estate Settlement Procedures Act and to inform borrowers, regardless whether they were in default. Plaintiffs do not deny that these were purposes of the notice, but they ask the court to look at the "whole context" of the notice to determine whether there were additional purposes. In particular, plaintiffs argue that one purpose was to tell plaintiffs how to begin paying off their debt, emphasizing that the notice was sent shortly after IndyMac Federal foreclosed on plaintiffs' collateral property and that the notice explained how and when to begin making payments to defendant.

Although plaintiffs' subjective reaction to the notice may have been colored by their particular situation, their own perception is not relevant to the test. Ruth, 577 F.3d at 798 (proper standard is objective one). It is undisputed that defendant was required to send the notice to plaintiffs simply because the servicing of their mortgage loans was transferred to a new company as a result of the merger. The purpose of the notice had nothing to do with plaintiff's defaulted status or past due payments.

In conclusion, I agree with defendant that no reasonable jury could find that the notice was sent "in connection" with the collection of plaintiffs' debt under § 1692g. The notice neither explicitly demanded payment nor implicitly tried to induce plaintiffs to make payments on their defaulted loan. Furthermore, there is nothing about the parties'

relationship that indicates it was based on plaintiffs's default. The coincidence of the filing of the foreclosure action on the same date as defendant's merger with IndyMac Federal may have led plaintiffs to interpret the notice as an effort to collect on their debt. Viewed notice objectively, however, the notice was simply an informative mailing sent to notify borrowers of the merger, as required by the Real Estate Settlement Procedures Act.

In summary, plaintiffs have failed to show that defendant violated the Fair Debt Collection Practices Act. Accordingly, defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Defendant OneWest Bank, FSB's motion for summary judgment, dkt. # 14, is GRANTED.

2. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 2d day of March, 2011.

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