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

JULIE SPAULDING,

Plaintiff,

v.

TRI-STATE ADJUSTMENTS, INC.,

Defendant.

OPINION AND ORDER

18-cv-377-wmc

Plaintiff Julie Spaulding brought suit against Tri-State Adjustments alleging violations of the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692, *et seq*. In answering the amended complaint, Tri-State asserted a counterclaim under § 1692k(a)(3) of the FDCPA based on Spaulding's alleged acts in "bad faith and [with the] purpose of harassment." (2d Ans. (dkt. #14) ¶ 39.) Specifically, defendant alleges that Spaulding made a series of unsolicited phone calls, in which she misled Tri-State as to the remaining balance on her debt and whether she was represented by counsel. For this alleged misconduct, defendant requests: (1) the dismissal of plaintiff's case with prejudice; (2) reasonable attorney's fees and costs provided by the FDCPA; and (3) "such other relief as the court deems just and equitable." (*Id.* at 13.) Presently before the court is plaintiff's motion to dismiss the counterclaim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Mot. to Dismiss (dkt. #17) 1.) For the reasons that follow, plaintiff's motion will be granted in part and denied in part.

OPINION

A motion to dismiss under Rule 12(b)(6) is designed to test the complaint's legal sufficiency. *See* Fed. R. Civ. P. 12(b)(6). Dismissal is warranted only if no recourse could

be granted under any set of facts consistent with the allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). Accordingly, to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege sufficient facts to "state a claim for relief that is plausible on its face." *Spierer v. Rossman*, 798 F.3d 502, 510 (7th Cir. 2015) (citing *Twombly*, 550 U.S. at 570). This same standard applies when a motion to dismiss targets a counterclaim. *See Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826-27 (7th Cir. 2015).

Plaintiff primarily argues that there is no cause of action available to a FDCPA defendant under 15 U.S.C. § 1692k(a)(3).[1] (Mot. to Dismiss Br. (dkt. #18) 2-4.) In response, defendant argues that: (1) § 1692k(a)(3) *does* provide a cause of action for a debt collector (Opp'n (dkt. #19) 11-14); and (2) its counterclaim is appropriate under Federal Rule of Civil Procedure 13 because it shares a factual basis with plaintiff's claims (*id.* at 4-5, 11). Relatedly, the parties disagree about whether a cause of action would further Congressional intent.

The FDCPA expressly states that: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Because the Seventh Circuit has not yet addressed whether § 1692k(a)(3) creates a separate cause of action, both parties acknowledge that

[1] Plaintiff also argues that any request for fees is only appropriate by petition *after* a defendant has prevailed on the merits, but that is mainly semantics, since whether done prospectively in a prayer for relief or following an adjudication of the merits by petition, the question of fees will not be taken up by the court until that time.

this is an open question in this jurisdiction. (*See* Opp'n (dkt. #19) 11 (noting that neither the Supreme Court nor the Western District of Wisconsin has determined whether § 1692k(a)(3) creates a cause of action); Mot. to Dismiss Br. (dkt. #18) 4 (asking the court "to adopt the analysis of the majority of district courts").)

While other courts are split on this question, as plaintiff points out, a majority have concluded that defendants cannot rely on § 1692k(a)(3) to pursue a formal counterclaim, but rather must wait to pursue relief at the conclusion of the case. *See Rodriguez v. Portfolio Recovery Assocs., LLC*, 841 F. Supp. 2d 1208, 1210-11 (W.D. Wash. 2012) (collecting cases and recognizing split in authority, with a majority of courts concluding that "§ 1692k(a)(3) should not be pursued as a counterclaim, but should be resolved only after a defendant prevails on the merits"); *Kropf v. TCA, Inc.*, 752 F. Supp. 2d 797, 799 (E.D. Mich. 2010) (collecting cases and recognizing that "the majority of cases to consider this issue have instead dismissed the counterclaim as premature or for lack of statutory cause of action, permitting defendants to renew attorney's fee requests at the conclusion of the case"). This court will join the majority because its reasoning is far more persuasive, but given the limited relief afforded, that result would appear to be a distinction without a difference.

Indeed, § 1692k(a)(3) only permits the court to provide relief -- in the form of reasonable attorney's fees -- to a defendant who shows that plaintiff brought her claim to harass and in bad faith. *See Brock v. Maryville Collection Serv., Inc.*, No. 2:11-CV-60, 2012 WL 2120705, at *2 (E.D. Tenn. May 10, 2012) (concluding that § 1692k(a)(3)'s purpose "is not to provide defendants with a cause of action but rather to provide relief to a defendant subjected to litigation brought in bad faith," as the plain language "indicat[es]

that a defendant may seek relief under the FDCPA only after a finding by the court that the plaintiff's action was brought in bad faith"); *Allen v. Michael J. Scott, P.C.*, No. 3:10-CV-02005-F, 2011 WL 219568, at *2 (N.D. Tex. Jan. 19, 2011) (concluding that "§ 1692k does not create an independent cause of action for a bad faith filing" but rather permits post-trial recovery of attorney's fees for a defendant who established that "the plaintiff brought the FDCPA claim in bad faith and for the purpose of harassment"); *Young v. Reuben*, No. 1:04 CV 0113 SEB VSS, 2005 WL 1484671, at *1 (S.D. Ind. June 21, 2005) (explaining that defendant's asserted "counterclaim" was "less an independent claim for relief than it is a heads-up to Plaintiffs and the Court that, after an adjudication of the primary claim, Defendants intend to pursue their statutory entitlement to attempt to prove that Plaintiffs' lawsuit against them was brought in bad faith and for the purpose of harassment"); *Hardin v. Folger*, 704 F. Supp. 355, 356-57 (W.D.N.Y. 1988) (explaining that the permissive language of § 1692k(a)(3) indicates that the statute was meant to provide relief, but not a claim). Put another way, "§ 1962k does not create an affirmative claim for relief. [Defendant] could not have brought its 'claim' before [plaintiff] filed suit; nor could it likely recover in a separate lawsuit once this case comes to a close." *Allen*, 2011 WL 219568, at *2. Accordingly, § 1692k(a)(3) provides defendants "an opportunity to ameliorate any harm that might have arguably befallen them if the litigation proves to have been ill-founded," but does not authorize "a counterclaim, compulsory or permissive, because it is not in and of itself a cause of action recognizing established rights or requiring an independent jurisdictional basis." *Young*, 2005 WL 1484671, at 1.

Reading § 1692k(a)(3) to permit a defendant to pursue any right to attorney's fees

after trial is also "consistent with Rule 54 of the Federal Rules of Civil Procedure." *Brock*, 2012 WL 2120705, at *2; *see also Kropf*, 752 F. Supp. 2d at 801 (adopting majority approach because it is consistent with Rule 54 and § 1692k "is retrospective" and "contemplates a post-trial proceeding following an assessment of the merits of a plaintiff's complaint"); *see also Rodriguez*, 841 F. Supp. 2d at 1211 (explaining that considering an award of fees under § 1692k(a)(3) is consistent both with Federal Rule of Civil Procedure 54, which governs requests for attorney fees, and Congress's overarching goal of protecting consumers from abusive debt collection practices).

In contrast, the few cases that the court can identify declining to dismiss a § 1692k(a)(3) counterclaim lack persuasive reasoning. *See, e.g.*, *Hylkema v. Palisades Collection, LLC.*, No. C07-1679RSL, dkt. #16 (W.D. Wash. Jan. 15, 2008) (declining to dismiss §1692k(a)(3) counterclaim alleging that plaintiff's suit was filed in bad faith and with intent to harass); *Ayres v. Nat'l Credit Mgmt. Corp.*, Civ. A. No. 90-5535, 1991 WL 66845, at *5 (E.D. Pa. Apr. 25, 1991) ("I am respectfully unable to find any reason why defendants should not be allowed to seek costs and fees in their responsive pleading. . . . [S]uch counterclaims do not increase the costs of litigation, or request relief which defendants are not potentially entitled. Rather, they simply put plaintiffs and the court on notice that a 'bad faith' claim will be raised at trial on the merits."). Moreover, even among those few courts that have let such counterclaims stand, the practical difference can be hard to discern since they expressly reserve on any award of fees to defendant until resolution of the merits of plaintiff's claims. *See, e.g.*, *Leatherwood v. Universal Bus. Serv. Co.*, 115 F.R.D. 48, 50 (W.D.N.Y. 1987) (denying without prejudice plaintiff's motion to

dismiss counterclaim, but reserving on defendant's request for attorney's fees until after the case was resolved on the merits).[2] Accordingly, plaintiff's motion to dismiss defendant's counterclaim under 15 U.S.C. § 1692k(a)(3) will be granted. Of course, Tri-State may still seek attorney's fees under § 1692k(a)(3) should it prevail on the merits of plaintiff's claims. *See Brock*, 2012 WL 2120705, at *2; *Kropf*, 752 F. Supp. 2d at 798; *Leatherwood*, 115 F.R.D. at 50.

At least arguably, that might not end the inquiry here. In its opposition to plaintiff's motion to dismiss, defendant argues that "Plaintiff, through a deliberate course of action, has done her best to create a lawsuit in order that she may seek damages. This is the essence of abuse of process, unclean hands and malicious prosecution of a claim." (Opp'n (dkt. #19) 4.) This characterization could be read to go beyond the legal theory pled in the counterclaim. (*Cf.* 2d Ans. (dkt. #14) ¶¶ 40, 86-87, 120 (alleging that counterclaim was brought "[p]ursuant to 15 U.S.C. § 1692k(a)(3)," plaintiff "violated" the same, and defendant sought "actual damages for reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3)"). However, a party seeking relief does not need to plead its legal theories. *See King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014). Accordingly, to the extent defendant's factual allegations raise claims for abuse of process or other state law claims,

[2] As for defendant's citation to *Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989), the court actually held that the counterclaim for malicious prosecution in that case was "without merit" because the plaintiff there had established a violation of the FDCPA and noted that § 1692k(a)(3) allows "a court to award reasonable attorney's fees and costs only upon a finding" that plaintiff's suit "was brought in bad faith and for the purpose of harassment." The Second Circuit did not expressly consider whether § 1692k(a)(3) permits a counterclaim, but rather declined to award sanctions against defendant because "the counterclaims may be considered as factually- and legally-based claims brought in good faith to recover costs and attorney's fees for harassment under the provisions of section 1692k(a)(3)." *Id.*

plaintiff's motion to dismiss will be denied, but only so far as defendant's allegations, liberally construed, are intended to put plaintiff on notice that it may seek relief under Wisconsin common law that exceeds what may be available under § 1692k(a)(3).[3] *Cf. Strid v. Converse*, 111 Wis.2d 418, 426-27, 331 N.W.2d 350 (Wis. 1983) (explaining "the two elements of the tort [of abuse of process] are: (1) a purpose other than that which the process was designed to accomplish, and (2) a subsequent misuse of the process" and that "[t]he plaintiff must allege and prove that something was done under the process which was not warranted by its terms" (citing and quoting *Thompson v. Beecham*, 72 Wis.2d 356, 362-63, 241 N.W.2d 163 (1976)).[4] Again, however, the practical distinction on the facts here may be quite limited.

Even if defendant is not attempting to seek relief under state law, defendant's *allegations* about plaintiff's conduct may still be relevant. Indeed, plaintiff's conduct is a relevant and important factor in determining whether her claim was brought in good faith, but that again is a determination for the court to make. *See* 15 U.S.C. § 1692k(a)(3) ("*On a finding by the court* that an action under this section was brought in bad faith and for the purpose of harassment, *the court may award* to the defendant attorney's fees reasonable in relation to the work expended and costs." (emphasis added)); *see also Young*, 2005 WL 1484671, at *2 ("In short, what Defendants have advanced here is nothing more than a conditional claim, one that is contingent upon, and will not ripen unless and until the

[3] However, if that is defendant's intent, it should seek leave to amend the counterclaim to explicitly set forth the bases for these claims, attaching a proposed amended counterclaim only.

[4] It does not appear that defendant has pled a malicious prosecution claim. *See Strid*, 111 Wis.2d at 423 (outlining six elements for a malicious prosecution claim).

Court concludes that Plaintiffs' case against Defendants was the result of Plaintiffs' bad faith and intent to harass Defendants. That decision, obviously, cannot and should not be made until the primary dispute is resolved between/among the parties.").[5]

ORDER

IT IS ORDERED that:

1) Plaintiff's motion to dismiss the counterclaim (dkt. #17) is GRANTED IN PART and DENIED IN PART.

2) Defendant may seek leave to amend its counterclaim to explicitly set forth any state law bases for an award of fees and costs incurred in responding to plaintiff's lawsuit.

3) Cognizant of the existing order staying discovery, the impending dispositive motion deadline and the need for discovery to resume in an orderly fashion, all current deadlines in this case are STRUCK. Instead, this case is CONSOLIDATED with related Case No. 18-cv-826 for all proceedings going forward, and the latter case's schedule shall apply to both cases, including a consolidated trial, if necessary, on January 13, 2020. Going forward, all documents should be filed in case number 18-cv-826 only.

4) The discovery stay is also LIFTED. Additionally, the parties are directed to alert the court promptly if they still require guidance on defendant's motion to compel (dkt. #21) or its motion to extend discovery (dkt. #27).

Entered this 27th day of February, 2019.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

[5] As the District Court for the Southern District of Indiana noted in *Young*, the defendants' allegations concerning bad faith and harassment should also be addressed by the court after the jury reached a verdict on the merits. 2005 WL 1484671, at *2.