NO. COA12-825
NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

KEITH SADLER,
Plaintiff,

v. Cumberland County
No. 11 CVD 4272

SCOTT LOWERY LAW OFFICE, P.C., A COLORADO CORPORATION; GRAHAM PARKER, ESQ.; JEFFERSON CAPITAL SYSTEMS, LLC, A GEORGIA LLC; and FIRST NATIONAL COLLECTION BUREAU, INC., A NEVADA CORPORATION,
Defendants.

Appeal by plaintiff from order entered 11 January 2012 by Judge Kimbrell Kelly Tucker in Cumberland County District Court. Heard in the Court of Appeals 7 January 2013.

Christopher W. Livingston, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Allen Thomas, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff Keith Sadler appeals from the trial court's grant of a motion for summary judgment in favor of defendants Scott

Lowery Law Office, P.C. and Graham Parker, Esq. After careful consideration of plaintiff's arguments, we affirm.

Plaintiff brought this action seeking damages from all defendants for alleged violations of Chapter 58, Article 70, Parts 3 and 4 of the North Carolina General Statutes, The North Carolina Collection Agency Act ("NCCAA") and 15 U.S.C. § 1692, The Federal Debt Collection Practices Act ("FDCPA"), as well as a declaratory judgment that he is not indebted to any defendant. After discovery, defendants Scott Lowery Law Office, P.C. ("SLLO") and Graham Parker moved for summary judgment.

Considered in the light most favorable to plaintiff, the evidence before the trial court tended to show that plaintiff was previously married to Brenda Sadler. During their marriage and shortly before their divorce, Brenda Sadler allegedly obtained a Metris Visa credit card using plaintiff's name, address, and personal identifying information. Brenda Sadler thereafter used the credit card without plaintiff's knowledge solely for her own benefit, incurring a substantial balance, and did not repay any of the debts. Plaintiff was not aware of the debts until December 2007 when he saw the negative entries on his credit report. The account statements related to the Metris Visa card show the date of last activity as 10 September 2007.

After plaintiff received a dunning letter and at least nine phone calls between August 2008 and November 2009 from debt collectors unrelated to defendants SLLO and Parker, attempted collection of the debt ceased for a period of time.

In January 2011, in response to renewed collection activity, plaintiff retained counsel to demand validation of the Metris Visa debt. Plaintiff's counsel received a package of documents under the letterhead of defendant-firm SLLO signed by defendant Graham Parker, an attorney employed by SLLO. SLLO, incorporated in 1999, is owned by Scott Lowery, a licensed Colorado attorney. Scott Lowery is the sole shareholder. SLLO has two offices: one in Colorado and one in Tulsa, Oklahoma. The Tulsa office has thirty-five employees, two of whom, including Parker, are licensed attorneys. Each office operates under the management of a licensed attorney. SLLO's principal practice area is debt collection on behalf of clients; all collection activities are conducted in SLLO's name.

Defendant SLLO made two calls to plaintiff's counsel in March and April 2011 in an attempt to collect the Metris Visa debt. Plaintiff's counsel admitted at hearing in front of the trial court that all of defendants' communications have been solely with plaintiff's counsel.

The trial court granted defendants' motion for summary judgment, dismissing both of plaintiff's claims against SLLO and Parker with prejudice. Additionally, the trial court denied plaintiff's motion to amend his complaint, but entered a declaratory judgment declaring that plaintiff owes nothing to defendants SLLO or Parker. Plaintiff appeals.

On appeal, plaintiff contends the trial court erred by (I) granting summary judgment for defendants SLLO and Parker and (II) denying plaintiff's motion to amend his complaint. Specifically, plaintiff argues that the trial court erred by granting summary judgment based on a determination that the FDCPA does not apply to communications between a debt collector and the debtor's counsel and that defendants are not subject to the NCCAA.

I.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572,

576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

A.

Plaintiff contends that the trial court erred in granting summary judgment because he has a viable claim against defendants under the FDCPA based on their communication with his attorney. Specifically, plaintiff argues that defendants violated 15 U.S.C. § 1692e which prohibits debt collectors from making a false representation of "the character, amount or legal status of any debt" by failing to inform him that the Metris Visa debt could potentially be barred by a three-year statute of limitations. 15 U.S.C. § 1692e(2)(A) (2011). We disagree.

The FDCPA was designed to protect consumers from abusive lending practices. 15 U.S.C. § 1692(e) (2011). With this aim in mind, a few courts have held that communications between debt collectors and debtors' attorneys are not actionable under the FDCPA, reasoning that when a debt collector communicates with a debtor's attorney, the attorney is able to protect the client from the debt collector's unfair or misleading practices that would be otherwise actionable under the FDCPA. *See, e.g.*, *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938-39 (9th Cir. 2007); *Kropelnicki v. Siegel*, 290 F.3d 118, 127-28 (2d Cir.

2002). Defendants argue that plaintiff's FDCPA claim fails under this approach because the offending communication, which he alleges falsely represented the legal status of his debt, was directed at plaintiff's attorney, rather than plaintiff himself.

Other courts, meanwhile, have held that a debtor may have a viable claim under the FDCPA even though the communication went to debtor's counsel, but only if a debt collector's unfair or misleading communication would be likely to deceive or mislead a competent attorney. *See Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 366 (3d Cir. 2011), *cert denied*, __ U.S. __, 181 L. Ed. 2d 1016 (2012); *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 775 (7th Cir. 2007). The proponents of this approach believe the deterrent effect of the FDCPA would be undermined by allowing a debt collector to escape liability for false or misleading communications "simply because that communication was directed to a consumer's attorney" and not the "unsophisticated" debtor. *See Allen*, 629 F.3d at 368; *Evory*, 505 F.3d at 774. Thus, under this approach, "the standard for determining whether particular conduct violates the statute is different when the conduct is aimed at a lawyer than when it is aimed at a consumer." *Evory*, 505 F.3d at 774. As a result, a claim alleging that a communication is false or misleading is

actionable under the FDCPA only if it would be likely to deceive or mislead a competent attorney, thereby rendering the attorney unable to protect his or her client.[1]

North Carolina courts have not adopted either of these approaches to date. In the instant case either of these approaches would dictate the same result: plaintiff does not have a viable claim under the FDCPA. Under the first approach, plaintiff's claim cannot be actionable because the communication that plaintiff alleges violates the FDCPA was sent to his attorney, rather than him, and therefore, his attorney was capable of protecting him from the alleged false representation. Under the second approach, plaintiff's claim still fails because the allegedly misleading communication, which makes no mention of the possibility that the debt would be barred by the statute

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[1] We note that the 4th Circuit in *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232–33 (4th Cir. 2007), took yet another approach, holding that FDCPA liability attaches to a debt collector's communication with a debtor's attorney. The Court in *Sayyed* based its reasoning on the U.S. Supreme Court case, *Heintz v. Jenkins*, 514 U.S. 291, 292, 131 L. Ed. 2d 395, 398 (1995), which it believed to imply that the debtor had a cause of action under the FDCPA based on statements made by the debt collector to her counsel in a letter because it held that a lawyer who regularly tries to collect consumer debt through litigation is a "debt collector" under the FDCPA. Several courts have since rejected this approach, acknowledging that the Supreme Court in *Heintz* answered a narrower question and therefore did not pass on the question we now address. *See Allen*, 629 F.3d at 368 n.6; *Guerrero*, 499 F.3d at 937–38.

of limitations, would not be likely to mislead a competent attorney. Here, the last transaction listed on the Metris Visa account statement is from September 2007. Defendants began collection attempts on behalf of their client, who owned the debt, in January 2011, apparently more than three years after the last transaction. Because any competent attorney would not be misled by defendants' alleged failure to acknowledge that the debt may be barred by the statute of limitations, under this approach, the plaintiff does not have a valid claim under the FDCPA. Therefore, we hold that the trial court did not err in granting summary judgment dismissing plaintiff's claim under the FDCPA.

B.

Plaintiff next contends that the trial court erred by granting defendants' motion for summary judgment as to his claim under the NCCAA because the validation package sent to plaintiff's counsel by defendants, on its face, violated the NCCAA. Specifically, plaintiff argues defendants' validation package violated N.C.G.S. § 58-70-115, which states that "[n]o collection agency shall collect or attempt to collect any debt by use of any unfair practices" such as "[s]eeking or obtaining any written statement or acknowledgment in any form containing

. . . an acknowledgment of any debt barred by the statute of limitations . . . .” N.C. Gen. Stat. § 58-70-115(1) (2011). Plaintiff argues that the Metris Visa debt may have been barred by a three-year statute of limitations under N.C.G.S. § 1-52(1) and defendants’ failure to disclose this fact while seeking acknowledgment of the debt amounts an unfair practice under the NCCAA. *See* N.C. Gen. Stat. §§ 1-52(1), 58-70-115(1) (2011).

However, N.C.G.S. § 58-70-15 states that the term “collection agency” does not apply to “[a]ttorneys-at-law handling claims and collections in their own name and not operating a collection agency under the management of a layman.” N.C. Gen. Stat. § 58-70-15(c)(8) (2011). SLLO is a law firm solely owned by a licensed attorney. The Tulsa office is managed by defendant Parker, a licensed attorney, not a layman. Moreover, all debt collection activity is taken on behalf of the firm’s clients and in the firm’s name. Accordingly, SLLO falls within the exception outlined in N.C.G.S. § 58-70-15(c)(8) and is not a collection agency under the NCCAA. Therefore, the trial court did not err in granting defendants’ summary judgment motion and dismissing plaintiff’s claims under the NCCAA.

II.

Plaintiff also contends the trial court erred by denying his motion to amend his complaint. Generally, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011). Once an answer has been served, a plaintiff must seek leave of court to amend his or her complaint, and "leave shall be freely given when justice so requires." *Id.* However, while "leave to amend should be freely given, the motion is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of a showing of an abuse of discretion." *Duncan v. Ammons Constr. Co.*, 87 N.C. App. 597, 599, 361 S.E.2d 906, 908 (1987).

Under N.C.G.S. § 1A-1, Rule 6, "[a] written motion, other than one which may be heard ex parte . . . *shall be served not later than five days before the time specified for the hearing*, unless a different period is fixed by these rules or by order of the court." N.C. Gen. Stat. § 1A-1, Rule 6(d) (2011) (emphasis added). Rule 15, addressing amendment of pleadings, does not prescribe a time period for filing motions to amend different from the five-day period required by Rule 6. N.C. Gen. Stat. § 1A-1, Rule 15(a).

At the summary judgment hearing, plaintiff attempted to hand-deliver to counsel and present to the trial court a motion to amend that was contained in "Plaintiff's Opposition to Summary Judgment Motion." Plaintiff's counsel did not file the motion with the trial court or provide a copy to defendants' counsel prior to the hearing, as required by Rule 6. In response, the trial court stated, "[t]hat motion is not before me and I'm not accepting it in oral form." Accordingly, because plaintiff "did not comply with the requirements of Rule 6(d)" and "waited to file [his] motion until the very day that [he] wished it heard" and because "allowing [the untimely motion] would have been unfair and prejudicial to defendants . . . we hold that the trial court did not abuse its discretion in denying [plaintiff's] motion." *See Duncan*, 87 N.C. App. at 600, 361 S.E.2d at 908.

Affirmed.

Judges ERVIN and DILLON concur.

Report per Rule 30(e).