DEBT COLLECTION

COMMUNICATIONS REGARDING HAZARD INSURANCE WERE NOT AN "ATTEMPT TO COLLECT A DEBT"

Burns v. Seterus, Inc., ____F .Supp.3d ____ (W.D.N.Y 2017).
https://casetext.com/case/burns-v-seterus-inc

FACTS: Seterus, Inc. ("Defendant") acquired the servicing rights to Laurie A. Burns's ("Plaintiff") mortgage debt that was discharged in bankruptcy. Defendant initiated several phone calls to Plaintiff regarding her lapsed hazard insurance after Plaintiff requested all communications to cease. Defendant subsequently sent Plaintiff several letters demanding proof of insurance and informed Plaintiff she was "solely responsible for repayment of the cost" of the insurance policy if Defendant had to obtain it. The letters also advised Plaintiff that as a result of a bankruptcy discharge she was not personally liable on the debt.

Plaintiff filed suit alleging Defendant's debt collection practices violated the FDCPA, including the communications by letter and an automated telephone dialing system. Defendant moved for a 12(b)(6) dismissal on grounds that its communications with Plaintiff did not constitute attempts to collect a debt.
HOLDING: Granted.
REASONING: Defendant argued the letters were sent to satisfy its obligations as a mortgage servicer under federal law rather than to collect a debt. RESPA requires a servicer of a federally-related mortgage to obtain force-placed hazard insurance if there is a reasonable basis to believe the borrower has failed to comply with the loan contracts requirements to maintain property insurance. The court accepted Defendant's argument in noting that the letters contained no demand for payment, discussion of a payment deadline, threats in the event of nonpayment, or mention of Plaintiff's underlying mortgage debt. The court held the bankruptcy disclaimer within the letters was sufficiently prominent and unambiguous to put Plaintiff on notice thgat she would not be personally responsible for the debt. The court further held there were insufficient facts regarding the unspecified number of harassing telephone calls allegedly made by Defendant to demonstrate a legitimate FDCPA claim.

HOA FINE IS DEBT FOR PURPOSES OF FAIR DEBT COLLECTION PRACTICES ACT

Agrelo v. Affinity Mgmt. Servs., LLC, 841 F.3d 944 (11th Cir. 2016).
http://www.leagle.com/decision/In%20FCO%2020161109064/AGRELO%20v.%20AFFINITY%20MANAGEMENT%20SERVICES,%20LLC

FACTS: Agrelo and Fernandez ("Plaintiffs"), a married couple, resided in a community know as Marbella. As members of Marbella, the homeowners association, Plaintiffs were bound by Marbella's governing documents. Although Marbella identified no specific provision of the governing documents the Plaintiffs had violated, Marbella contended they improperly performed unapproved construction, relocated a fence, and removed plants. Marbella gave the Plaintiffs three weeks to correct the purported violation, but they took no action. After a hearing on the violation before Marbella's Grievance Committee, the Committee recommended Marbella's Board of Directors fine the homeowners $100 for each day the violation went uncorrected. Marbella set the total fine at $1,000, the maximum Florida law allows for a single, continuing violation. Plaintiffs refused to pay the fine and maintained that they had not violated any Marbella rule and had not been given due process. Meloni, the debt collector employed by Marbella, and Affinity, sent payment demand letters demanding a total of total of $1,115.00, which the Plaintiffs disputed. Plaintiffs also demanded evidence that Meloni was a licensed debt collector.

Plaintiffs brought suit against their Marbella, Affinity and Meloni ("Defendants"), seeking to recover for alleged violations of the Fair Debt Collection Practices Act (FDCPA) and the Florida Consumer Collection Practices Act (FCCPA). Plaintiff alleged that Marbella was vicariously liable for its agents' violations. The United States District Court for the Southern District of Florida granted Defendants' motion for summary judgment, finding the assessments were not a debt under the FDCPA. Plaintiffs appealed.
HOLDING: Reversed in Part, Vacated in Part and Remanded.
REASONING: Marbella and Affinity argued the obligation to pay does not constitute a debt, so they are not subject to the FDCPA. The circuit court disagreed. Because consumer protection statutes are construed broadly in favor of consumers, as long as the transaction creates an obligation to pay, a debt is created. By contrast, when the obligation to pay arises solely by operation of law, rather than contractual dealing, it is not a debt under the FDCPA. The homeowners' obligation arises from the documents that explicitly treat HOA fines as assessments. HOA assessments stem directly from the consensual home-purchase transaction. When a homebuyer must contractually agree to pay homeowners' assessments in order to purchase a home, that homebuyer takes on "debts" for those assessments under the FCCPA. By agreeing to the terms of the governing documents, the homeowners acknowledged that a failure to comply with HOA requirements could result in a fine that would be treated as an individual assessment. Thus, their obligation to pay for a claimed breach of the governing documents arose.

When the obligation to pay arises solely by operation of law, rather than contractual dealing, it is not a debt under the FDCPA.

EIGHTEEN PHONE CALLS DID NOT VIOLATE FAIR DEBT COLLECTION PRACTICES ACT

Chisholm v. AFNI, Inc., ____ F.Supp.3d ____ (D.N.J. 2016).
http://law.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2015cv03625/319572/30/

FACTS: Plaintiff, Samuel Chisholm, had an account with DirecTV that became delinquent and was subsequently referred to

Defendant, AFNI, Inc., for collection. Defendant attempted to contact Plaintiff. According to both AFNI's recording system and plaintiff's phone records, Defendant placed eighteen phone calls to Plaintiff's cell phone over the course of two weeks. Defendant reached Plaintiff one time and, after the representative identified himself, Plaintiff hung up. The other seventeen call attempts were unanswered.

Plaintiff filed suit alleging that the phone calls violated several sections of the FDCPA. Defendant responded with a motion for summary judgment.

HOLDING: Summary Judgment Granted

ANALYSIS: Plaintiff claimed the calls demonstrated conduct, the natural consequence of which was to harass, oppress, or abuse the Plaintiff under the FDCPA. The court rejected this argument and noted that courts around the country have held that the number of calls alone cannot violate the FDCPA. The court pointed to the case of *Turner v. Professional Recovery Servs., Inc.,* 956 F.Supp.2d 580 (D.N.J. 2013) and stated that "plaintiff must also show some other egregious or outrageous conduct in order for a high number of calls to have the "natural consequence" of harassing a debtor". The court highlighted that Defendant never called more than three times a day, there was at least three hours between the attempts, all of the calls came during normal business hours, and the Defendant's representative acted professionally when contact was successful. Further, the court reiterated that the FDCPA was not intended to prevent debt collectors from contacting debtors at all, nor to impose unnecessary restrictions on ethical collectors. As such, the court held t no reasonable jury could find that the quantity, frequency, and proximity of the telephone calls demonstrated conduct, the natural consequence of which was to harass, oppress, or abuse the plaintiff under the FDCPA.

The court highlighted that Defendant never called more than three times a day, there was at least three hours between the attempts, all of the calls came during normal business hours, and the Defendant's representative acted professionally when contact was successful.

LAW FIRM COLLECTING A DEBT AND ENFORCING A SECURITY INTEREST IS SUBJECT TO FDCPA

Mashiri v. Epsten Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017).
https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/13/14-56927.pdf

FACTS: Defendant Epsten, Grinnell & Howell ("Epsten") sent a collection letter ("May Notice") to Plaintiff Zakia Mashiri ("Mashiri"), seeking to collect Mashiri's overdue assessment fees for the homeowner's association ("HOA"). The May Notice also included a warning that failure to pay the assessment fee would result in the HOA recording a lien against Mashiri's property. Mashiri sued Espten for violation of the FDCPA. The district court held Mashiri failed to state a claim and dismissed the case. Mashiri appealed.

HOLDING: Reversed and remanded.

REASONING: Epsten argued it was not subject to the full scope of the FDCPA because it was not attempting to collect a debt and was only seeking to enforce an existing security interest or lien. The court of appeals rejected Epsten's argument and held Epsten was subject to the full scope of the FDCPA, irrespective of whether it sought to perfect HOA's security interest, because it sent the May Notice as a debt collector attempting to collect debt payment.

The FDCPA imposes liability only when a proper entity is attempting to collect debt. The court held: (1) the overdue assessment fee was a debt; and (2) Epsten was a debt collector under the FDCPA. First, FDCPA defines debt as any obligation of a consumer to pay money arising out of a transaction that is primarily for personal, family or household purposes. The court reasoned the overdue assessment fee was a debt because Mashiri's obligation to pay the assessment fee related to her household and arose from her HOA membership.

Second, if the entity seeking to enforce a security interest engages in debt collection activities, it is a debt collector under the FDCPA. Epsten's May Notice requested payment of the assessment fee and warned of the consequence for failure of payment. There was no existing security interest for Epsten to enforce at the time it sent the May Notice. The court concluded that the May Notice sought to collect debt, Mashiri's overdue assessment fee and make necessary disclosure that would perfect the HOA's security interest and permit it to record a lien at a later date.