DEBT COLLECTION

DEBT COLLECTION LETTER MUST BE EVALUATED ON THE "UNSOPHISTICATED CONSUMER" STANDARD.

DEBT COLLECTION LETTER REQUIRING WRITTEN DISPUTE DOES NOT VIOLATE FDCPA

Jolly v. Shapiro, 237 F. Supp.2d 888 (N.D.Ill. 2002).

FACTS: Plaintiffs John and Patricia Jolly ("Jolly") purchased a home in Chicago, Illinois. A mortgage on the home was held by Banker's Trust Company of California. Jolly defaulted on all of their payments beginning in December 2001. Defendant, the law firm Shapiro & Kreisman, hired by Banker's Trust to collect the defaulted payments, sent collection letters to Jolly demanding payment and insisting that any dispute of the debt be written to Defendant within thirty days of receipt. The letters stated Jolly's debt as of December 13, 2001. Jolly filed this suit alleging violation of the Fair Debt Collections Practices Act ("FDCPA"). Defendants moved for summary judgment, and Jolly filed a cross motion for summary judgment.
HOLDING: Defendant's motion granted.
REASONING: A court must decide if a debt collector violated the FDCPA on an "unsophisticated consumer standard." The unsophisticated consumer standard protects the consumer who is uninformed, naïve, or trusting, yet it admits an objective element of reasonableness. *Gammon v. G.C. Servs., Ltd.*, 27 F.3d 1254, 1257 (7th Cir. 1994).

Jolly alleged that the letters sent violated 15 U.S.C. sections 1692(g) and (g)(a)(3). Section 1692(g) requires that debt collection letters must state the balance of the debt at the date of the letter. Jolly relied on a sample safe harbor letter written by Judge Posner in *Miller v. McCalla*, 214 F.3d 872 (7th Cir. 2000) that states the balance of the debt as of the letter date. The court found this reliance to be misplaced and held that section 1692(g) only requires that the letter state the balance as of any certain date specified in the letter.

Section 1692(g)(a)(3) provides that unless a debt is disputed within thirty days, the collector can assume it to be valid. Jolly alleged that the requirement that any dispute of their debt be in writing was a violation of the FDCPA. The court reasoned that although the statute does not expressly require a dispute to be in writing, such a requirement was necessary to give effect to section 1692(g)(a). Although section 1692(g)(a)(3) does not require writing, other subsections require that a debt collector stop collection upon written notice of a dispute and must verify a debt after such written notice. A lack of a written requirement would leave a debt collector who received an oral dispute with no statutory grounds for assuming a debt to be valid, but also no duty to verify the debt or stop collection. The court relied on *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991), which stated that section 1692(g)(a)(3) did require a written dispute. The court in *Harrison* also reasoned that a written dispute is necessary to preserve a record of the dispute. Thus, under the "unsophisticated consumer standard," the contents and requirements of the letter sent to Jolly were not unreasonable, and the letter did not violate the FDCPA.

MECHANICS' LIEN MUST BE FILED WITHIN 30 DAYS OF COMPLETION OR TERMINATION OF ORIGINAL CONTRACT

Page v. Structural Wood Components, Inc., 102 S.W.3d 720 (Tex. 2003).

FACTS: Plaintiff Structural Wood Components, Inc. ("Structural Wood") was a subcontractor to Sepolio, a general contractor hired by Page. Structural Wood completed its portion of the original contract in mid-March 1998. Page terminated his contract with Sepolio on April 14, 1998. The subsequent contractors eventually finished the project some time later. Sepolio failed to pay Structural Wood in full for its labor and materials. Structural Wood filed an affidavit claiming a lien on the property 31 days after Page terminated the contract with Sepolio, but well before the project was completed. The trial court entered judgment for Structural Wood, interpreting the statutory definition of completion as the date when the subsequent contractors finished the project in July 1998. The court of appeals affirmed.
HOLDING: Reversed, judgment rendered.
REASONING: The Mechanics' Lien Statute requires owners to retain either "10 percent of the contract price of the work to the owner" or "10 percent of the value of the work…" for "30 days after the work is completed." TEX. PROP. CODE § 53.101. These retained funds secure payment to workers, such as Structural Wood, who have performed labor or services under a contract. A subcontractor who wants to make a claim on the retained funds must properly give notice and file an affidavit claiming a lien not later than the 30th day after the work is completed.

The legislative history of the current Mechanics' Lien Statute shows that the legislature intended to make retainage requirements dependent upon individual contracts rather than upon the completion of all contracts in multi-contract situations. The legislature did not intend to allow an indefinite delay in the payment of individual contractors by requiring them to wait for completion of all contracts on a multi-contract project.

Contract modifications such as termination can change the work contemplated by the contract. If an owner terminated a contract, no additional work could be contemplated under the contract, and the work is complete. Given the difficulty of ascertaining when all work on a project is complete in many situations, a prudent contractor or subcontractor should file a lien affidavit no later than 30 days after completion.

In this case, the construction contract and the work performed were complete at the time the contract was terminated. Therefore, the lien affidavit must have been filed within 30 days of the contract's termination. Structural Wood's affidavit was not timely filed as it was filed 31 days after Page terminated Sepolio's construction contract. Accordingly, the

appellate court's judgment was reversed, and judgment was rendered that Structural Wood take nothing.

COMPANY IS DEBT COLLECTOR WITH RESPECT TO DEBTS THAT ARE NOT DELINQUENT

Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003).

FACTS: Fairbanks Capital Corp. acquired 128,000 subprime mortgages from ContiMortgage, approximately 10% of which were identified as in default. One of the acquired mortgages belonged to Chad and Frances Schlosser. According to ContiMortgage's records, the Schlossers' mortgage was delinquent at the time of transfer, and Fairbanks treated it as such. Fairbanks, identifying itself as a debt collector, sent the Schlossers a letter asserting that their mortgage was in default. However, the Schlossers' mortgage was not in default. Furthermore, Fairbanks' collection letter failed to notify the Schlossers of their right to contest the debt as required by the Fair Debt Collection Practices Act ("FDCPA"). 15 U.S.C. § 1692g(a). The Schlossers sued Fairbanks for violation of the FDCPA, claiming that Fairbanks's letter failed to notify them of their right to contest the debt in writing, which would have required Fairbanks to verify the debt before pursuing collection activity. The district court granted Fairbanks' motion to dismiss and concluded that Fairbanks was not a "debt collector" under the FDCPA because the debt was not actually in default at the time Fairbanks acquired it. The Schlossers appealed.
HOLDING: Reversed and remanded.
REASONING: When a debt is assigned, the assignee is considered either a "debt collector" or a "creditor," depending upon the status of the debt assigned. 15 U.S.C. § 1692a(6)(F)(iii). An assignee is treated as a "debt collector" if the debt sought to be collected was in default when acquired by the assignee and as a "creditor" if the debt was not in default at the time of acquisition. *Bailey v. Security Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998). Fairbanks and the district court improperly relied upon the plain language of this statutory definition.

The court stated "[w]e think the language of section 1692a(6)(F)(iii) is susceptible to an alternative interpretation, one that . . . is more consistent with the rest of the statute." The antecedent of the limitation found in subparagraph (iii) was "such activity," which suggested that the FDCPA's reach was extended to collection activities regardless of whether the debt sought to be collected was actually owed. *Schroyer v. Frankel*, 197 F.3d 1170, 1178 (6th Cir. 1999).

Based upon Fairbanks' and the district court's interpretation of section 1692a(6)(F)(iii) of the FDCPA, it made little sense to exempt an assignee from the application of the FDCPA based on a status it was unaware of and that was contrary to its assertion made to the debtor. This interpretation gave the assignee little incentive to acquire accurate information about the status of the loan because its ignorance would have exempted it from FDCPA requirements. The section 1692a(6)(F)(iii) exclusion did not apply in this case because Fairbanks attempted to collect on a debt that was asserted to be in default and because that asserted default existed at the time Fairbanks acquired the debt.

COURT APPLIES "UNSOPHISTICATED DEBTOR" STANDARD TO EVALUATE LETTER UNDER FDCPA

Hogan v. MKM Acquisitions, 241 F. Supp. 2d 896 (N.D. Ill. 2003).

FACTS: Hogan had an outstanding credit card balance with First Card Services Visa. MKM purchased Hogan's outstanding balance. MKM sent a letter to Hogan informing her they had purchased her outstanding balance and offered her the opportunity to settle her account at a forty percent discount. MKM's letter stated the offer was valid for only thirty-five days, that they were providing her an opportunity to improve her credit rating, and that MKM would remove their reporting of the account from her credit report if she paid. Hogan never made any payments on her outstanding balance.

Hogan filed suit alleging that MKM falsely stated that payment of the debt was an opportunity to improve her credit rating. Hogan further asserted that the benefit MKM implied she would receive by paying MKM was illusory and therefore a violation of the FDCPA. MKM filed a motion for summary judgment.
HOLDING: Defendant's motion for summary judgment granted.
REASONING: Under the FDCPA "a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692(e). The court used the "unsophisticated debtor" standard to review the letter for compliance with the FDCPA. This standard "assume[d] that the debtor [wa]s uninformed, naïve, or trusting, and that the statements are not confusing or misleading unless a significant fraction of the population would be similarly mislead." *Petitt v. Retrieval Masters Creditor Bureau, Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000). The unsophisticated debtor standard also presupposes that an unsophisticated debtor "possesses rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses reasonable intelligence and is capable of making basic logical deductions and inferences." Hogan claimed that the statements made by MKM were illusory because her credit rating would not "improve significantly" by paying her outstanding debt. The letters MKM sent to Hogan did not state that her credit rating would "significantly improve." The letters merely stated that this was an opportunity for Hogan to "improve" her credit rating. The court found that even an unsophisticated debtor should realize that the fewer delinquent notices on one's credit report, the better one's credit rating will be.

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