PRIOR LAWSUIT BY SELLER AGAINST PREVIOUS OWNER DOES NOT HAVE TO BE DISCLOSED TO BUYER

Sherman v. Elkowitz, 130 S.W.3d 316 (Tex. App.—Houston [14th Dist.] 2004).

FACTS: Michael and Lori Sherman purchased a home from Patrick and Amy Shields in 1998. Richard Elkowitz, a realtor employed with Re/Max Westside Realtors ("Re/Max"), acted as the listing agent for the Shields and assisted them with the sale of the property to the Shermans. The notice issued by the Shields to the Shermans disclosed cracks in the driveway as a known defect in need of repair and treatment for termites in 1990. The Shermans had the property inspected before agreeing to purchase.

Some time after moving in, the Shermans discovered various defects in the property, and they eventually learned that, in 1994, the Shields had sued the previous owner for failing to disclose, allegedly, the same defects the Shermans discovered. Neither the alleged defects nor the previous lawsuit had been disclosed in the notice.

The Shermans brought suit against the Shields, Elkowitz, and Re/Max for statutory and common-law fraud, violations of numerous provisions of the Texas Deceptive Trade-Practices Consumer Protection Act, negligence, and gross negligence, claiming that the Shields and Elkowitz were required to disclose the alleged defects and the previous lawsuit. The trial court granted a directed verdict for Elkowitz and Re/Max, but refused to grant a directed verdict for the Shields. At the conclusion of the trial, the Shermans obtained a favorable judgment against the Shields. The Shermans appealed the directed verdict for Elkowitz and Re/Max.

HOLDING: Affirmed.

REASONING: Sellers of residential real property are required to give the purchaser written notice and disclosure of the seller's knowledge of the condition of the property. Tex. Prop. Code § 5.08(a). This notice must be in the form prescribed in the statute, or in a form that is "substantially similar." *Id.* § 5.08(b). Elkowitz provided the Shields with a three-page notice printed by the Texas Association of Realtors, and this notice appeared to be substantially similar to that prescribed by the statute. The only representation made by Elkowitz and Re/Max in the Notice was that they "had no reason to believe [the disclosure notice] to be false or inaccurate." *Kubinsky v. Van Zandt Realtors*, 811 S.W.2d 711, 714 (Tex. App.—Fort Worth 1991), held that listing realtors have no legal duty to inspect listed property for defects over and above asking the sellers if such defects exist. Although Elkowitz was named in the previous lawsuit as a person with knowledge of relevant facts, and although Amy Shields testified that Elkowitz told her that she did not need to disclose the previous lawsuit, there was no evidence that Elkowitz knew or was ever informed of the relevant specifics of the previous lawsuit.

Sellers of residential real property are required to give the purchaser written notice and disclosure of the seller's knowledge of the condition of the property.

As a matter of law, the previous lawsuit did not have to be disclosed in the notice because it was dismissed several years before the Shields put the property on the market. Although the notice required sellers to disclose their knowledge of "any lawsuits [or other legal proceedings] directly or indirectly affecting the Property," in the context of the entire notice, the question appeared to be directed to pending lawsuits. If the legislature intended for prior lawsuits to be listed, it could have included a phrase. . . . .

DEBT COLLECTION

SON OF DEBTOR IS NOT CONSUMER FOR PURPOSES OF FAIR DEBT COLLECTION PRACTICES ACT

CREDITORS OF CONSUMER ARE NOT SUBJECT TO FDCPA

Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003).

FACTS: In 1998, Montgomery's mother, Helen Smith, financed the purchase of a BMW by entering into a personal loan agreement with Huntington Bank. As collateral for the loan, Huntington Bank took a security interest in the car. Approximately one year later, Smith allegedly suffered an injury and was apparently unable to work. Despite Montgomery's repeated contention that his mother was covered by credit disability insurance that she had purchased as part of the personal loan agreement to protect her in the event of a disability, Huntington Bank sought to take possession of the BMW. Huntington Bank retained an agency, Silver Shadow, to repossess the vehicle pursuant to the terms of the loan agreement. In 2000, Silver Shadow repossessed Smith's vehicle, which was parked in Montgomery's garage. Montgomery asserted that, in the process of repossessing the car, Huntington Bank and Silver Shadow violated numerous Michigan laws, including unlawful breaking and entering, and that Silver Shadow damaged his driveway, two of his cars, and various other personal effects.

Montgomery filed suit in federal court, claiming that Huntington Bank violated various provisions of the Fair Debt Collection Practices Act ("FDCPA"). Huntington Bank moved to dismiss the complaint, arguing that Montgomery was not a "consumer" within the meaning of the statute and that Huntington Bank did not meet the statutory definition of a "debt collector" under the FDCPA. The district court granted the motions and dismissed the complaint. Montgomery appealed.

HOLDING: Affirmed.
REASONING: The FDCPA defines a "consumer" as "any natural person obligated or allegedly obligated to pay any debt," or "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. §§ 1692a(3), 1692c(d). Montgomery admitted that, at the time of the repossession, the BMW was owned by Smith and merely borrowed by him. Nowhere in his complaint did Montgomery allege that he was the legal guardian of Smith or that he was otherwise obligated to pay any debt in connection with the purchase of the BMW. Accordingly, Montgomery failed to meet the statutory definition of "consumer."

The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Exempted from the definition of a debt collector, however, is any person collecting a debt owed which was "originated by that person or any person collecting a debt which was not in default at the time it was obtained by that person." 15 U.S.C. § 1692a(6)(F)(ii)(iii). Huntington Bank was an actual, original, consumer creditor of Smith collecting its account, and, as such, was exempted from the statutory definition of a "debt collector." Furthermore, at the time Huntington Bank extended a personal loan to Smith to purchase a car, and thus acquired a debt, the personal loan was not in default. In fact, the alleged default in this case did not occur until over a year after Smith entered into the loan agreement with Huntington Bank. Therefore, Huntington Bank was not a "debt collector" pursuant to the statute.

COLLECTION LETTER THAT STATED THE AMOUNT DUE BUT ALSO PROVIDED A PHONE NUMBER TO OBTAIN CURRENT BALANCE INFORMATION VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Chuway v. Nat'l Action Fin. Services, Inc., 362 F.3d 944 (7th Cir. 2004).

FACTS: The defendant, National Action Financial Services, Inc. ("National") mailed the plaintiff, Chuway, a letter stating that Chuway owed an outstanding balance of $367.42 on her credit card. The letter added that the lender "has assigned your delinquent account to our agency for collection. Please remit the balance listed above in the return envelope provided. To obtain your most current balance information, please call 1-800-916-9006."

Chuway brought a class action suit against National asserting that its dunning letter failed to state the amount of the debt owed in violation of the Fair Debt Collection Practices Act ("FDCPA"). Chuway claimed she was unsure what amount National was trying to collect from her and she did not know if it was the "BALANCE" or a different "MOST CURRENT BALANCE" that could only be determined by calling National's 1-800 number. The district judge granted summary judgment for National, ruling that the letter stated the amount of the debt and therefore did not violate the statute. Chuway appealed.
HOLDING: Reversed and remanded.
REASONING: The FDCPA requires that any dunning letter sent by a debt collector state the amount of the debt the debt collector is attempting to collect. 15 U.S.C. § 1692g(a)(1). A debt collector must present this disclosure in a manner likely to be understood by an "unsophisticated consumer". *Bartlett v. Heibl*, 128 F.3d 497, 500-01 (7th Cir.1997).

The language in the letter could have confused the plaintiff, who could have reasonably thought the reference to the "current balance" meant that the defendant was trying to collect an additional debt.

The court found that the language in the letter could have confused the plaintiff, who could have reasonably thought the reference to the "current balance" meant that the defendant was trying to collect an additional debt, only not telling her how large an additional debt and thus violating the statute. The entire bench was confused about the meaning of the letter until the defendant's lawyer explained it at the oral argument.

The court held summary judgment was inappropriate because it was apparent from reading the letter that the amount of the debt was unclear. Chuway testified credibly that she was indeed confused, and Chuway was representative of the type of people who received that letter or a similar letter. This evidence was sufficient to create a triable issue.

LAW FIRM COLLECTING DELINQUENT WATER FEES IS SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Piper v. Portnoff Law Associates, 274 F.Supp.2d 681 (E.D. Penn. 2003).

FACTS: Plaintiff Bridget Piper and her husband were delinquent in paying water fees for their property. The City of Bethlehem employed defendant Portnoff Law Associates ("Portnoff") as its exclusive attorney for the enforcement of delinquent municipal claims, including water fees. To collect the delinquent fees, Portnoff sent a notice of delinquency to Piper. Piper agreed to pay the debt by a certain date but did not. Portnoff continued to send letters to Piper and filed writs, accruing court costs and attorneys' fees. These costs and fees were assessed against Piper's real property, adding debt to her existing delinquency. The original delinquent water fees amounted to $252.75. Piper did eventually pay Portnoff a total of $553.60. The entire debt, however, including court costs and attorneys' fees, totaled $2,806.92. Portnoff, therefore, initiated an action to facilitate a sheriff's sale of Piper's home.

Piper filed suit against Portnoff, claiming Portnoff had not complied with its obligations under the Fair Debt Collec-

tion Practices Act ("FDCPA"). Piper also moved for an injunction to stop the sheriff's sale. The court granted the injunction and certified a class of plaintiffs against Portnoff. Both parties filed motions for summary judgment.

HOLDING: Plaintiff's summary judgment motion granted.

REASONING: The FDCPA provides a remedy for consumers who have been subjected to abusive, deceptive, or unfair debt collection practices by debt collectors. Debt collectors subject to the FDCPA must follow the requirements of the statute. Piper alleged that Portnoff did not conform to two FDCPA requirements involving the failure to inform Piper that Portnoff was a debt collector and the failure to include validation notices. Portnoff did not deny that it failed to conform to those requirements; instead, Portnoff contended that the FDCPA did not apply to them or this situation.

Portnoff claimed the FDCPA did not apply because its letters did not concern the collection of a "debt" against the plaintiff, but the enforcement of a municipal lien against property. Portnoff contended that municipal liens against property do not fall within the definition of "debt" because they do not involve a "transaction" as required by the FDCPA. The court, however, held that the lien was indeed a "debt" that arises from a "transaction". It is insignificant whether the debt collector proceeded against the debt in rem by obtaining a lien against the property or in personam, the obligation still falls under the FDCPA. A "debt" is created whenever a consumer is obligated to pay money as a result of a transaction whose subject is primarily for personal, family, or household purposes. The delinquent water fees were a debt because they were an obligation to pay money for the water service, a transaction exchanging an obligation to pay for a service.

Portnoff further claimed that it was exempt from the FDCPA because it was a government officer collecting debts on behalf of the City of Bethlehem. The court rejected that claim, holding that Portnoff was not exempt merely because it had a contractual relationship with the government. Portnoff also claimed that any impropriety on its part was not intentional and, therefore, was a bona fide error for which it is not liable under the FDCPA. The court held that Portnoff did indeed intentionally exclude the required language from its letters and there there was no bona fide error. For the foregoing reasons, the plaintiff's motion for partial summary judgment as to liability was granted.

PRIVATE COLLECTION AGENCIES COLLECTING STUDENT LOANS ARE SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Kort v. Diversified Collection Services, Inc., 270 F. Supp.2d 1017 (N.D. Ill. 2003).

FACTS: Kort brought a class action complaint against Diversified Collection Services, Inc. ("DCS"), a collection agency of delinquent student loans for various creditors. Kort alleged violations of the Fair Debt Collection Practices Act ("FDCPA"). 15 U.S.C. §§ 1692 et seq. Kort claimed DCS's "Notice Prior to Wage Withholding" letter, dated February 5, 2000 and postmarked February 7, 2000, violated the FDCPA by misstating the date by which a debtor must enter into a repayment plan or pay off the loan to avoid administrative wage garnishment under the Higher Education Act, ("HEA"). 20 U.S.C. §§ 1071 et seq. Kort asserted the letter threatened to garnish wages sooner than Kort was legally entitled to. The HEA required a thirty day notice period before garnishment could begin. The deadline date given in the letter was March 6, 2000.

DCS argued that specific provisions of the HEA and the FDCPA conflicted and could not be harmonized. DCS claimed that the HEA, as the more specific statute, controlled, not the FDCPA. DCS also claimed and that the FDCPA did not apply to student loan servicers, which only printed, addressed, and mailed the collection letters authored by its clients. Additionally, DCS asserted that the letter did not misstate Kort's and class member's rights because the date by which the letter's recipient must act was not necessarily the date on which garnishment would begin. Kort and DCS both moved for summary judgment.

HOLDING: Summary Judgment granted for Plaintiff.

REASONING: The courts have the duty to harmonize conflicting federal statutes, when there is no clearly expressed Congressional intent to the contrary. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The provisions of the HEA and the FDCPA cited by DCS as conflicting were irrelevant to this particular case. The Congressional policy of facilitating wage garnishment to defray the costs of defaulted guaranteed student loans does not extend to a wish to see collection efforts proceed in a manner sufficiently abusive and unfair as to otherwise run afoul of the FDCPA. Therefore, while it may be appropriate for specific provisions of the HEA to preempt specific provisions of the FDCPA, where the HEA is silent, the court assumed the FDCPA had full effect, because the HEA did not trump or preempt the FDCPA. *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1267 (9th Cir. 1996). The Secretary of Education endorsed this view by stating that abusive and unfair collection of such guaranteed student loan debts is regulated by the FDCPA.

Private guaranty agencies attempting to collect guaranteed student loans are subject to the FDCPA.

The court also noted that other courts have held that private guaranty agencies attempting to collect guaranteed student loans are subject to the FDCPA. Under similar reasoning, courts have held that private guaranteed student loan debt collectors are subject to the FDCPA. In the instant case, DCS was a debt collector subject to the FDCPA because it collected money from debtors, included its own name in its letters, was paid on a contingency basis and had a direct relationship with its creditor clients. *See Laubach v. Arrow Service Bureau, Inc.*, 987 F.Supp 625, 631 (N.D. Ill. 1997).

Guaranty agencies are not required to provide a specific deadline for establishing a repayment plan, full remittance or even the commencement of wage garnishment. If however, a deadline is established, it must not be misleading to the unsophisticated consumer. DCS violated the FDCPA because its letter was on its face ambiguous and the court found an unsophisticated consumer could be lead to believe that wage garnishment could begin before the 30 day notice period required by section 1095(a) of the HEA.