IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DANNY BRITTINGHAM, Plaintiff, v. CONSUMER ADJUSTMENT CO., INC., Defendant.	))))))))))	CIVIL ACTION NO. 21-0096-MU

ORDER

Three motions are currently before the Court, Defendant Consumer Adjustment Company, Inc.'s Motion for Summary Judgment (Docs. 86, 88); Plaintiff Danny Brittingham's Motion to Supplement his Opposition to Defendant's Motion for Summary Judgment (Doc. 96); and Plaintiff's Second Motion for Class Certification (Doc. 90). The parties have fully briefed the issues (*see* docs. 92, 93, 94, 95, 97) and the motions are now ripe for disposition. For the reasons discussed below, Defendant's Motion for Summary Judgment is **GRANTED**; Plaintiff's Motion to Supplement is **DENIED**; and Plaintiff's Second Motion for Class Certification is **MOOT**.

I. PLAINTIFF'S MOTION TO SUPPLEMENT HIS OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. 96).

Defendant Consumer Adjustment Company, Inc. (Defendant or "CACi") filed a Motion for Summary Judgment on May 1, 2023. (Doc. 86). The Amended Scheduling Order (Doc. 83) established that Plaintiff Danny Brittingham (Plaintiff or "Brittingham") had until May 31, 2023, to respond to the motion. Plaintiff filed his response in opposition on May 31, 2023. (Doc. 92). Plaintiff's filing failed to include a response to

CACi's Statement of Material Facts. (*See* Docs. 92; 95 at 6). Pursuant to the Federal Rules of Civil Procedure, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2); *see also* Civil L.R. 5(b) and (d).

Plaintiff now seeks to supplement his opposition to include a response to Defendant's Statement of Facts (Doc. 96), and CACi opposes the motion. (Doc. 97). Plaintiff's motion to supplement requests leave to amend his response to the summary judgment motion, which is essentially a request to modify the Court's scheduling order. The rule is clear that such scheduling order deadlines "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The "good cause" standard "precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension." *Sosa v. Airprint Sys., Inc*., 133 F.3d 1417, 1418 (11th Cir. 1998) (internal quotation omitted). Diligence is the "touchstone" of Plaintiff's burden. *De Varona v. Discount Auto Parts, LLC*, 285 F.R.D. 671, 672-73 (S.D. Fla. 2012)) (stating that "diligence is the key to satisfying the good cause requirement"). Plaintiff, here, has provided the Court with no explanation for failing to include with his summary judgment opposition a response to Defendant's Statement of Facts, other than to claim he "inadvertently failed" to file it. (Doc. 96). Consequently, Plaintiff has failed to demonstrate good cause exists for the out-of-time filing. For this reason and those explained in CACi's response, Plaintiff's Motion to Supplement (Doc. 96) is **DENIED**.

Notably, however, this finding does not alter the Court's analysis and decision regarding CACi's motion for summary judgment, which is discussed below.

II. CACi's Motion Summary Judgment (Doc. 86) is GRANTED.

a. Background

In April of 2020, Plaintiff received a notification from a credit monitoring service that Midwest Recovery Systems, LLC ("Midwest") reported derogatory information about him on his credit reports, that is that Plaintiff's debt with National Payday Loans was delinquent. However, Plaintiff never had an account with Midwest or with National Payday Loans. And, he had previously disputed the reporting of this same debt a year earlier. (Doc. 86-4 at 9-10). After receiving this notification, Plaintiff checked his credit report and credit score and confirmed that "Midwest" reported an open "account in collections" (in the amount of $444.00, with the original creditor listed as National Payday Loan) on his credit report. In June of 2020, Plaintiff filed a written dispute with the credit reporting agencies Equifax and TransUnion regarding the Midwest credit reporting. Equifax deleted the Midwest account; however, TransUnion did not. Indeed, TransUnion "VERIFIED AS ACCURATE" the same reporting on July 21, 2020. (Doc. 92-2).

On February 26, 2021, Plaintiff filed this action against TransUnion, LLC and Midwest. (Doc. 1). On May 19, 2021, Plaintiff and TransUnion, LLC filed a notice of settlement (*see* Doc. 14), and on July 8, 2021, a joint stipulation to dismiss Midwest and substitute Defendant CACi was entered. (Doc. 21). Thereafter, on July 26, 2021, Plaintiff filed an amended complaint against CACi, which is the operative complaint in this action. (*See* Doc. 26, "Complaint").

It is undisputed that CACi, a third-party debt collector, entered into an asset purchase agreement with Midwest, a third-party debt collector, on September 1, 2019, and acquired Midwest's physical lists, its bank account(s); its client relationships, and the service agreements with those clients, including a contractual relationship with O'Brien Wexler & Associates ("OBW"), a debt buyer – the provider of the reported $444.00 National Payday Loan debt at issue in this action ("the debt" or "the account"). CACi also contracted through the asset purchase agreement with Midwest the right to use the "Midwest" name; however, CACi never registered the "doing business as" or trade name of Midwest with any state in which it conducts its business, including with the Alabama Secretary of State. (Doc. 11). It is further undisputed that, following the asset purchase agreement with Midwest, CACi continued to report debts to credit reporting agencies under the name of Midwest, including the account at issue here, until CACi successfully transferred (or merged) the purchased information of Midwest's systems over to CACi's system. (Doc. 92-5 at 10).

Plaintiff is suing CACi for violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*., violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, and for acts of negligence. According to Plaintiff, CACi had a uniform practice of collecting debts it knew to be or should have known were bogus. Plaintiff claims he suffered actual damages including, but not limited to, the loss of credit, loss of the ability to purchase and benefit from the credit, mental and emotional pain, distress, anguish, humiliation, frustration, anxiety, and embarrassment.

b. Standard of Review.

Summary judgment should be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has satisfied its responsibility, the burden shifts to the non-movant to show the existence of a genuine issue of material fact. "If the nonmoving party fails to make 'a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (footnote omitted)). "In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 999 (11th Cir. 1992) (internal citations and quotations omitted). "Summary judgment is justified only for those cases devoid of any need for factual determinations." *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1016 (11th Cir. 1987) (citation omitted).

c. Analysis.

The crux of Plaintiff's claim is that CACi knew or should have known at the time it initially reported Plaintiff's debt to the credit reporting agencies that the debt was inaccurate and/or false. In short, Plaintiff references (and piggybacks) charges asserted

by the Federal Trade Commission against Midwest in November of 2020, including the charge that Midwest operated a scheme to collect phantom debts by "parking" bogus debts and derogatory information on consumers' credit reports - that is, placing purported debts on a consumers' credit reports without attempting to communicate with the consumers about the debt. (Docs. 92; 92-1). Plaintiff alleges in his Complaint that CACi continued these same practices when it acquired the assets of Midwest in September of 2019 and that CACi is liable for essentially the same conduct the Federal Trade Commission charged against Midwest. However, Plaintiff has failed to establish this beyond mere conjecture and conclusory allegations.

1. FCRA Claims – Count One.

Plaintiff alleges in the Complaint that as early as April of 2020, CACi provided derogatory, false, and disputed credit information about him (and others) to consumer reporting agencies ("CRAs"). In so doing, CACi, violated 15 U.S.C. § 1681s-2(b) by: failing to fully, reasonably or adequately investigate his dispute of the reporting of the false information on his credit reports; failing to review all relevant information regarding the dispute and by disregarding the information after review; and by continuing to submit false and derogatory information, which it knew to be inaccurate, incomplete, and not verifiable, to the consumer reporting agencies after receiving notice of the dispute directly from Plaintiff and the credit bureaus.

Pursuant to the FCRA, furnishers of consumer information are required to take specific actions upon notice of a dispute:

> After receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall--
> **(A)** conduct an investigation with respect to the disputed information;

> **(B)** review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
> **(C)** report the results of the investigation to the consumer reporting agency;
> **(D)** if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
> **(E)** if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
> **(i)** modify that item of information;
> **(ii)** delete that item of information; or
> **(iii)** permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1). This investigation must be completed within thirty (30) days. § 1681s-2(b)(2) and § 1691i(a)(1)(A). Plaintiff alleges that CACi is a furnisher of consumer information and for purposes of this motion, the Court concludes the same. Plaintiff further alleges CACi's FCRA violations were willful and negligent, entitling him to recovery remedies provided in 15 U.S.C. § 1681n and § 1681o.

CACi has shown that it received notice on June 26, 2020 that Plaintiff sent disputes to the CRAs regarding the OBW, National Payday Loan, account. First, CACi marked the account as "disputed" in its system. CACi then verified the account by checking that the information provided by the CRA and dispute information matched the information contained in CACi's system. Next, CACi attempted to validate the account by asking the current creditor, OBW, to provide supporting account documentation. When OBW failed to provide documentation about the debt within the specified thirty-day time period, CACi requested, on July 23, 2023, that the credit reporting agencies delete their reporting of the account.

The Eleventh Circuit uses a "reasonable" standard to evaluate whether a furnisher of credit information has met its dispute investigation requirements. *Hinkle v. Midland Credit Mgmt, Inc*., 827 F.3d 1295, 1302 (11th Cir. 2016). "[W]hat constitutes a reasonable investigation will vary depending on the circumstances of the case and whether the investigation is being conducted by a CRA under § 1681i(a), or a furnisher of information under § 1681s–2(b)." *Id*. (internal quotation and citation omitted). "Whether a furnisher's investigation is reasonable will depend in part on the status of the furnisher—as an original creditor, a collection agency collecting on behalf of the original creditor, a debt buyer, or a down-the-line buyer—and on the quality of documentation available to the furnisher." *Id*. Here, CACi has demonstrated that it followed its set procedures to the letter regarding Plaintiff's dispute and did everything required by the FCRA in response to Plaintiff's dispute. This included, as a debt collector, rather than an original creditor, an attempt to obtain documents from its client, OBW, in the course of the investigation. When that attempt failed, because of OBW's lack of response, CACi requested deletion of the account from Plaintiff's credit reporting - 27 days after receiving notice of the dispute. Plaintiff has failed to establish how this investigation was not reasonable and how CACi violated the FCRA. To the contrary, Plaintiff's testimony essentially corresponds to the facts put forth by CACi, detailing that the last time he saw the Midwest Recovery or CACi on his credit report was July of 2020. (Doc. 86-4 at 5-6, 8-9).

Moreover, Plaintiff has failed to show that any different result would have occurred had CACi conducted any part of its investigation differently. *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1313 (11th Cir. 2018) ("[A] plaintiff asserting a claim

against a furnisher for failure to conduct a reasonable investigation cannot prevail on the claim without demonstrating that *had* the furnisher conducted a reasonable investigation, the result would have been different; *i.e.*, that the furnisher would have discovered that the information it reported was inaccurate or incomplete, triggering the furnisher's obligation to correct the information.").

As to Plaintiff's allegation that CACi violated the FCRA in its initial reporting of the debt to the CRAs, Plaintiff's claim fails as a matter of law. Section 1681s-2 of the FCRA imposes a number of specific duties on furnishers of credit information. The statute, however, only requires a furnisher to conduct any kind of investigation after it receives a dispute from a consumer, which CACi did, as discussed above. The statute contains no requirement for a furnisher to investigate the validity of a debt before commencing to report on that account to the CRAs. And, while the FCRA prohibits furnishers of credit information from reporting inaccurate consumer information, 15 U.S.C. § 1681s-2(a), it also prohibits private causes of actions for violations of subsection (a). *See* § 1681s-2(c), (d). In other words, the enforcement of subsection (a) is expressly reserved to governmental agencies and officials, thereby limiting a consumer's private cause of action against a furnisher of credit information to violations of § 1681s-2(b). *See e.g., Chipka v. Bank of America,* 355 F. App'x 380, 383 (11th Cir. 2009). Beyond this, for the reasons stated in CACi's motion and reply, the record does not support that CACi knew or should have known the account was false or inaccurate prior to the initial reporting of the account to the CRAs, as CACi has produced evidence reflecting it had no notice that the account was related to a previously disputed debt, no knowledge that Midwest was being investigated for parking debts, and, further, that CACi reasonably relied on

the information provided by Midwest and OBW because both entities' contracts with CACi included clauses and covenants that support that reliance. (*See* Docs. 88-1; 88-2; 86 at 21-22; 92-5). Plaintiff has pointed to no record evidence demonstrating that CACi knew the reported debt was inaccurate or that CACi acted maliciously or willfully to cause him harm and further testified that he had no reason to believe that after receiving notice of the dispute that CACi continued to submit false information to the CRAs after June of 2020. (Doc. 86-4 at 11, 13).

Thus, Plaintiff has failed to carry his burden of establishing a FCRA violation.

2. <u>FDCPA Claims – Count Two</u>

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors. . . ." 15 U.S.C. § 1692(e). Such practices include collecting amounts not owed and making false representations in connection with the collection of any debt. 15 U.S.C. § 1692e and 1692f(1). Plaintiff alleges that CACi is a debt collector as defined by the FDCPA, 15 U.S.C. § 1692a(6) and, as such, has violated the FDCPA by: (1) furnishing information regarding debt to a CRA before communicating with him about the debt, in violation of § 1692f; (2) collecting and attempting to collect late fees it was not entitled to collect, in violation of § 1962f(1); and (3) providing false information regarding the status of a loan, in violation of § 1692c. (Doc. 26 at 6).

Section 1692f prohibits a debt collector from using "unfair or unconscionable means to collect or attempt to collect any debt." The provision then identifies several acts that, without limiting the section's applicability, would constitute per se violations of the statue, including "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly

authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). As to Plaintiff's allegation that CACi furnished information regarding the debt to a CRA before communicating with him about the debt, CACi asserts that such a practice was not a violation of any law or agency rule until November 30, 2021, with the passage of Regulation F by the Consumer Financial Protection Bureau, 84 FR 23274-01. *See also* Doc. 95 at 9, n.4 and Doc. 86 at 24, citing cases demonstrating that credit reporting does not, by itself, trigger the notice requirement of § 1692g. Plaintiff has further failed to put forth evidence showing CACi had any knowledge the debt reported was not accurate, and CACi has shown the account was placed for collection after the acquisition of Midwest, and no evidence regarding the account reflects the debt was previously disputed or invalid. (Doc. 95 at 2, 10-11). Notably, Plaintiff has failed to carry his burden to show otherwise. (*See* Docs. 92; 86, n.3). Next, Plaintiff's claim that CACi attempted to collect late fees it was not entitled to collect is belied by his own testimony and thus fails. (Doc. 86-4 at 14-15).

Plaintiff further alleges CACi violated § 1692c, which regulates the communications of a debt collector with the consumer and third parties in relation to the collection of a debt, by providing false information regarding the status of a loan. (Doc. 26 at 6). However, Plaintiff fails to provide any specific factual allegations or support for this claim. Notably, Plaintiff alleges for the first time in his response to summary judgment that CACi violated § 1962e, which prohibits using "any false, deceptive, or misleading representation or means in connection with the collection of any debt", including "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization", 15 U.S.C. §

1692e(14), when it reported the account under the name of Midwest Recovery Systems, LLC, rather than CACi. According to CACi, it contractually acquired (through the asset purchase agreement with Midwest) the right to use the name and do business under the name of Midwest. Plaintiff contends such agreement is legally insufficient to overcome the statutory provision. *See Connolly v. Pension Benefit Guaranty Corp*., 475 U.S. 211, 224 (1986) ("If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions."). Plaintiff's attempt to insert this cause of action, however, comes too late. Plaintiff does not assert this allegation nor statutory provision in his complaint (nor has he amended or supplemented the complaint to reflect such a claim). "It is well-settled in this circuit that a plaintiff may not amend the complaint through argument at the summary judgment phase." GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1258 and note 27 (11th Cir. 2012). Plaintiff's complaint fails to give notice of this FDCPA claim by reference to a provision on point or directly pleaded claim. Thus, Plaintiff has improperly asserted a new claim in his response to Defendant's Motion for Summary Judgment. As such, this claim is not properly before the Court and will not be substantively addressed or considered.

Because Plaintiff has failed to establish CACi violated the FDCPA, Defendant is entitled to summary judgment on the FDCPA claims.

3. Negligence Claims – Count Three

To the extent Plaintiff alleges that CACi was negligent for failing to verify the validity of the debt prior to reporting it to the CRAs, the claim is preempted by the FCRA

and not actionable. *See* 15 U.S.C. §§ 1681t(b)(1)(F) and 1681h(e). Section 1681t(b)(1)(F) provides:

> No requirement or prohibition may be imposed under the laws of any State-(1) with respect to any subject matter regulated under-(F) section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply [to two statutory exemptions concerning Massachusetts and California].

Section 1681h(e) provides:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

This Court finds 1681(b)(1)(F) controlling and an absolute bar to state law claims, to the extent they are based on Defendant's reporting of false information to credit agencies. *See also Bowman v. CitiMortgage, Inc.,* No. CIV.A. 11-0047-KD-N, 2011 WL 2039576, at *3 (S.D. Ala. May 6, 2011), report and recommendation adopted, No. CIV.A. 11-00047-KD-N, 2011 WL 2160043 (S.D. Ala. May 25, 2011).

Accordingly, Defendant is entitled to summary judgment on the asserted claim of negligence.

d. Conclusion

Based on the forgoing, Defendant CACi's Motion for Summary Judgment (Doc. 86) is **GRANTED**.

III. PLAINTIFF'S SECOND MOTION TO CERTIFY CLASS (DOC. 90) IS ˜MOOT.

On May 1, 2023, Plaintiff filed a Second Motion to Certify Class. (Doc. 90). Plaintiff claims that from at least September 1, 2019 through September 30, 2020, CACi's business model mimicked that of Midwest Recovery Systems, LLC, with the collection of bogus debts by reporting them under a false name on the credit reports of Plaintiff and class members. Plaintiff alleges he and the Class described are victims of this "scheme," as plead in his complaint. (Doc. 90 at 5). Because Plaintiff's complaint has been dismissed in its entirety with the granting of summary judgment in favor of Defendant CACi, Plaintiff's Motion to Certify Class is **DENIED as MOOT**.

IV. CONCLUSION.

For the reasons stated herein:

1. Defendant Consumer Adjustment Company, Inc.'s Motion for Summary Judgment (Docs. 86) is **GRANTED**;
2. Plaintiff Danny Brittingham's Motion to Supplement his Opposition to Defendant's Motion for Summary judgment (Doc. 96) is **DENIED**; and
3. Plaintiff's second motion for class certification (Doc. 90) is **MOOT**.

DONE and **ORDERED** this **27th** day of **July**, **2023.**

s/P. Bradley Murray
UNITED STATES MAGISTRATE JUDGE