UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Shawtee S. Kellar, Plaintiff, v. Financial Recovery Services, Inc., Defendant.	)	Civil No. 1:12-cv-97 **REPORT AND RECOMMENDATION**

Plaintiff Shawtee Kellar alleges in her complaint that defendant Financial Recovery Services, Inc. (hereafter "FRS") violated the Fair Debt Collection Practices Act in its communications with her. FRS has moved for summary judgment (Doc. # 12) and the matter has been fully briefed. Kellar has moved for oral argument on the summary judgment motion. (Doc. # 26).

Factual Background

On or about June 18, 2012, an FRS representative telephoned Kellar about a debt it claimed Kellar owed to a creditor in the amount of $1087.04. Kellar alleges the caller was rude and unprofessional, interrupted her repeatedly, and eventually hung up on Kellar. According to the affidavit of Brian Bowers, CEO/President of FRS, an audio recording of the call indicates the representative who spoke to Kellar was Amanda Cady, and "when it became clear that Plaintiff would not agree to a payment arrangement, Ms. Cady terminated the call by stating that she would 'set it up as refusal to pay on the file and good luck to you, Ma'am.' Ms. Cady then hung up the phone." (Bowers Affidavit, Doc. 14). Kellar then called FRS and spoke to Ray Lewis, an

account manager. During the call Lewis at no time told Kellar she could dispute the debt in writing within 30 days. With Kellar's permission, following the call Lewis sent her a communication by fax or email. The communication, which is attached to the complaint, notified Kellar that FRS was authorized to settle the matter for $597.87, payable no later than June 28, 2012. It did not notify Kellar she could dispute the debt within 30 days.

Kellar alleges that on June 21, 2012 she received a letter from FRS that was dated June 14, 2012, four days before the telephone contact and fax/email. An unreadable copy of this letter is attached to the complaint, but a more legible copy is attached to the Affidavit of Sam Andreasen, submitted by defendant in support of its motion. (Doc. # 6-2). This letter offers Kellar four "opportunities": (1) to pay the account balance in full with a one-time payment, or (2) to settle for a one-time payment equal to 40% of the balance, or $434.82, or (3) to pay three equal consecutive monthly payments totaling an amount equal to 55% of the account balance, or $597.87, or (4) to fill in an amount an number of monthly paymenst affordable to her and to make those payments until the account balance is paid in full or another agreement is negotiated. Id. The letter included notice of the right to dispute the debt within 30 days.

Kellar alleges in her complaint that the letter dated June 14, 2012 was backdated and actually had been written and sent after the June 18, 2012 telephone call and fax/email. The affidavit of Sam Andreasen, who serves as President and Chief Operating Officer of CompuMail, Inc., a collection letter processor and mailer utilized by FRS, states that FRS requested the letter on June 14, 2012, CompuMail printed the letter on June 14, 2012, and it mailed the letter to Kellar on June 15, 2012. Kellar states she did not receive the letter until about June 21, 2012.

Kellar contends FRS violated the FDCPA by engaging in the following deceptive and abusive debt collection practices: (1) it backdated the letter dated June 14; (2) the June 14 letter is confusing to the least sophisticated consumer; (3) the June 18 fax/email and June 14 letter, taken together, are confusing to the least sophisticated consumer; and (4) if the June 18 fax/email was sent before the June 14 letter, the fax/email was a violation because it failed to include notice of the right to dispute the debt within 30 days.

Requests for Admission

On October 10, 2012, FRS served discovery requests on Kellar, consisting of interrogatories, request for production of documents, and requests for admission. As of the date FRS filed its motion for summary judgment on June 24, 2013, Kellar had not responded to the discovery requests. FRS's requests for admission included the following requests:

> 4. Admit that you have no evidence that the debt is "a consumer debt."
> 5. Admit that you have no evidence that Defendant violated the law.
> 6. Admit that you did not suffer any actual damages as alleged in your pleadings.
>
> . . . .
>
> 16. Admit that other than the date on which you received FRS' June 14, 2012 letter, you have no evidence to support your claim that the referenced letter was "backdated" as alleged in paragraph 7 of the Complaint.

(Poncin Affidavit, Ex. A, Doc. # 13-1).

FRS contended in its brief that Kellar's failure to timely respond to the requests for admission resulted in all of the above statements being deemed admitted. (Memorandum of Law in Support of Defendant's Motion, Doc. # 15, at 3). Kellar thereafter served responses to the requests for admission on July 17, 2013, one day before she filed her brief opposing the summary judgment motion. In her brief she claims she "has now cured the discovery defect by serving a response on Collector." (Consumer's Memorandum of Law, Doc. # 17, at 13).

Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides a party may be entitled to a judgment as a matter of law. Summary judgment is proper if the pleadings, discovery, and disclosure materials on file, and any affidavits show there is no genuine issue of material fact. Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011). The movant bears the initial burden of identifying for the court the basis of its motion and the absence of a genuine issue of material fact. Id. (quoting Celotex Corp.v.Catrett, 477 U.S. 317, 323 (1986)).

If the movant meets this burden, the non-movant must show in its response evidence that sets out "specific facts showing that there is a genuine issue for trial." Id. The facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to the facts. Id. However, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. There is no genuine issue for trial, if the record taken in its entirety would not lead a reasonable trier of fact to find in favor of the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Effect of Untimely Responses to Requests for Admission

FRS's initial brief sought summary judgment in part on Kellar's admissions due to her failure to timely respond to the requests for admission. Rule 36, which provides for requests for admission, declares that "[a] matter is admitted" unless the receiving party serves a written answer or objection within 30 days, or such other period of time as the court may order. F.R.Civ.P. 36(a)(3). The rule provides that a matter admitted is "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." F.R.Civ.P. 36(b).

Once matters are deemed admitted by failure to respond to requests for admission in a timely manner, mere service of tardy responses is generally insufficient to negate the admissions. See Quasius v. Schwan Food Co., 596 F.3d 947 (8th Cir. 2010). Rule 36(b) requires a motion to withdraw the admissions. If such a motion is filed, "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." F.R.Civ.P. 36(b).

Kellar's service of responses almost contemporaneously with her summary judgment brief is not sufficient under Rule 36(b) as a motion for withdrawal of her deemed admissions. The court may grant FRS summary judgment as a matter of law on the basis of Kellar's admissions. Nonetheless, FRS has demonstrated that it is entitled to summary judgment on the merits, without regard to the admissions, so the court will proceed to address the merits of Kellar's claims, since no prejudice will result to FRS.

Backdating

In her complaint Kellar alleges the June 14 letter "was falsely backdated and was in fact sent on June 18 after the Lewis Fax." (Doc. # 1-1, ¶ 6). She also alleges that "if the Lewis Fax was in fact sent before the June 14 Letter, the Lewis Fax violatated 15 U.S.C. § 1692g." (Doc. # 1-1, ¶ 7). FRS denies that it backdated the June 14 letter and has submitted the affidavit of Sam Andreason, President/CEO of the processing/mailing service utilized by FRS, which states the letter dated June 14 was printed on June 14 and mailed on June 15. In response, Kellar argues that FRS's "own evidence proves the June 14 Letter is backdated," establishing "a technical violation of FDCPA." (Consumer's Memorandum of Law Opposing Summary Judgment, Doc. # 17, at 11).

The violation of 15 U.S.C. § 1692g which Kellar alleges is the requirement that within five days of the initial debt collection communication with a consumer, a debt collector must send the consumer written notice that the consumer has thirty days to dispute the debt. The June 18 fax/email did not contain such notice. The June 14 letter did. If the June 14 letter was backdated, Kellar contends FRS violated § 1692g by failing to give timely notice of Kellar's right to dispute the debt within 30 days.

Kellar appears to no longer contend that the June 14 letter was sent after the June 18 fax/email, but she does "rest on the technical violation as to backdating." (Consumer's Memorandum, Doc. # 17, at 12). The court takes judicial notice that printing a letter one day and placing it in the mail the following day is a common business occurrence, depending on the time of day the letter was printed, the volume of outgoing mail on that day, and the availability of sufficient personnel to process the mail on that day. Kellar has no evidence on any of these factors. Thus, there is no genuine issue of material fact on the issue. The court finds the June 14 letter was not backdated. Because the June 14 letter was prepared and sent prior to the June 18 fax/email, there is no evidence that FRS violated § 1692g by failing to give timely notice of Kellar's right to dispute the debt within 30 days. The court finds no violation, technical or otherwise, of FDCPA as a result of the alleged backdating of the June 14 letter and lack of notice of right to dispute the debt in the June 18 letter. FRS is entitled to judgment as a matter of law on this claim.

Confusion Regarding "Cost of Credit"

Kellar contends FRS's communications on June 14 and June 18 are impermissibly confusing because they do not disclose the cost of one alternative compared to the others. She

contends the third alternative offer in the June 14 letter, which is the only proposal repeated in the June 18 fax/email, "is in effect an offer to make a loan–Collector will lend Consumer $434.82 and charge her 1/3 of $597.87 a month," but the effect is "burying the cost of credit." (Consumer's Memorandum, Doc. # 17, at 7-8). She also contends the fourth alternative offer "contemplates an unknown number of payments . . . without information defined by Congress [in the Truth in Lending Act] as critical (namely the cost of credit)" and thus "is a deceptive, abusive or misleading debt collection practice" under 15 U.S.C. § 1692e. Id. at 12. Kellar's brief repeatedly refers to the requirements of the Truth in Lending Act (hereafter "TILA"). She acknowledges that the third settlement offer in the letter falls beneath the TILA's four-installment threshold, but nevertheless contends the third offer "is in effect an offer to make a loan" with a buried cost of credit. Id. at 6, 11. She further argues that offer with "three installments could well be the very design of the deception - skate under the 4-installment rule and get away with burying the cost of credit," and thereby violate the FDCPA. As to the fourth alternative offer, which would have allowed Kellar to fill in the number and amount of payments she could afford to make to retire the account, Kellar proposes that if FRS "accepted [Kellar's] hypothetical counter offer of 1,088 payments of $1 each, TILA would assuredly apply." Id. at 12. Thus, Kellar back-doors her TILA argument into her FDCPA claim by arguing that "[t]he question in this case isn't whether TILA applies, but whether the provision of some information without information defined by Congress as critical (namely the cost of credit) is a deceptive, abusive, or misleading debt collection practice." Id.

The premise of Kellar's TILA argument, that the third and fourth offers were loan offers subject to TILA's disclosure requirements, is erroneous. The offers were alternative proposals to

settle a pre-existing debt made by a debt collector, not by the creditor.[1] TILA's disclosure requirements do not apply to the settlement offers made by a debt collector. See Redding v. Capital One Bank (USA), 2011 WL 4340855 (D.Minn.); Large v. LVNV Funding, LLC, 2010 WL 3069409 (W.D. Mich.). FRS's failure to disclose TILA information in its settlement alternatives did not constitute a false, deceptive or misleading representation and was therefore not a violation of FDCPA. FRS is entitled to summary judgment on the "buried cost of credit" claims.

In her complaint Kellar also alleges the June 14 letter and the June 18 fax/email were confusing to the least sophisticated consumer, and separately, she alleges "the June 14 letter was deceptive as well as confusing to the least sophisticated consumer, because it presented four payment choices in a confusing and deceptive manner." Complaint, Doc. # 1-1, at ¶ 7. No further explanation is provided in the complaint, and she did not address these allegations in her brief other than her arguments regarding hidden cost of credit as discussed above. To the extent Kellar's allegations in the complaint encompass other claimed violations of FDCPA, she has failed to support those claims in response to FRS's motion for summary judgment and those claims should be dismissed as well.

Rude and Unprofessional Conduct

In her complaint Kellar alleges that the caller from FRS on June 18, 2012 was "rude and unprofessional, repeatedly interrupting" her. Under 15 U.S.C. § 1692d, "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any

[1]Under the TILA, a "creditor" "refers only" to one who regularly extends consumer credit payable in four or more installments or for which a finance charge is required and is the one to whom the debt arising from the transaction is initially payable. 15 U.S.C. § 1602(f).

person in connection with the collection of a debt." Without further evidence regarding the caller's behavior, it is not clear that the allegation in the complaint rises to an actionable level of conduct that would violate FDCPA.

Brian Bowers, CEO/President of FRS, has testified by affidavit in support of FRS's summary judgment motion that he listened to the audio recording of the telephone call, and "when it became clear that Plaintiff would not agree to a payment arrangement, Ms. Cady [FRS's caller] terminated the call by stating that she would 'set it up as refusal to pay on the file and good luck to you, Ma'am.' Ms. Cady then hung up the phone." (Doc. # 14). Kellar has not countered Bowers' arguably hearsay statement with submission of any evidence about the telephone call; nor has she even mentioned this allegation in her brief opposing the summary judgment motion. The court construes Kellar's silence as conceding or abandoning the issue. FRS is entitled to judgment as a matter of law on the issue of a violation of 15 U.S.C. § 1692d.

Oral Argument Request.

Kellar has requested oral argument on the summary judgment motion. She cites oral argument as "[h]er only chance at illuminating Collector's perceived confusion, her only chance at replacing Kafka with Twain." (Consumer's Memorandum of Law Supporting Motion for Oral Argument, Doc. # 27, at 2). The court finds oral argument would not be helpful to the court; nor would it help Kellar. Her case suffers from a lack of evidence, oral argument would not overcome this deficiency.

Conclusion

FRS has shown that no material issue of fact exists on any of Kellar's claims, and FRS is entitled to judgment as a matter of law on all claims asserted in the complaint.

IT IS RECOMMENDED that defendant's motion for summary judgment (Doc. # 12) be **GRANTED** and plaintiff's complaint be **DISMISSED** with prejudice. Plaintiff's motion for oral argument (Doc. # 26) should be **DENIED.**

Notice of Right to Object

Pursuant to Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1 (D)(3), any party may object to this recommendation by November 15, 2013.

Dated this 29th day of October, 2013.

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge