UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RENY RIVERO,

Plaintiff,

-against-

ACB RECEIVABLES MANAGEMENT, INC.,

Defendant.
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REPORT AND RECOMMENDATION
13 CV 4573 (ENV)(LB)

BLOOM, United States Magistrate Judge:

This is one of numerous actions *pro se* plaintiff Reny Rivero has initiated in this Court against an alleged debt collector pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692–1692p, section 5-77 of the New York City Rules, Consumer Protection Law Regulations, Title 6, and section 20-493.1 of the New York City Administrative Code.[1] Here, Plaintiff seeks actual, statutory, and punitive damages against Defendant ACB Receivables Management, Inc. ("ACB"). (Am. Compl., ECF No. 16.) ACB moves for summary judgment under Federal Rule of Civil Procedure 56 on all of Plaintiff's claims. Judge Vitaliano referred ACB's motion to me for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). For the reasons stated below, it is recommended that ACB's motion for summary judgment should be granted and this action should be dismissed.

[1] See, e.g., ECF No. 1; Rivero v. Dynamic Recovery Services, Inc., 14-CV-6565; Rivero v. B&B Collections Inc., 14-CV-4200; Rivero v. ACB Receivables Mgmt., Inc., 14-CV-2912; Rivero v. LCA Collections, 13-CV-4793; Rivero v. Providian Nat'l Bank, 13-CV-4023; Rivero v. America's Recovery Solutions LLC, 13-CV-3359; Rivero v. Chase Receivables , 13-CV-3312; Rivero v. Smartfund Medic. Acceptance Co., LLC, 13-CV-1847; Rivero v. Commercial Collection Corp. of NY, 13-CV-1032; Rivero v. Cohen & Slamowitz, LLP, 12-CV-1052.

BACKGROUND[2]

This action arises from ACB's attempts to collect a $20.07 bill for medical services rendered to Plaintiff by Staten Island Physician Practice on January 25, 2012 ("the Debt"). (Polon Aff., ECF No. 35 ¶¶ 2, 5.) According to ACB's Chief Executive Officer, Robert Polon, Staten Island Physician Practice ("SIPP")[3] assigned a legal interest in the Debt, including the right to collect the Debt from Plaintiff, to ACB. (Id. ¶¶ 2–5.) On August 15, 2012, ACB sent Plaintiff a letter notifying Plaintiff of the amount of the Debt, that "Staten Island Physician" was the Debt creditor that referred the Debt to ACB for collection, and that ACB is a debt collector. (Polon Aff., Ex. A.) The letter further states that, "[u]nless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume the debt is valid." (Id.) Plaintiff alleges that he received the letter on August 18, 2012, but, because the letter got lodged between mailboxes, he did not discover it until August 27, 2012. (Am. Compl. ¶¶ 33, 35–36.)

Days before he discovered the letter, on August 23, 2012, ACB called Plaintiff's residential telephone and left Plaintiff what he alleges was an "unintelligible" message. (Id. ¶ 31, Ex. G; Polon Aff. ¶ 6b.) On August 27, 2012, Plaintiff called ACB to demand documentation regarding the subject of ACB's August 23 call. (Am. Compl., Ex. J; Polon Aff. ¶ 6c.) In

[2] The background is taken from the Amended Complaint, an Affidavit from Defendant's CEO, Robert Polon, Defendant's Memorandum of Law in Support of their Motion for Summary Judgment (Mot., ECF No. 35), and the exhibits attached to these documents. The Court also relies on Defendant's requests for admissions that Plaintiff admitted or failed to either admit or deny. See (Mot., Ex. 4. ECF No. 35-1); Fed. R. Civ. P. 36 (permitting the Court to deem unanswered requests for admissions as admitted). Although the Court typically derives the operative facts on a motion for summary judgment from the movant's Rule 56.1 statement, Defendant's counsel failed to file such a statement. Defendant's failure to file that statement violates Local Civil Rule 56.1(a) and is a sufficient basis to deny Defendant's motion. N.Y. State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc., 426 F.3d 640, 648–49 (2d Cir. 2005). Nevertheless, it is recommended that the Court exercise its discretion and conduct its own review of the record to decide the instant motion. See Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001) (holding that a district court may in its discretion "opt to 'conduct an assiduous review of the record' even where one of the parties has failed to file [a 56.1] statement.").

[3] Defendant identifies the provider as both "Staten Island Physicians" and the "Staten Island Physician Practice," (Polon Aff. ¶¶ 2, 6f), but documents only name the Staten Island Physician Practice as the provider.

response, ACB sent a second collection notice to Plaintiff on August 28, 2012, which Plaintiff received on August 31, 2012. (Am. Compl., Aff. ¶ 14, Ex. I; Polon Aff., Ex. B.) The notice stated that Plaintiff owed $20.07 for medical services provided by "Staten Island Physician" on January 25, 2012. (Polon Aff., Ex. B.)

In a September 3, 2012 letter to ACB, Plaintiff disputed the alleged debt and demanded both validation of the amount of the alleged debt and the name and address of the original creditor. (Am. Compl., Ex. J.; Polon Aff., Ex. C.) Over one year later, on November 22, 2013, Plaintiff called ACB to obtain its address for service of process, but, because the office was closed, he called ACB again on November 25, 2013. (Am. Compl., Aff. ¶ 18, Ex. M; Polon Aff. ¶ 6j–k.) Mr. Polon provided Plaintiff with ACB's address and, minutes later, called Plaintiff to notify him that he has a "zero" balance because ACB considered the Debt "uncollectible" or "not worthwhile to attempt to collect." (Polon Aff. ¶ 6m; see id. ¶ 6j–m; Am. Compl. ¶¶ 40–42.)

PROCEDURAL HISTORY

On August 14, 2013, Plaintiff commenced this action, raising claims under the FDCPA, the Telephone Consumer Protection Act ("TCPA"), and the New York City Administrative Code and Rules. (ECF No. 1.) Plaintiff amended his complaint to add new factual allegations, but no new claims. (ECF No. 16.) ACB moved to dismiss the Amended Complaint, and the motion was granted in part, dismissing Plaintiff's TCPA claims with prejudice. (ECF No. 22.) Plaintiff's appeal of that decision to the U.S. Court of Appeals for the Second Circuit was dismissed. (ECF Nos. 26, 30.)

The action proceeded on Plaintiff's remaining claims. ACB now moves for summary judgment. (Mot.) Plaintiff opposes the motion, (ECF No. 42),[4] and ACB replied, (ECF No. 36.)

[4] Plaintiff's opposition contains arguments related to a pending motion to dismiss in Plaintiff's case, Rivero v. ACB Receivables Management, Inc., 14-CV-2912. His complaint in that case involves a similar claim against ACB for

Although Plaintiff filed a sur-reply without Court permission, (ECF No. 38), it is considered but generally repeats the arguments in Plaintiff's opposition.

DISCUSSION

I. Legal Standard

"Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Doninger v. Niehoff, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). A fact is material if it is one that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (quoting Anderson, 477 U.S. at 248). "'A *pro se* party's submissions are to be read liberally, a requirement that is especially strong in the summary judgment context, where a *pro se* plaintiff's claims are subject to final dismissal.'" Routier v. O'Hara, No. 08-CV-02666, 2013 WL 3777100, at *4 (E.D.N.Y. July 17, 2013) (citation omitted).[5] However, the non-moving party must provide "affirmative evidence" from which a jury could return a verdict in its favor. Anderson, 477 U.S. at 257. "Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact." Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (quoting Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)). Moreover, "[t]he 'mere existence of a scintilla of evidence' supporting the non-

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attempting to collect an alleged debt from SIPP. I consider only the opposition arguments that relate to the Debt in the instant case.

[5] The Clerk of Court is directed to send Plaintiff the attached copies of all the unreported cases cited herein.

movant's case is also insufficient to defeat summary judgment." Id. (quoting Anderson, 477 U.S. at 252).

Here, neither party has submitted a Rule 56.1 Statement. Only Plaintiff's and Mr. Polon's affidavits, as well as the attached exhibits, are submitted for the Court's consideration. Construing this record in the light most favorable to Plaintiff, I find that there is no material issue of fact in dispute and Defendant is entitled to judgment as a matter of law.

II. FDCPA

Plaintiff alleges that Defendant violated five provisions of the FDCPA by harassing him using false and deceptive practices to collect a debt, and failing to comply with the notification requirements of the statute. For the reasons stated below, it is recommended that the Court grant Defendant's motion for summary judgment on Plaintiff's FDCPA claims.

A. Harassment Claims under 15 U.S.C. § 1692d

Section 1692d prohibits debt collectors from engaging in conduct intended to harass, oppress, or abuse any person in connection with collecting a debt. 15 U.S.C. § 1692d. That section of the FDCPA defines harassing conduct in relevant part, as "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number," 15 U.S.C. § 1692d(5), and placing "telephone calls without meaningful disclosure of the caller's identity," id. § 1692d(6).

The conduct Plaintiff complains of here does not reflect the pattern of conduct that typifies § 1692d claims. See Kinkade v. Estate Info. Servs., LLC, No. CV 11-4787, 2012 WL 4511397, at * 10 (E.D.N.Y. Sept. 28, 2012) ("[Section] 1692d claims typically involve a *pattern* of conduct." (citation omitted)). Plaintiff asserts that Defendant violated § 1692(5) by calling him once for the purpose of collecting a debt and leaving an unintelligible message. In

determining whether a debt collector's calls were made with the requisite intent to "annoy, abuse, or harass," the Court considers the volume and pattern of calls, whether the plaintiff answered the calls or asked the defendant to stop calling, and whether the defendant made numerous calls in one day. See Hinderliter v. Diversified Consultants, Inc., No. 10-CV-1314, 2012 WL 3888148, at *2 (N.D.N.Y. Sept. 7, 2012) (collecting cases). ACB's single, unanswered telephone call does not, as a matter of law, demonstrate an intent to annoy, abuse or harass Plaintiff and therefore cannot sustain a claim under § 1692(d)(5). See, e.g., Chavious v. CBE Grp., Inc., No. 10-CV-1293, 2012 WL 113509, at *2 (E.D.N.Y. Jan. 13, 2012) (finding that 36 unanswered phone calls made over two months, at reasonable times and not immediately one after the other, did not establish a triable issue of fact as to whether debt collector violated § 1692d(5)); Fashakin v. Nextel Commc'ns, No. 05-CV-3080, 2009 WL 790350, at *7 (E.D.N.Y. Mar. 25, 2009) (granting defendant summary judgment on § 1692d(5) claim when six calls were made to the plaintiff consumer, some that went unanswered and some where no message was left).

Plaintiff's claim under § 1692d(6) also fails. There is no evidence as to the contents of the message left by Defendant, only Plaintiff's allegation in his Amended Complaint that it was unintelligible. Therefore nothing supports Plaintiff's claim that Defendant failed to "meaningfully" disclose its identity as required by § 1692d(6). The Court should therefore grant Defendant's motion for summary judgment on Plaintiff's claims under 15 U.S.C. § 1692d.

B. False and Deceptive Practices under § 1692e

Plaintiff also asserts that ACB engaged in false and deceptive practices, violating two provisions under § 1692e. First, Plaintiff asserts that ACB's conduct ran afoul of the broad prohibition against the "use of any false representation or deceptive means" in collecting a debt.

15 U.S.C. § 1692e(10). Second, he alleges that ACB falsely represented "the character, amount, or legal status of any debt." Id. § 1692e(2). Underlying the two claims is Plaintiff's denial that he owed any money to the SIPP or to ACB. (See Am. Compl. ¶¶ 53, 56, 61.)

In evaluating these claims, the Court applies an objective test based on the understanding of the "least sophisticated consumer." Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993). "[A] collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate." Russell v. Equifax, A.R.S. 74 F.3d 30, 35 (2d Cir. 1996). There is no evidence that ACB's collection notices were inaccurate. CEO Polon states in his affidavit that the SIPP assigned the right to collect the $20.07 debt that Plaintiff incurred on January 25, 2012, to ACB. (Polon Aff. ¶¶ 2, 3, 5.) Plaintiff attempts to rebut this by providing an August 12, 2013 letter from the SIPP, which states that Plaintiff "ha[s] not paid a copay or any other money to [the SIPP] from 2/4/11 to date." (Am. Compl., Ex. B.) But this letter does not state whether Plaintiff owed a balance on this account. Plaintiff also submits statements from SIPP dated December 12, 2014, which reflect a "zero" account balance. (Opp'n, Ex. P.) However, as Plaintiff admits, Mr. Polon advised him that ACB wrote off the Debt from SIPP as of November 22, 2013, when Mr. Polon deemed the Debt uncollectible. (Polon Aff. ¶ 6j–m; Am. Compl. ¶¶ 40–42.) Nothing in the record demonstrates that ACB's collection notices conveyed inaccurate information. Accordingly, as a matter of law, ACB did not violate §1692e(10).

Similarly, Plaintiff cannot establish a violation of § 1692e(2). To establish a claim under that subsection, Plaintiff must show that ACB "*knowingly or intentionally* misrepresented the amount of the debt in its collection letters." McStay v. I.C. Sys., Inc., 174 F. Supp. 2d 42, 48 (S.D.N.Y. 2001) (emphasis added). An allegation that a debt is invalid, standing alone, does not

state a claim under the FDCPA. Bleich v. Revenue Maximation Grp., Inc., 233 F. Supp. 2d 496, 501 (E.D.N.Y. 2002). Again, Plaintiff fails to support his claim that ACB knowingly or intentionally misrepresented the amount of Plaintiff's debt. Defendant's motion for summary judgment should therefore be granted on Plaintiff's claims under § 1692e.

C. § 1692(g) Notice Requirements

Finally, Plaintiff claims that ACB violated § 1692(g)(a)(3) by failing to inform him of his right to dispute the alleged debt *verbally* within 30 days. (Am. Compl. ¶ 92.) Plaintiff's claim is unavailing. Section 1692(g)(a)(3) requires only that the debt collector provide in its initial communication with the consumer "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." ACB's initial communication on August 12, 2012, tracks this language, warning Plaintiff that "[u]nless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid." (Polon Aff., Ex. A.) Section 1692(g)(a)(3) does not require ACB to explicitly state the ways in which Plaintiff could notify ACB of his dispute. Therefore, the Court should grant Defendant's motion for summary judgment on Plaintiff's claim under 15 U.S.C. § 1692(g)(a)(3).

III. New York City Law

The last of Plaintiff's claims arise under section 20-493.1 of the New York City Administrative Code, an amendment made by Local Law 15, and section 5-77 of New York City's Consumer Protection Law Regulations. These provisions regulate debt collection practices and agency licensing to protect consumers, see generally N.Y.C. Admin. Code §§ 20-488–494.1; 6 R.C.N.Y. § 5-77 (defining "unconscionable and deceptive trade practices"); see also N.Y.C.

Admin. Code § 20-493.1 (defining required collection practices), but Plaintiff cites no provision in the New York City Administrative Code or Rules providing a private right of action permitting consumers like himself to enforce these provisions. The Court has not found any such authority for such an action.

The subchapter that Local Law 15 amended has the principal purpose of imposing a licensing requirement on debt collection agencies to "protect the interests, reputations and fiscal well-being of the citizens of [New York] city against those agencies who would abuse their privilege of operation." N.Y.C. Admin. Code § 20-488 (legislative declaration); see also Eric M. Berman, P.C. v. City of New York, 25 N.Y.3d 684, 687 (2015) (explaining Local Law 15 and § 20-488). Any violation thereof may result in a civil penalty. N.Y.C. Admin. Code § 20-494. However, the authority to enforce these provisions and the regulations promulgated thereunder lies with the Commissioner for the Department of Consumer Affairs ("DCA Commissioner"). N.Y.C. Admin. Code § 20-493; see also id. § 20-104 ("The commissioner or the commissioner's designee shall collect all fees for all such licenses and permits and shall otherwise enforce the [licensing] provisions of chapter two."). Therefore, as Section 20-493.1 of the New York City Administrative Code provides no private right of action, Plaintiff's claim under this section must be dismissed.

The same reasoning applies regarding section 5-77 of the Consumer Protection Law Regulations. The Consumer Protection Law, as codified in the Administrative Code, imbues only the DCA Commissioner with authority to impose civil penalties and institute court actions for violations of that Law *and* the regulations promulgated thereunder. N.Y.C. Admin. Code § 20-703(a)–(c). Likewise, only the DCA Commissioner and the City of New York have authority to seek injunctive relief. Id. § 20-703(c), (d); see Kuklachev v. Gelfman, 600 F. Supp. 2d 437, 476

(E.D.N.Y. 2009) (stating that there is no private right of action under a Consumer Protection Law provision because N.Y.C. Admin. Code § 20-703(c) provides that only the DCA Commissioner may bring a claim under that law) (citing Collier v. Home Plus Assoc., Ltd., 856 N.Y.S. 2d 497 (Sup. Ct. 2007)). Consumers may make "claims against an account established pursuant to [these provisions]," but are required to "prove their claims to the [DCA] commissioner in a manner and subject to procedures established by the commissioner for that purpose." Id. § 20-703(c). The Consumer Protection Law Regulations supply that procedure; the sole avenue for consumers to alert the Commissioner to illegal debt collection practices is through an administrative hearing. 6 R.C.N.Y. § 6-21. Because neither the Consumer Protection Law nor its Regulations provide a private right of action, the Court should grant Defendant's motion for summary judgment on Plaintiff's city-law claims.

CONCLUSION

For the foregoing reasons, it is respectfully recommended that the Court should grant Defendant's motion for summary judgment and that Plaintiff's Amended Complaint should be dismissed.

FILING OF OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F.3d 42 (2d Cir. 2002); Small v. Sec'y of Health & Human Servs., 892 F.2d 15 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

SO ORDERED.

/S/ Judge Lois Bloom
LOIS BLOOM
United States Magistrate Judge

Dated: May 31, 2016
Brooklyn, New York