UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEYER SPERBER, on behalf of himself and all other similarly situated consumers,	:	NOT FOR ELECTRONIC OR PRINT PUBLICATION
Plaintiff,	:	
-against-	:	OPINION AND ORDER
CENTRAL CREDIT SERVICES, LLC,	:	16-CV-5222 (ARR) (RLM)
Defendant.	:	

ROSS, United States District Judge:

Plaintiff, Meyer Sperber, on behalf of himself and all other similarly situated consumers, brings this putative class action against consumer debt collector Central Credit Services, LLC ("CCS"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq*. Sperber claims that CCS's debt collection notices are deceptive and misleading because they do not disclose that post-judgment interest is accruing on the debt or state that CCS waives its right to collect that interest. CCS moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). For the reasons explained below, CCS's motion is denied.

FACTUAL BACKGROUND

Sperber alleges that he received a debt collection letter from CCS on October 27, 2015. Am. Compl. ¶ 10, Dkt. #7. That "letter was an effort to collect on a defaulted consumer debt." *Id.* ¶ 11. The letter stated, "This is your opportunity to make arrangements to pay the current balance due before the account is forwarded to an attorney licensed in your jurisdiction who will review it to determine whether or not to execute the judgment American Express has obtained against you." Letter, Dkt. #7-1. The letter additionally disclosed that the "[c]urrent [b]alance [d]ue" on the debt was $13,535.53. *Id.*

Sperber asserts that the letter "did not indicate that the balance may increase due to interest and/or legal fees." Am. Compl. ¶ 12. Sperber asserts that he "was left unsure whether the [balance] was accruing interest as there was no disclosure that indicated otherwise." *Id.* ¶ 13. Further, he "was left unsure whether the [balance] would accrue any type of legal fees, costs and/or disbursements as there was no disclosure that indicated otherwise." *Id.* ¶ 14. According to Sperber, "[a] reasonable consumer could read the notice and be misled into believing that he could pay his debt in full by paying the amount listed on the notice." *Id.* ¶ 15.

Sperber additionally asserts that "[i]n fact, however, since interest is accruing daily, or since there are undisclosed legal fees that will accrue, a consumer who pays the 'CURRENT BALANCE' stated on the notice will not know whether the debt has been paid in full." *Id.* ¶ 16. Further, "[t]he debt collector could still seek the interest and legal fees that accumulated after the notice was sent but before the balance was paid, or sell the consumer's debt to a third party, which itself could seek the interest and fees from the consumer." *Id.* ¶ 17. Sperber states that interest accrues on judgments under New York state law "from the date of the judgment at the rate of 9% per annum. The amount of the judgment automatically increases each day that the judgment amount remains unpaid due to the automatically statutory accrued interest." *Id.* ¶¶ 20–21; *see also* N.Y. C.P.L.R. §§ 5003, 5004. Sperber also alleges that CCS "knew that the balance would increase due to interest, fees and/or disbursements." *Id.* ¶ 26. Sperber asserts, however, that he "would be led to believe that the 'CURRENT BALANCE' would remain as is and that paying the amount due would satisfy the debt irrespective of when payment was remitted." *Id.* ¶ 28. According to Sperber, "[a]bsent a disclosure by the holder of the debt that the automatic interest is waived, [CCS] and or the creditor **could** still seek the automatic interest that accumulated after the judgment was obtained, or sell the consumer's debt to a third party,

which itself could seek the interest . . . from the consumer." *Id.* ¶ 29. Sperber claims that "[i]nterest and/or fees were accruing and [CCS] has increased [Sperber]'s balance from one letter to the next in an effort to collect the additionally accrued fees from [Sperber]." *Id.* ¶ 32.

CCS moved for judgment on the pleadings, arguing that its debt collection letter was not misleading because interest was not actually accruing on Sperber's debt. Def.'s Mem. of Law in Supp. of Mot. for J. on the Pleadings ("Def.'s Mem.") at 2, Dkt. #19-1. CCS's motion is now before the court.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). In deciding a motion for judgment on the pleadings, the court must "employ the same standard applicable to Rule 12(b)(6) motions to dismiss, 'accept[ing] all factual allegations in the [C]omplaint as true and draw[ing] all reasonable inferences in [the nonmoving party's] favor.'" *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 78 (2d Cir. 2015) (alterations in original) (quoting *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011)). To survive a motion for judgment on the pleadings, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "On a [Rule] 12(c) motion, the court considers 'the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.'" *L-7 Designs, Inc.*, 647 F.3d at 422 (quoting *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009)).

DISCUSSION

A. The FDCPA

The FDCPA prohibits "debt collector[s]" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. More specifically, the statute prohibits "[t]he false representation of . . . the character, amount, or legal status of any debt," *id.* § 1962e(2)(A), as well as "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt," *id.* § 1962e(10).

The Second Circuit has set forth two principles that guide interpretation of this language. First, "because the FDCPA is 'primarily a consumer protection statute,'" *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 75 (2d Cir. 2016) (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 95 (2d Cir. 2008)), I must construe it liberally to further its congressional purpose, *see id.* (citing *Vincent v. The Money Store*, 736 F.3d 88, 98 (2d Cir. 2013)). "That purpose is to 'eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'" *Id.* (quoting 15 U.S.C. § 1692(e)). Second, "in considering whether a collection notice violates Section 1692e," I must "apply the 'least sophisticated consumer' standard." *Id.* (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)). That standard "ask[s] how the least sophisticated consumer . . . would understand the collection notice." *Id.* (citing *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996)). "Under this standard, a collection notice can be misleading if it is 'open to more than one reasonable interpretation, at least one of which is accurate.'" *Id.* (quoting *Clomon*, 988 F.2d at 1319).

B. Caselaw Regarding the Disclosure of Interest Accruing on Debt

This matter presents the question of whether failing to disclose post-judgment interest, or failing to explicitly waive the right to collect it, constitutes a "false, deceptive, or misleading" practice under § 1692e. Post-judgment interest on judgments obtained in New York state courts accrues under New York C.P.L.R. § 5003, which provides that "[e]very money judgment shall bear interest from the date of its entry." N.Y. C.P.L.R. § 5003. Further, the statute says that "[e]very order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing." *Id.*

1. Second Circuit Caselaw

Plaintiff contends that the collection notice he received, which neither stated that post-judgment interest was accruing nor waived the creditor's right to collect it, is deceptive or misleading under *Avila v. Riexinger & Associates, LLC*, 817 F.3d 72 (2d Cir. 2016). In *Avila*, plaintiffs received collection notices from the defendant that included the current balance of their debt, but did not state "that the balance might increase due to interest and fees." *Id.* at 74. Plaintiffs "allege[d] that in fact interest was accruing daily" and that defendants had tried to collect the interest. *Id.* The Second Circuit decided "that plaintiffs [had] stated a claim that the collection notices at issue . . . [were] misleading within the meaning of Section 1692e" because "[a] reasonable consumer could read the notice and be misled into believing that she could pay her debt in full by paying the amount listed on the notice." *Id.* at 76. The court further said as follows:

> In fact, however, if interest is accruing daily, or if there are undisclosed late fees, a consumer who pays the "current balance" stated on the notice will not know whether the debt has been paid in full. The debt collector could still seek the interest and fees that accumulated after the notice was sent but before the balance was paid, or sell the consumer's debt to a third party, which itself could seek the interest and fees from the consumer.

Id. In other words, "the statement of an amount due, without notice that the amount is already increasing due to accruing interest or other charges, [could] mislead the least sophisticated consumer into believing that payment of the amount stated will clear her account." *Id.* The Second Circuit thus held "that the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees." *Id.*

To alleviate the "concern that requiring debt collectors to disclose this information might lead to more abusive practices," such as "debt collectors . . . us[ing] the threat of interest and fees to coerce consumers into paying their debts," the Second Circuit "adopt[ed] the 'safe harbor' approach." *Id.* Under this approach, "a debt collector [is not] subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." *Id.* at 77.

2. District Court Caselaw

A handful of district courts have applied the Second Circuit's ruling or reasoning to claims of deceptive debt collection practices relating to a failure to disclose accruing interest. On the whole, these courts have decided that a plaintiff can state a claim under Section 1692e of the FDCPA by alleging that, at the time she received her debt collection notices, interest was accruing on her debt and was not disclosed. A summary of these cases follows.

In *Dick v. Enhanced Recovery Co.*, 15-CV-2631, 2016 WL 5678556 (E.D.N.Y. Sept. 28, 2016), plaintiff alleged that defendant had sent a collection notice that stated the amount of plaintiff's debt, and that the non-interest charges and fees on the debt were $0.00. *Id.* at *1.

Plaintiff asserted that the latter disclosure was misleading because "such language could lead an unsophisticated consumer to believe that he or she might be liable for such fees in the future." *Id.* The court dismissed plaintiff's claim, reasoning that *Avila* was distinguishable because the plaintiff did "not allege that 'non-interest charges and fees' were actually accruing at the time [defendant] listed their amount at '$0.00,' or that they were going to accrue." *Id.* at *5. Further, plaintiff did "not allege that the balance stated in the Letter was not a complete and accurate representation of the amount owed, or that the balance stated in the Letter may increase over time due to interest and fees." *Id.* Thus, defendant was not required to note affirmatively "that the amount [was] *not* increasing" or that the amount would "*not* change in the future." *Id.*

By contrast, in *Douglass v. Forster & Garbus LLP*, No. 16-CV-6487, 2016 WL 6248824 (W.D.N.Y. Oct. 26, 2016), the court denied a debt collector's motion for summary judgment where interest was accruing on the debt and the debt collector failed to disclose this fact in its debt collection notice. *Id.* at *2. The debt collector argued that plaintiff had constructive knowledge that interest was accruing on the debt, but the court stated that "*Avila* does not suggest that were a debt collector able to prove that the information was made available to the debtor in some other fashion, then a debt collection letter failing to meet the *Avila* requirements would not be in violation of § 1692e." *Id.* at *3.

District courts outside the Second Circuit have found *Avila* persuasive and applied it in a manner consistent with its reasoning. In *McNamee v. Debski & Associates, P.A.*, No. 8:16-cv-2272-T-33, 2016 WL 5391396 (M.D. Fla. Sept. 27, 2016), defendant attempted to collect a debt plaintiff owed pursuant to a state court judgment, which was subject to Florida's post-judgment interest statute. *Id.* at *1. Plaintiff received debt collection letters that listed a balance higher than the judgment obtained in state court, which did not explain that post-judgment interest had

accrued. *Id.* Then, following an inquiry from plaintiff's counsel, the debt collector's counsel informed plaintiff's counsel that the creditor had instructed the debt collector to stop collecting post-judgment interest, but declined to provide an affidavit or other evidence to confirm this statement. *Id.* Plaintiff alleged that defendant had violated the FDCPA by failing to inform him that the creditor had stopped collecting interest on the judgment. *Id.* at *3. The court agreed, holding that plaintiff had stated a plausible claim to relief. *Id.* Finding *Avila* persuasive, the court determined that, if the debt collector had, in fact, stopped collecting interest, it was required to "clearly state[] that the holder of the debt [would] accept payment of the amount set forth in full satisfaction of the debt." *Id.* (quoting *Avila*, 817 F.3d at 77).[1]

Finally, in *Santibanez v. National Credit Systems, Inc.*, 2017 WL 126111 (D. Or. Jan. 12, 2017), the court rejected a plaintiff's argument that "every initial collection letter must state the interest rate (even if that interest rate is zero) and warn the consumer that if the debt is sold to another creditor, that creditor may elect to add interest or fees to the debt amount." *Id.* at *2. The plaintiff in that case did "not contend that defendant attempted to collect any interest," and it was thus "undisputed that . . . payment of the 'balance' listed in the letter would have cleared plaintiff's account." *Id.* at *3. Thus, "there was no danger plaintiff would be misled" by the collection notice, and the court granted summary judgment for the defendant. *Id.*

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[1] In a separate opinion, the court later denied the plaintiff's motion for summary judgment. *See McNamee v. Debski & Assocs., P.A.*, No. 8:16-cv-2272-T-33, 2016 WL 7407379, at *1 (M.D. Fla. Dec. 22, 2016). The parties disputed whether the court should apply the reasoning in *Avila* and *Dick*, and the court noted that "[r]esolution of that dispute . . . depends on whether interest was, in fact, accruing when the two [debt collection] letters were sent." *Id.* at *3. In other words, the court could not decide as a matter of law what was required to be disclosed unless it could determine whether interest was accruing on the debt. The court denied plaintiff's summary judgment motion because he had "not shown affirmatively the absence of a genuine issue of material fact with respect to whether interest was accruing," and defendant had submitted an affidavit stating that interest was *not* accruing. *Id.* Thus, the court could not determine what was required to be disclosed.

C. Analysis

The crux of CCS's argument in support of its motion for judgment on the pleadings is that *Avila* does not require it to disclose that interest was accruing on Sperber's debt because interest was not, in fact, accruing. Def.'s Mem. at 5. According to CCS, *Avila* does not apply because Sperber failed to "allege any facts showing CCS increased the amount the company sought to collect from [Sperber] pursuant to the CPLR Provisions." *Id.* at 10. CCS had apparently "waive[d]" its "right to charge [post-judgment] interest," and it was "not required to explain that to the consumer." Def.'s Reply Mem. in Supp. of Mot. for J. on the Pleadings at 2, Dkt. #19-4. However, Sperber has alleged that "[i]nterest and/or fees were accruing and [CCS] has increased [Sperber]'s balance from one letter to the next in an effort to collect the additionally accrued fees from [Sperber]." Am. Compl. ¶ 32. At this stage in the proceedings, the court is required to accept this factual allegation as true and draw all reasonable inferences in Sperber's favor. CCS cannot obtain judgment on the pleadings by contesting the factual allegations in Sperber's complaint.

CCS argues that the plaintiffs in the cases summarized above prevailed only if they were able to show that interest was actually accruing on their debt when they received debt collection notices. That is not accurate. The Second Circuit in *Avila* rested its ruling on plaintiff's *allegation* that interest was accruing daily on her debt. *Avila*, 817 F.3d at 74. Conversely, in *Dick*, the court dismissed plaintiff's claim because he *did* "*not allege* that the balance stated in the [collection] Letter was not a complete and accurate representation of the amount owed, or that the balance stated in the Letter may increase over time due to interest and fees." *Dick*, 2016 WL 5678556, at *5 (emphasis added); *cf. Santibanez*, 2017 WL 126111, at *3 (granting defendant's motion for summary judgment where it was undisputed that interest was not

accruing on plaintiff's debt). Sperber has made such an allegation here, which is sufficient to survive a motion for judgment on the pleadings under *Avila*. *Cf. McNamee*, 2016 WL 5391396, at *3 (denying motion to dismiss where plaintiff alleged that defendant did not disclose that it had stopped collecting post-judgment interest). It is true that the court in *Douglass* noted that interest was, in fact, accruing on plaintiff's debt, but the court was considering a motion for summary judgment, not a motion for judgment on the pleadings. *See Douglass*, 2016 WL 6248824, at *2. Indeed, whether or not interest was accruing on Sperber's debt when CCS sent its collection letters is a factual question that I cannot resolve on a motion for judgment on the pleadings. *See McNamee*, 2016 WL 7407379, at *3 (holding that whether interest was accruing on plaintiff's debt presented a genuine issue of material fact that precluded summary judgment). Simply put, CCS cannot obtain a judgment in its favor at this stage by disputing a factual allegation in Sperber's complaint. Having alleged that interest was accruing on his debt and that CCS failed to either disclose this interest or otherwise disclaim its right to collect it, Sperber has stated a plausible claim that the collection notices he received from CCS were misleading under Section 1692e of the FDCPA. *See Avila*, 817 F.3d at 76.

CONCLUSION

For the foregoing reasons, CCS's motion for judgment on the pleadings is denied.

SO ORDERED.

Dated: May 1, 2017
Brooklyn, New York

/s/ ARR
Allyne R. Ross
United States District Judge