

IN THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI
ASSOCIATE CIRCUIT DIVISION

LVNV FUNDING, LLC as ASSIGNEE)	
OF SEARS/CITIBANK,)	
)	
Plaintiff,)	
)	Cause No. 0822-AC03330
vs.)	
)	Division 27
MARLENE C. SMITH,)	
)	
Defendant.)	

**ORDER/JUDGMENT ON
PLAINTIFF'S MOTION TO DISMISS
DEFENDANT'S COUNTERCLAIM**

Plaintiff's Motion to Dismiss Defendant's Counterclaim was called and heard on the 11th day of June, 2009. Plaintiff appeared by its attorneys S. Jeremiah Hong and Michael Payne. Defendant appeared by her attorney Robert L. Swearingen. Plaintiff submitted and the parties presented argument on four (4) issues in relation to the Motion to Dismiss: (1) Insufficiency of the Pleadings, (2) Witness Immunity Doctrine, (3) Litigation Immunity Doctrine and (4) the Wahl Defense.

Insufficiency of the Pleadings

For civil cases originally filed before an associate circuit judge, the practice and procedure is governed by Chapter 517. 517.011.1 RSMo.; Chesterfield Financial v. North County General, 917 S.W.2d 603, 605 (Mo.App.ED 1996). Section 517.031.1 provides as follows:

The plaintiff shall file a written petition containing the facts upon which the claim is founded. ... The pleadings of the petition shall be informal unless the court in its discretion requires formal pleadings. Section 517.031.1 RSMo.

This Court has not been requested to require formal pleadings in this matter and has not exercised its discretion to so require same. Thus, the Court will review Defendant's Counterclaim in accordance with the dictates of Section 517.031.1 requiring only informal pleadings in civil cases filed before an associate circuit judge. Chesterfield Financial at 605.

When reviewing a pleading under Chapter 517, all that is required is that (1) the pleading be sufficient to advise the answering party of the nature of the action and (2) the pleading is sufficient to bar another action by the party filing same. Pemiscot County Memorial Hospital v. Bell, 770 S.W.2d 499, 502 (MoApp SD 1989), Kershner v. Hilt Truck Line, Inc., 637 S.W.2d 769, 771 (Mo,App. SD 1982).

A review of Defendant's Counterclaim finds that the Counterclaim meets the two (2) dictates of pleading requirements under Chapter 517. The Counterclaim does advise the Plaintiff of the nature of the action and is sufficient to bar a subsequent action by Defendant. Thus, Plaintiff's Motion to Dismiss is denied as it relates to the issue of sufficiency of pleadings.

Witness Immunity Doctrine

Plaintiff asserts in its Motion that Defendant's Counterclaim must be dismissed because Plaintiff's Petition qualifies for absolute witness immunity. In support of that position Plaintiff cites to three (3) Federal District Court opinions: Beck v. Codillis & Stawiarski, P.A., unreported, N.D. Fla. Case No. 4:99cv485-RH (N.D. Fla. 2000); Etapa

v. Arrow Financial Corp., 373 F.Supp.2d 687 (E.D. Kentucky 2004); and Cox v. Great Seneca Financial Corp., 2007 WL 772937 (E.D. Mo. March 9, 2007). In each of these cases, the District Court was reviewing an allegation by the debtor that the debt collector had violated the FDCPA by submitting false affidavits in a court proceeding. Each Court held that the doctrine of absolute witness immunity barred the debtor's claim against the debt collector. The Courts each found that the doctrine of absolute witness immunity afforded protection to the author of the affidavit and that protection extended to the author's employer. Beck at page 6; Etap at 688; and Cox at page 1. This Court does not find these three (3) cases applicable to the situation at hand. Defendant's Counterclaim is not based upon the filing of an allegedly false affidavit or any form of witness testimony. Defendant's Counterclaim is based solely upon allegations of violations of the FDCPA as a result of the filing of and the content of the petition that was filed by Plaintiff. No affidavit has been filed by Plaintiff in this case and no witness testimony, written or oral, has been submitted to date.

Thus, Plaintiff's Motion to Dismiss is denied as it relates to the issue of witness immunity.

Litigation Immunity Doctrine

Plaintiff asserts that the doctrine of litigation immunity entitles participants in a judicial proceeding to immunity from suit for the statements and pleadings made in the course of that judicial proceeding. Plaintiff further asserts that pleadings are not subject to FDCPA liability because pleadings are not considered "communications". See Plaintiff's Memorandum of Law pages 6 and 7. Thus, the question raised by Plaintiff is

whether or not a pleading is considered to be a “communication” as same is defined by the FDCPA. This Court finds that pleadings filed in state court actions are not excluded from the reach of the FDCPA and are considered by that Act to be a “communication”.

The United States Supreme Court in Heintz v. Jenkins, 514 US 291 (1995) held that the FDCPA applies to attorneys who regularly collect consumer debt, even when that activity consists of litigation. An analysis of the post-Heintz law regarding the applicability of the FDCPA to pleadings can be found in Sayyed v. Wolpoff & Abramson, 485 F.3d 228 (4th Cir. 2007).

After Heintz, Congress passed an amendment to the statute that provides further confirmation that the FDCPA applies to conduct like that at issue here. It amended § 1692e(11), which prohibits communications that fail to disclose that they are from a debt collector, to state that the provision “shall not apply to a formal pleading made in connection with a legal action.” 15 U.S.C. § 1692e(11), as amended Pub.L. 104-208, § 2305(A), 110 Stat. 3009, 3009-425 (1996). This provision expressly exempts formal pleadings from a sole, particularized requirement of the FDCPA: the requirement that all communications state that they come from a debt collector.

If W & A were correct that conduct in the course of litigation, or even formal pleadings more specifically, were entirely exempt from the FDCPA, § 1692e(11)’s express exemption of formal pleadings would be unnecessary. “[C]ourts should disfavor interpretations of statutes that render language superfluous.” Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). The amendment by its terms in fact suggests that all litigation activities, including formal pleadings, are subject to the FDCPA, except to the limited extent that Congress exempted formal pleadings from the particular requirements of § 1692e(11). Furthermore, because Congress is presumed to act with awareness of judicial interpretation of a statute, the fact that the amendment occurred after Heintz further indicates that Congress was aware of the Court’s interpretation of the FDCPA and accepted it, except for the narrow exemption it provided for formal pleadings from the requirements of § 1692e(11). . . . Thus, under multiple precepts of statutory interpretation, Congress’ amendment of § 1692e(11) provides clear evidence that litigation activity is subject to the FDCPA.

This analysis in Sayyed in regard to §1692e(11) is equally applicable to § 1692g(d). That section provides: “A communication in the form of a formal pleading in

a civil action shall not be treated as an initial communication for purposes of subsection (a).” If the Court accepts Plaintiff’s claim that a pleading is not a “communication”, then it would render § 1692g(d) superfluous. Under Plaintiff’s analysis, a “formal pleading” would not be a communication of any type, specifically not an “initial communication”. Had Congress wished to declare that “formal pleadings” were not “communications” for purposes of the FDCPA, it could have done so through a clear and concise section.

The language of the FDCPA demonstrates that formal pleadings are considered to be “communications” under the Act, except to the extent Congress has exempted them in particular sections, such as §1692e(11) and §1692g(d). Plaintiff’s Motion to Dismiss in regard to this issue is denied.

The Wahl Defense

The oral argument on the Wahl Defense was cut short due to time constraints. The Court passes this issue and does not render ruling on same. Plaintiff is authorized to provide a new notice for argument on this issue if it wishes to raise the defense.

Summary of Ruling

Plaintiff’s Motion to Dismiss Defendant’s Counterclaim is denied in all respects, except as it relates to the Wahl Defense raised in paragraphs 6 and 7 of Plaintiff’s Motion to Dismiss and on page 10 of Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion to Dismiss Defendant’s Counterclaim. The Court passes the issue of the Wahl Defense and authorizes Plaintiff to argue same upon notice to Defendant.

SO ORDERED:

Theresa Counts Burke, Judge

Date: June 19, 2009

Cc: S. Jeremiah Hong
Michael Payne
Attorneys for Plaintiff

Robert Swearingen
Attorney for Defendant