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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARK BRADLEY DAVIS,)
)
Debtor/Plaintiff,)
)
VS.) Civil Action No: SA-07-CA-967-XR
)
FARM BUREAU BANK, FSB,)
)
Defendant.)

ORDER

On this date, the Court considered Defendant's motion for summary judgment (docket no. 2).

Background

Debtor Mark Bradley Davis initiated an adversary proceeding in the Bankruptcy Court against Farm Bureau Bank on February 24, 2007, alleging violations of the Fair Credit Reporting Act (FCRA). Specifically, Davis alleges that he used a credit card issued by Defendant, that he filed for Chapter 7 bankruptcy relief and listed Farm Bureau Bank as a creditor, that he was discharged on November 17, 2001, and notice of the discharge was issued to Defendant, and that from July 2006 onward and "on information and belief" for years earlier, Defendant reported false credit information that Plaintiff owed $3,038. Plaintiff asserts claims for contempt based on knowing and intentional violations of the discharge injunction[1], violation of the Fair Credit Reporting Act, and the torts of

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[1]A discharge under 11 U.S.C. § 524(a)(2) "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...." *In re Ellett*, 254 F.3d 1135, 1148 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). Section 524 implements the concept of discharge by

unreasonable collection efforts, invasion of privacy, and defamation.

Plaintiff moved to withdraw the reference from Bankruptcy Court, and this Court granted the motion. See Docket no. 1.

Motion for summary judgment

Defendant moves for summary judgment on the contempt claim arguing that it did not attempt to collect the discharged debt, and there is no evidence that any action by Defendant caused any damage to Plaintiff.

Defendant moves for summary judgment on the FCRA claim arguing: (1) this Court lacks jurisdiction to hear such a claim; (2) Plaintiff failed to exhaust his administrative remedies; (3) the claim is preempted by the Bankruptcy Code; (4) there is no private cause of action under the act; and (5) Defendant did not violate the act by any false reporting.

Defendant moves for summary judgment on the unreasonable collection efforts claim arguing this Court lacks jurisdiction to hear such a claim and there is no evidence establishing the essential elements of such a claim.

Finally, Defendant argues that all of Plaintiff's claims are barred by the doctrine of laches and stare decisis.

Defendant's summary judgment evidence

Defendant has submitted the affidavit of Enrique Lerma, Collection Manager.[2] He states that he is familiar with Defendant's collections operations and Plaintiff's claims. He declared that his

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enjoining a party seeking to collect a debt as a personal liability of the debtor.

[2]Plaintiff's objections (not based on personal knowledge, conclusory, speculative and hearsay) are overruled.

statements were based on his personal knowledge. He states that after he received a copy of Plaintiff's 2007 complaint, he reviewed Plaintiff's case. He notes that Plaintiff's bankruptcy discharge occurred on November 17, 2001. Because of the lapse in time, he noted that Defendant's files were incomplete. He states that at no point prior to the 2007 complaint did Defendant receive any contact from Plaintiff about an incorrect credit report listing. He further states that at no time after the bankruptcy discharge did Defendant undertake any action to collect on the credit card account in question. He further states that Defendant has not made any telephone calls or engaged in any correspondence to Plaintiff or anyone else regarding the account. Finally, he stated that after its receipt of the 2007 Complaint, Defendant notified the various credit bureaus that it should be reflected that there is a zero balance due on the account.

Plaintiff's summary judgment evidence

Plaintiff has produced a copy of a TransUnion credit report that he obtained on or about January 29, 2007.[3] That report indicates Plaintiff had a Farm Bureau Bank account, that it had a past due amount of $3,038, that it was charged off as a bad debt, that it was closed in July of 2006, and that the account was closed "by credit grantor." Other entries such as a Ford Motor Credit account indicate no balances and the accounts were "included in bankruptcy", "account closed by consumer/Chapter 7", or "Chapter 7 bankruptcy." The report also indicates that Farm Bureau Bank "obtained information from [Plaintiff's] consumer report for the purpose of an account review or other business transaction" on December 2006, October 2006, August 2006, May 2006, March 2006, February 2006, December 2005, October 2005, and September 2005. The report further states that

[3]Defendant's motion to strike (docket no. 6) the credit report and Plaintiff's affidavit as hearsay is denied.

"these inquiries are not displayed to anyone but you and will not affect any creditor's decision or any score...."

Analysis

Contempt Claim

Violation of the discharge injunction with notice of the discharge injunction is subject to a contempt remedy under 11 U.S.C. § 105(a). To find a creditor in civil contempt the court must find that the offending party knowingly violated a definite and specific court order. *Id.*; *In re Johnson*, 148 B.R. 532, 538 (N.D. Ill. 1992).

Plaintiff initially filed this case as an adversary proceeding in the Bankruptcy Court and styled the matter as "Debtor's Original Complaint for Contempt for Violation of the Discharge Injunction and for Damages." Plaintiff thereafter filed a "Motion for Withdrawal of Reference" which the Court granted.

Both parties have briefed this matter as if this District Court can rule on the contempt claim without first having it addressed by the Bankruptcy Court. Inasmuch as Plaintiff appears to have waived that step, this Court finds that Plaintiff has submitted no evidence that Defendant initiated any debt collection in violation of the discharge. Plaintiff has not presented any evidence that Defendant deliberately kept the amount due in an attempt to collect the debt.[4] Indeed, the past due amount

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[4]*See In re Torres*, 367 B.R. 478, 486 (Bkrtcy. S.D. N.Y. 2007)("If Plaintiff ... can prove that defendant inaccurately reported or failed to update the status of the debt as a current liability of Plaintiffs ... for the purpose of coercing payment by Plaintiffs notwithstanding the discharge, which would essentially amount to lying in passive wait, then in this court's view a violation of the discharge injunction will have occurred without other overt collection action such as letters or harassing telephone calls."). In this case Farm Bureau did not list the debt as a current debt. *See In re Jones*, 367 B.R. 564, 570 (Bkrtcy. E.D. Va. 2007)("But where the act complained of is not on its face an act to collect a debt, the debtor must show, not merely that it could be used for such purpose, but that it was intended for that purpose. The debtor has not presented, by way of affidavit or otherwise, any

correctly noted that it was charged off as a bad debt, closed in July of 2006, and that the account was closed "by credit grantor." *See e.g. In re Mogg*, 2007 WL 2608501 (Bkrtcy. S.D. Ill. 2007); *See also In re Mahoney*, 368 B.R. 579, 584-90 (Bankr. W.D. Tex.2007) (the mere reporting to a credit bureau of the existence of a debt, even one that is discharged, does not violate the discharge injunction absent other overt acts taken in an effort to collect a pre-petition debt); *In re Vogt*, 257 B.R. 65, 70 (Bankr. D. Colo.2000) ("[I]t cannot be said that the Defendant's position in this regard, [i.e., post-discharge credit reporting], standing alone, was in any way 'an act' to effect collection of the debt. Nor can the Defendant be faulted, under section 524, for refusing to correct this report.").

To find a creditor in civil contempt, the court must first find that the offending party knowingly violated a definite and specific court order. Because Plaintiff has presented no such evidence, Defendant's motion for summary judgment on the contempt claim is GRANTED.

FCRA Claim

15 U.S.C.A. § 1681s-2(a) imposes upon furnishers of credit information such as Defendant a duty to provide accurate information. The section states: "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C.A. § 1681s-2(a)(1)(A).

In addition, the Act imposes a duty to correct and update information.

> A person who - (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and (B) has furnished to a consumer

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evidence that would tend to support such a conclusion, and the evidence presented by Justice FCU convinces the court that any misreporting of the status of the debt was not done for the purpose of pressuring the debtor into paying it, and, indeed, was unknown to the creditor.")

> reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

15 U.S.C.A. § 1681s-2(a)(2).

However, liability for any alleged violations does not result until a credit reporting agency reports an inaccuracy and the furnisher fails to correct the error. *See e.g. Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631 (5th Cir. 2002)("However, the FCRA establishes a duty for a consumer reporting agency (like Equifax or CBLC) to give notice of a dispute to a furnisher of information (like Penney) within five business days from the time the consumer notifies the consumer reporting agency of the dispute. 15 U.S.C. § 1681i(a)(2). Such notice is necessary to trigger the furnisher's duties under Section 1681s-2(b). 15 U.S.C. § 1681s-2(b)(1) ("After receiving notice pursuant to [section 1681i(a)(2)] of this title of a dispute ...." (emphasis added)). Thus, any private right of action Young may have under § 1681s-2(b) would require proof that a consumer reporting agency, like Equifax or CBLC, had notified Penney pursuant to § 1681i(a)(2). See 15 U.S.C. § 1681s-2(b) (cross-referencing § 1681i(a)(2) and establishing duties of furnishers of information arising upon notice of a dispute); see also Nelson, at 1060. Young points to no evidence tending to prove that Penney received notice of a dispute from a consumer reporting agency within five days, as is required to trigger Penney's duties under Section 1681s-2(b). Because Young has not satisfied the notice element with respect to Penney, his FCRA claims fail as a matter of law.").

Defendant's motion for summary judgment arguing that Plaintiff failed to produce any evidence that he notified a credit reporting agency or Defendant of any alleged errors before filing

this lawsuit pursuant to the scheme set out in 15 U.S.C. §§1681 is GRANTED.[5]

The Court denies Defendant's alternative argument that Plaintiff has failed to produce any evidence that inaccurate information was relayed by Defendant to the credit reporting agency. A fact issue exists as to whether the balance should have been reflected as zero after the debt was discharged in bankruptcy. Defendant accessed Plaintiff's credit history on a number of occasions after the bankruptcy discharge and failed to correct that amount. Inasmuch as Plaintiff failed to report this discrepancy before filing this lawsuit and Defendant now alleges that it has corrected the amount past due once it became aware of this lawsuit, the FCRA claim is still dismissed for the reasons set forth above.

Unreasonable Collection Efforts Claim

A Texas tort claim for unreasonable collection efforts has been defined "as efforts that amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm." *Woodrum v. Bradley*, 1990 WL 151264 (Tex. App.-Hous. [14 Dist.] 1990, writ denied). *See also Mitchell v. Chase Home Finance LLC*, 2008 WL 623395 (N.D. Tex. 2008).

In this case, Plaintiff has failed to present any evidence that Defendant engaged in any continued debt collection efforts[6], much less engaging in any efforts that were "willful, wanton, malicious, and intended to inflict mental anguish and bodily harm." Defendant's motion arguing that

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[5]The Court denies Defendant's alternative arguments that this Court lacks jurisdiction over the FCRA claim, that the FCRA claim is preempted by the Bankruptcy Code, and that there is no private cause of action under the FCRA.

[6]Plaintiff's counsel's argument that there was no reason to make any credit inquiries except to engage in collections efforts are conclusory and lack evidentiary support.

there is no evidence of any collection attempts is GRANTED.[7]

Laches argument

Defendant argues that all of Plaintiff's claims should be dismissed because of the laches doctrine. Defendant argues that Plaintiff waited more than five years following the bankruptcy discharge before he alleged that Defendant was incorrectly reporting his credit report information. Defendant alleges that this delay hampered its ability to investigate Plaintiff's complaint. Defendant, however, has not shown that it is entitled to relief based on laches. There is no evidence presented to indicate when Plaintiff first became aware of his credit report. Plaintiff has stated in his affidavit that he obtained his credit report on or about January 29, 2007. Defendant has not provided any competent evidence to the contrary that indicates Plaintiff sat on his rights for an unreasonable amount of time. Laches requires there be (1) an unreasonable delay by one party in the assertion of his remedy, and (2) the prejudice to another as a result of the delay. *Florida Bahamas Lines, Limited v. Steel Barge Star 800 of Nassau*, 433 F.2d 1243, 1251 (5th Cir. 1970).

Stare Decisis argument

The doctrine of stare decisis is, in general, to the effect that when a question of law has once been settled by a judicial decision, it forms a precedent which is not afterward to be departed from or lightly overruled. 79 A.L.R.2d 1126.

In this case Defendant argues that because the Bankruptcy Court dismissed similar allegations made by Plaintiff against Wells Fargo Bank[8], this Court is bound by stare decisis to dismiss Plaintiff's

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[7]The Court denies Defendant's alternative arguments that this Court lacks jurisdiction over this tort claim and that this claim is preempted by the Bankruptcy Code.

[8]*See In re Davis*, 2007 WL 1080143 (Bkrtcy. W.D. Tex. 2007).

allegations in this case. Defendant advanced this argument when this proceeding was still in the Bankruptcy Court. As noted above, the withdrawal of reference was granted. This argument is no longer applicable inasmuch as the District Court is not bound by stare decisis as to decisions of the Bankruptcy Court.

Conclusion

Defendant's motion for summary judgment is granted and denied as discussed above. Judgment in favor of Defendant shall issue separately according to rule 58. The Clerk of the Court is instructed to issue a Judgment that Plaintiff take nothing. Defendant is awarded its costs and shall file a bill of costs in the form required by the Clerk of the Court, with supporting documentation, within fourteen days of the Judgment.

SIGNED this 30th day of April, 2008.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE