

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THEOPHILUS R. NIX, SR.,	:	
et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 00-669-JJF
	:	
WELCH & WHITE, P.A.,	:	
et al.,	:	
	:	
Defendants.	:	

David Staats, Esquire, and George R. Tsakataras, Esquire of LAW OFFICE OF DAVID STAATS, P.A., Wilmington, Delaware.
Attorneys for Plaintiffs.

David A. White, Esquire of WELCH & WHITE, P.A., Wilmington, Delaware.
Attorney for Defendants.

MEMORANDUM OPINION

July 18, 2001
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendants Welch & White, P.A.'s and Jeffrey S. Welch's Motion to Dismiss for Failure to State a Claim Under Which Any Relief Can be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) (D.I. 9). For the reasons set forth below, the Court will grant the motion.

BACKGROUND

On August 25, 1997 and November 21, 1997, Theophilus R. Nix, Sr., and Lulu Mae Nix ("Plaintiffs") obtained loans ("the Loans") from Wilmington Savings Fund Society, FSB ("WSFS") in the amounts of \$47,000 and \$30,000 respectively. Plaintiffs failed to timely repay the Loans, and WSFS's counsel, Jeffrey Welch, Esquire of Welch & White, P.A. (collectively "Defendants") sent two letters dated September 29, 1999 to Plaintiffs in an attempt to collect the debts owed on the defaulted Loans. Plaintiffs filed the instant action against Defendants on July 20, 2000, alleging that these letters violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1662 et seq., and seeking compensatory damages, statutory damages, prejudgment and postjudgment interest, costs, and attorney's fees. (D.I. 1).

On April 29, 1999 and August 2, 1999, Plaintiffs entered into "consumer credit transaction[s]" totaling \$351 with Joseph B. Dietz, Jr., DDS, for dental treatment provided by Dr. Dietz to Plaintiffs. Acting as legal counsel for Dr. Dietz, Defendants filed a complaint against Plaintiffs in Justice of the Peace Court Number 13 on October 24, 2000, seeking to collect the debts owed on the above credit

transactions. Also, Defendants sent Plaintiffs a letter dated October 25, 2000 in an attempt to collect the debts. As a result, Plaintiffs filed an Amended Complaint in this action on November 17, 2000, adding Defendants' collection efforts on Dr. Dietz's behalf as a basis for its FDCPA claim. (D.I. 6).

On December 4, 2000, Defendants filed the instant motion to dismiss.

STANDARD OF REVIEW

When a court analyzes a motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the factual allegations of the complaint must be accepted as true, and the court must draw all reasonable inferences in favor of the nonmoving party. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). In addition to the factual allegations in the complaint, a court can consider public records and exhibits to or documents referenced in the complaint that are central to the plaintiff's claims. Kuromiya v. United States, 37 F. Supp. 2d 717, 721 (E.D. Pa. 1999). See also Steinhardt Group Inc. v. Citicorp, 126 F.3d 144, 145 (3d Cir. 1997); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384-85 n.2 (3d Cir. 1994). In sum, the only way a court can grant a Rule 12(b)(6) motion to dismiss is "if it appears that the [nonmoving party] could prove no set of facts" consistent with the allegations that would entitle it to relief. Langford, 235 F.3d at 847.

DISCUSSION

A. Applicability of the FDCPA

As a preliminary issue, the Court must determine whether the FDCPA applies to Defendants' collection efforts on behalf of WSFS. Defendants contend the Loans are "commercial" loans rather than "consumer" loans. Since the FDCPA only applies to the collection of consumer debt, Defendants contend that Plaintiffs do not have standing to sue under the FDCPA with respect to the Loans. (D.I.

10 at 13-18).

The FDCPA was enacted to curb abusive, deceptive, and unfair debt collection methods. 15 U.S.C. § 1692(a). The FDCPA defines a “debt” as: “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5). As a result, the FDCPA only applies to efforts to collect consumer debts and not business debts. Sheehan v. Mellon Bank, 1995 WL 549018, at *2 (E.D. Pa. Sept. 13, 1995).

In order to determine whether a loan is a commercial loan or a consumer loan, a court must examine the “nature of the transaction from which the debt arose, not the nature of the assets used to satisfy the debt.” Id. A recent decision from the Court of Appeals for the Ninth Circuit discussed the consumer/commercial distinction at length, opining that the borrower’s intended use of the loan proceeds is the determinative issue, and that the lender’s motives and “the fashion in which the loan was memorialized” are not dispositive. Slenk v. Transworld Sys., Inc., 236 F.3d 1072, 1075 (9th Cir. 2001). See also Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 874-75 (7th Cir. 2000)(holding that a loan is a consumer debt under the FDCPA, even if the loan proceeds are ultimately used for commercial purposes, if the borrower intended to use the proceeds for personal use at the time of the transaction).

In the instant case, Plaintiffs allege in their Amended Complaint that the Loans were “consumer credit transaction[s].” (D.I. 6 at ¶¶ 7-8). Therefore, the Court concludes that Plaintiff sufficiently

pleads that the Loans were consumer loans, and thus “debt,” under the FDCPA. Defendants nonetheless cite to evidence refuting Plaintiffs’ allegation that the Loans were consumer loans, including: (1) the notes corresponding to the Loans, (2) “business loan agreements” confirming the Loans, (3) credit request forms, (4) letters exchanged between the parties, and (5) the transcript of Mrs. Nix’s deposition in related litigation in the Delaware Superior Court. Without addressing whether each cited document can properly be considered at this juncture,¹ and recognizing that the borrower’s intent is dispositive regardless of the form of the loan documents, the Court concludes that none of the cited documents conclusively establishes that Plaintiffs did not intend to use the loan proceeds “primarily for personal, family, or household purposes.” Therefore, the Court concludes that Plaintiffs can maintain its FDCPA claim relating to Defendants’ collection efforts with respect to the Loans.

B. Sufficiency of the Pleadings

Defendants also contend that Plaintiffs’ Amended Complaint should be dismissed for failure to adequately plead facts in support of their claim that Defendants violated the FDCPA. (D.I. 10 at 25-26). Under Rule 8(a) of the Federal Rules of Civil Procedure, a plaintiff’s complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a). A plaintiff need not allege the existence of every element of his or her claim as long as the

¹ For instance, the Court concludes that it would be inappropriate to consider Ms. Nix’s deposition transcript from the Delaware Superior Court litigation in order to make factual findings, because to do so would inappropriately convert the instant motion to one for summary judgment. Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 427 n.7 (3d Cir. 1999).

allegations plead facts sufficient to provide the defendant with “fair notice of the transaction” and to “set[] forth the material points necessary to sustain recovery.” Menkowitz v. Pottsdawn Mem’l Med. Ctr., 154 F.3d 113, 124 (3d Cir. 1998). However, a court need not accept “bald assertions” or “legal conclusions” when determining if a complaint is sufficient to survive a motion to dismiss. In re Burlington Coat Factory Securities Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). See also Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993).

In their Amended Complaint, Plaintiffs allege that the two letters they received from Defendants regarding the Loans “attempt[ed] to collect debts,” and that they “embodied violations of the FDCPA.” (D.I. 6 at ¶¶ 9-10). Plaintiffs also allege that Defendants “violated the [FDCPA] in other ways.” (D.I. 6 at ¶ 11). Plaintiffs’ allegations pertaining to Defendants’ collection efforts on behalf of Dr. Dietz contain identical language. (D.I. 6 at ¶¶ 15-17). Plaintiffs fail to allege, however, any facts to support these allegations and provide no notice to Defendants as to how the letters allegedly violated the FDCPA. This lack of notice is evidenced by Defendants’ brief in support of the instant motion, which contains five pages of argument that the letters do not constitute “harassment,” or “abuse,” and do not contain “false or misleading representations” in violation of the FDCPA, 15 U.S.C. §§ 1692d & 1692e. (D.I. 10 at 19-24). Defendants discovered for the first time through Plaintiffs’ answering brief that the basis for Plaintiffs’ claims are that the letters failed to contain the validation and verification language required by 15 U.S.C. § 1692g(a)(3)-(4).² (D.I. 16 at 11, 16). Defendants did not have an

² 15 U.S.C. § 1692g(a) states in relevant part:

opportunity to respond to the specific factual allegations and legal theories advanced by Plaintiffs until they filed their reply brief in support of the instant motion. (D.I. 23 at 8-10). Accordingly, the Court concludes that Plaintiffs' Amended Complaint fails to satisfy the minimal pleading requirements of Rule 8(a), and that Plaintiffs' Amended Complaint must therefore be dismissed.

CONCLUSION

For the reasons discussed, the Court concludes that Defendants' Motion to Dismiss (D.I. 9) should be granted.

An appropriate Order will be entered.

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing . . .

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty- day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

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Defendants.	:	

ORDER

At Wilmington this 18 day of July, 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants Welch & White, P.A.'s and Jeffrey S. Welch's Motion to Dismiss for Failure to State a Claim Under Which Any Relief Can be Granted Pursuant to Federal Rule of Civil Procedure 12(b)(6) (D.I. 9) is **GRANTED**.

UNITED STATES DISTRICT JUDGE