UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Curtis Glawe,

Plaintiff,

vs.

Carpenter, Hazlewood, Delgado & Bolen PLC; Javier Delgado; Mark Holmgren; Mark K. Sahl; and Gregory A. Stein,

Defendants.

CV 18-1282-PHX-JAS (JR)

REPORT AND RECOMMENDATION

Pending before the Court is Defendants' Motion for Summary Judgment (Doc. 40) filed on October 19, 2018. Plaintiff Curtis Glawe responded on November 17, 2018 (Doc. 46) and Defendants replied on November 30, 2018 (Doc. 53). The Magistrate Judge recommends that Defendants' Motion be granted.

I. Facts

A. The Mohave Property

Plaintiff Curtis Glawe ("Plaintiff") and his wife are the owners of the residence located at 22062 W. Mohave Street, Buckeye, Arizona 85326 (the

"Mohave Property"). (Plaintiff's Complaint ("Compl."), ¶ 18; Defendant's Statement of Facts in Support of Motion for Summary Judgement ("DSOF"), ¶ 1); Plaintiff's Controverting Statement of Facts ("PCSOF"), ¶ 1. By virtue of their ownership of the Mohave Property, Plaintiff and his wife are members of the Sundance Residential Homeowners Association, Inc. (the "HOA") and are subject to the Declaration of Residential Homeowner Benefits and Covenants, Conditions and Restrictions of the Sundance Residential Community ("CC&Rs"). DSOF, ¶ 1.

Plaintiff alleges that the Mohave Property is a "retirement" property located in Maricopa County, Arizona. DSOF, ¶ 31; Compl., ¶ 3. Although Plaintiff owned the house, he has never lived in Arizona and the Mohave Property was used as a rental property and the income has been declared as rental income on Plaintiff's income tax returns. DSOF, ¶¶ 34, 36, 32, Ex. 1, p. 2 (Arizona Court of Appeals Memorandum Decision). Although the Mohave Property was purchased in 2009 as a retirement home, neither Plaintiff nor any member of his family have lived in the home at any time. DSOF, ¶ 33, Ex. 13, pp. 17:24-18:23, 79:25-80:7.

B. First Lawsuit

Plaintiff failed to pay HOA assessments from 2009 to 2012 and in March 2012 was sued for breach of contract by the HOA, which was represented by the Defendant Attorneys. Compl., ¶ 17; DSOF, ¶ 2, Ex. 2 (HOA Complaint). Plaintiff paid the assessments and the lawsuit was settled in July 2012. DSOF, ¶ 4, Ex. 1, p. 2 (Arizona Court of Appeals Decision noting the settlement).

Plaintiff was informed that, for the HOA to send an invoice for the Mohave Property assessments to his residence in Iowa, he needed to complete a Change of Address form for the Mohave Property. DSOF, ¶ 5, Ex. 3; PCSOF, ¶ 5. Despite being informed on May 4, 2012, of the necessity of submitting a Change of Address form, Plaintiff did not submit the form until August 10, 2013. PCSOF, ¶ 6; DSOF, ¶ 6, Ex. 1, p. 7, n. 5 (Arizona Court of Appeals noting that Plaintiff was on notice of the need to submit a Change of Address form); Ex. 3, ¶ 27. As a result, the HOA, through the Defendant Attorneys, continued sending invoices for the Mohave Property to the Mohave address. DSOF, ¶ 7; PCSOF, ¶ 7. Plaintiff refused to pay the assessments on the Mohave Property because he did not receive invoices at his Iowa address. DSOF, ¶ 8; PCSOF, ¶ 8.

C. Second Lawsuit

Plaintiff failed to pay subsequent quarterly assessments and, in June 2013, the Defendant Attorneys, on behalf of the HOA, demanded Plaintiff pay the assessments and late fees. DSOF, ¶ 9; PCSOF, ¶ 9. Plaintiff did not pay the outstanding balance and, on April 3, 2014, the HOA filed a second lawsuit alleging breach of contract in the White Tanks Justice Court, seeking payment of the assessments, late charges, accrued interest and attorneys' fees on the Mohave Property. DSOF, ¶ 10; PCSOF, ¶ 10.

Defendant Attorneys filed a motion for summary judgment on behalf of the HOA. DSOF, ¶ 12. On September 14, 2016, the court granted summary judgment in favor of the HOA on its breach of contract claim, found the HOA "did not timely and properly invoice for any late fees or collection fees" and declined to award collection or late fees, but granted the HOA's attorneys' fees and costs. DSOF, ¶ 13, Ex. 5; PCSOF, ¶ 13. On November 23, 2016, the court entered judgment in favor of the HOA and against the Plaintiff on the breach of contract claim, awarding the HOA $9,864.25 ($7,500 in attorneys' fees and $2,364.25 in costs). DSOF, ¶ 14, Ex. 6; PCSOF, ¶ 14.

On December 20, 2016, Plaintiff filed a Notice of Appeal, appealing the trial court's summary judgement ruling. DSOF, ¶ 15, Ex. 8; PCSOF, ¶ 15. On January 9, 2018, the Arizona Court of Appeals affirmed the trial court's grant of summary judgment in favor of the HOA. DSOF, ¶ 16, Ex. 1 (Court of Appeals' Memorandum Decision); PCSOF, ¶ 16. The Court of Appeals awarded the HOA attorneys' fees and costs on appeal in the amount of $7,664.30. DSOF, ¶ 17, Ex. 7; PCSOF, ¶ 17 (not disputing award but noting that the HOA sought $16,164.00 in fees and costs). The final Judgment Pursuant to Appellate mandate included both the fees awarded by the trial court ($9,864.25) and the appellate court ($7,664.30) and totaled $17,528.55. DSOF, ¶ 18, Ex. 7; PCSOF, ¶ 18.

On February 2, 2018, the Court of Appeals denied Plaintiff's motion for reconsideration. DSOF, ¶ 19, Ex. 8; PCSOF, ¶ 19. Plaintiff did not seek timely review and, on March 8, 2018, the Court of Appeals issued its mandate. DSOF, ¶¶ 20, 21; PCSOF, ¶¶ 20, 21. Subsequently, in accordance with the opinion and mandate of the Court of Appeals, the Superior Court entered judgment in favor of the HOA in the amount of $17,528.55, with interest in accordance with A.R.S. § 44-1201(B). DSOF, ¶ 22, Ex. 7; PCSOF, ¶ 22.

D. The Present Lawsuit

On April 19, 2018, Plaintiff filed his Complaint in the present lawsuit, alleging that the HOA's attorneys violated the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692-1692p. DSOF, ¶¶ 24, 25; PCSOF, ¶¶ 24, 25. Plaintiff alleges that at various times between 2011 and 2018 the Defendant Attorneys sent demand letters or communications to Plaintiff that violated the FDCPA. DSOF, ¶ 26; PCSOF, ¶ 26. The documents produced in disclosure and discovery identify more than 39 communications between 2011 and 2018 that Plaintiff alleges violate the FDCPA. DSOF, ¶ 28; PCSOF, ¶ 28. The Attorney Defendants have prepared an Index and Summary of the communications to which Plaintiff has added additional communications. DSOF, ¶ 29; PCSOF, ¶ 29.

II. Legal Standard

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing summary judgment "may not rest upon mere allegations of denials of pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995). The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson*, 477 U.S at 255.

III. Discussion

The FDCPA does not apply.

To prevail on a claim under the FDCPA, a plaintiff must prove that (1) he "has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a 'debt collector' under the FDCPA, and (3) the defendant engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA." *Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1113 (N.D. Cal. 2014). Here, the Defendant Attorneys argue that the obligation underlying Plaintiff's FDCPA claim is associated with a rental property and is therefore not a "debt" subject to the FDCPA. The Court agrees.

Because not all obligations to pay are considered debts under the FDCPA, whether a dispute involves a "debt" within the meaning of the FDCPA is "a threshold issue." *Robinson v. Managed Accounts Receivables Corp.*, 654 F.Supp.2d 1051, 1058 (C.D. Cal. 2009) (citation omitted). 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 . . . ." 15 U.S.C. § 1692a(5); *see also Bloom v. I.C. Sys. Inc.*, 972 F.2d 1067, 1068-69 (9th Cir. 1992) (explaining that the FDCPA applies to consumer rather than commercial debts).

Several courts in the Ninth Circuit have analyzed the FDCPA's "consumer debt" requirement in the context of a debt owned in relation to a rental property and have uniformly concluded that such debts are not subject to the FDCPA's collection requirements. In *Klahn v. Clackamas County Bank*, No. 3:13-CV-621-ST, 2013 WL 3834709 (D. Or. July 24, 2013), the plaintiff, who lived in Montana and then in California, obtained a loan from the defendant bank to purchase a floating home in Portland, Oregon with the stated intention of making the home his primary residence. *Id*. at *4. The Plaintiff's move to Oregon was delayed and they rented the home in the interim. *Id*. at *2. After the plaintiff failed pay moorage fees and property taxes associated with the floating home, the bank sought and obtained a judgment foreclosing the bank's security interest. *Id*. at *2. The plaintiff then sued the bank and its attorneys in federal court, alleging breach of contract and several business torts by the bank and violation of the FDCPA by the lawyers. *Id*. at * 3. The defendants filed motions to dismiss and the court quickly dispensed the FDCPA claims against the lawyers, stating that the alleged conduct by the lawyer defendants "occurred after the floating home became a rental or investment property" and therefore "did not pertain to a consumer debt." *Id*. at *5.

Here, Plaintiff argues that the Mohave Property "initially was purchased as a retirement residence," and contends that his "subsequent actions after the purchase do not count." *Opposition to Motion for Summary Judgment*, pp. 3, 9. Plaintiff goes on to assert that "[f]or FDCPA purposes a debt is classified as consumer if the debtor[']s intent at the time of incurring the debt was personal." *Id.*, p. 9. However, Plaintiff cites no authority that supports his assertion. Moreover, the Court has searched for Ninth Circuit authority that would bolster Plaintiff's contention but has found only authority that is consistent with the *Klahn* court's conclusion that debts associated with rental properties are not consumer debts. For example, in *Johnson v. Wells Fargo Mortgage, Inc.*, No. 3:05-CV-0321-RAM, 2007 WL 3226153 (D. Nev. Oct. 29, 2007), the defendant asserted that foreclosed loans on rental properties were not consumer loans. *Id.* at *8. In response, the plaintiff argued that the rental properties were part of his retirement plan and the loans were therefore consumer-related. *Id*. at *9. The District of Nevada rejected the plaintiff's position. The court first noted that the "Ninth Circuit instructs that district court, not the fact finder, to examine the transaction as a whole in determining whether [a loan] was primarily consumer or commercial in nature." *Id*. (citing *Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992)). The court then noted that the plaintiff "has not used either of these rental properties for his personal residence or for any other personal, family or household purpose," and noted that there was "no authority supporting the proposition that obtaining rental properties, which he does not occupy, but merely uses to collect rental payments, is still consumer in nature because he uses the properties for retirement planning." *Id*.; *see also Connelly v. Ekimoto & Morris, LLC*, Civ. No. 16-448-LEK-KSC, 2018 WL 3312957, at *2-*3 (D. Haw. July 5, 2018) (dismissing FDCPA claim arising out of collection of delinquent homeowners' association dues incurred on a rental property).

Here, Plaintiff has not distinguished his situation from those addressed in *Klahn* and *Johnson*. He alleges that the Mohave Property is a "retirement" property, DSOF, ¶ 31; Compl. ¶ 3 ("Plaintiff . . . owns retirement property in Maricopa County, Arizona, and resides in Aurelia, Iowa . . . ."), but has admitted that neither he nor any member of his family have lived at the Mohave Property and, since it was purchased in 2009, the home has always been available for rent with the rents declared as rental income on Plaintiff's income tax returns. DSOF, Ex. 13. Moreover, the Arizona Court of Appeals found that Plaintiff "used [the Mohave Property] as a rental property, and lived in Iowa." Because there is no genuine dispute that the Mohave Property was a rental property, the debt associated with the property is business in nature, not consumer in nature and therefore does not qualify as a debt under the FDCPA. As such, the Defendant Lawyers are entitled to summary judgment.

IV. Recommendation

Based on the foregoing, the Magistrate Judge RECOMMENDS that the District Court, after its independent review, GRANT Defendant's Motion for Summary Judgment (Doc. 40).

This Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment.

However, the parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the District Court. See 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Replies shall not be filed without first obtaining leave to do so from the District Court. If any objections are filed, this action should be designated case number: **CV 18-1282-PHX-JAS**. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to de novo consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Dated this 12th day of August, 2019.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge