THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ONESHA DOUGLAS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. CIV-18-0005-F
	)	
NCC BUSINESS SERVICES, INC.,	)	
	)	
Defendant.	)	

ORDER

Cross-motions for summary judgment are before the court in this action, which is brought under 15 U.S.C. § 1692e of the Fair Debt Collection Practices Act (FDCPA). Section 1692e provides that a debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of a debt. The complaint alleges this provision was violated because the defendant debt collector, NCC Business Services, Inc., failed to disclose certain information regarding the impact of the statute of limitations on the debt. Plaintiff, Onesha Douglas,[1] alleges the disclosures should have been made to her during a phone call which she, along with her credit advisor, placed to the defendant debt collector, unprompted by the debt collector. As stated in the transcript of the call, plaintiff placed the call to try to "figure out what's going on," after her application for a mortgage was denied.

[1] At times, plaintiff's papers spell her name "Oneasha."

Defendant NCC Business Services, Inc., moves for summary judgment, arguing there was no violation of § 1692e. Doc. no. 22. Plaintiff Douglas responds, objecting. Doc. no. 39. No reply brief was filed.

Plaintiff brings a cross-motion for summary judgment, arguing that § 1692e was violated. Doc. no. 38. Defendant responds, objecting. Doc. no. 41. No reply brief was filed.

For the reasons stated below, the court concludes that the non-disclosures did not violate § 1692e. Accordingly, defendant's motion will be granted, and plaintiff's cross-motion will be denied.

Standards

Under Rule 56, Fed. R. Civ. P., summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). All reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. United States v. Agri Services, Inc., 81 F.3d 1002, 1005 (10th Cir. 1996). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

Fact-findings

The following facts (or mixed statements of fact and law) are undisputed.[2]

1. A transcript of the call in question appears in the record as part of doc. no. 22-1. Doc. no. 22-1 is the affidavit of Irv Pollan, president of NCC Business Services, Inc. The transcript is an exhibit to Mr. Pollan's affidavit.[3]

2. Plaintiff Onesha Douglas is a "consumer" as defined by 15 U.S.C. §1692a(3). Plaintiff's Statement of Facts (PSOF), doc. no. 38-1, ¶ 1.

3. Defendant NCC Business Services, Inc., is a "debt collector" as defined by 15 U.S.C. § 1692a(6). PSOF ¶ 2. (When this order refers to statements made by the debt collector, it refers to statements made by the agent for the debt collector.)

4. The debt in question, which is allegedly due to Summit Ridge Apartments, is a "debt" as defined by 15 U.S.C. § 1692a(5). PSOF ¶ 3.

5. The amount of the debt -- $4,033 (doc. no. 1, ¶ 6) -- remains unchanged since the debt's alleged inception date of Oct. 25, 2011. PSOF ¶ 6. Plaintiff has provided a "Move Out Statement" indicating a balance due of $4,032.75 as of October 25, 2011. Doc. no. 38-4. The transcript of the phone call indicates that the credit bureau may have rounded up the amount of the debt by twenty-five cents, from $4,032.75 to $4,033.00, a change which is negligible. Tr., p. 5.

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[2] Facts set forth in the statement of material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the non-movant using the procedures set forth in the court's local rule. *See*, LCvR56.1. Here, very few of either parties' numbered factual contentions were disputed. *And see*, defendant's response brief, doc. no. 41, p. 1: "The material facts of this case are not in dispute….."

[3] This order cites the transcript (Tr.) by transcript's page numbers rather than by the court's electronic case filing (ecf) numbers. Documents other than the transcript are cited by their ecf page numbers.

6. The debt arises from a contractual obligation between Summit Ridge Apartments and Ms. Douglas, specifically, an apartment lease allegedly breached on October 25, 2011. PSOF ¶ 10.

7. The debt was placed for collection with the defendant debt collector on November 5, 2012. PSOF ¶ 10.

8. Neither party has submitted evidence of any payments made on the debt after October 25, 2011. The evidence affirmatively shows that Ms. Douglas has not remitted any money or payment on the debt since at least November 5, 2012. PSOF ¶ 5.

9. Neither party has submitted evidence that any promises to make any payments on the debt were made after October 25, 2011. The evidence affirmatively shows that Ms. Douglas has not made such a promise since at least November 5, 2012. PSOF ¶ 7.

10. At some point, the debt collector placed an outdated collection account in the amount of $4,033.00 on Ms. Douglas' credit report. PSOF ¶ 13.

11. On December 8, 2017, Ms. Douglas and Vance Dotson called the debt collector to discuss the collection account. PSOF ¶ 11. Mr. Dotson was authorized by plaintiff to participate in the call. Tr., pp. 4-5. He is believed to be a person who markets himself as a "credit doctor." Defendant's Statement of Facts (DSOF), doc. no.22, ¶ 3, n.1. This order refers to Mr. Dotson as a credit advisor.[4]

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[4] Mr. Dotson has a noteworthy track record in this court, as a litigant, as a self-styled credit doctor, and as the subject of court-imposed sanctions resulting from reprehensible conduct in litigation in this court. *See,* Order, filed May 14, 2018, in Shameka Marion-Johns v. Agency of Credit Control, et al., CIV-17-438-F, USDC, WD Okla., doc. no. 96, where sanctions were imposed on Mr. Dotson for his abhorrent conduct, including repeated instances of use of unquestionably vile and abusive language in deposition proceedings in a case in which Mr. Dotson was involved in his capacity as a "credit doctor." It was apparent in Marion-Johns, as in this case, that one of Mr. Dotson's techniques is to participate in a telephone conversation between a consumer and a creditor for the purpose of inducing a violation of the FDCPA.

12. There is no evidence that the call was prompted by any action by the debt collector to collect the debt; rather, the call was initiated by plaintiff and her credit advisor after plaintiff's mortgage application was denied.

13. During the call, Ms. Douglas stated that she had been denied an application to get a home and that she was calling because, as she stated, "I'm trying to figure out what's going on." Tr., p. 2. In other words, Ms. Douglas had been denied a mortgage. The court assumes, for purposes of the present motion, that, as plaintiff asserts, she called the debt collector because of a genuine desire to find out more about her situation.

14. The call began with the debt collector verifying Ms. Douglas' identity. The debt collector stated that he was a "professional debt collector" with NCC Business Services. PSOF ¶ 14. The debt collector informed Ms. Douglas that his communications with her on that date were "an attempt to collect a debt." Tr., p. 3. He then solicited payment of the debt, stating that the amount of "$4,032.75 was placed with our agency for immediate collection," and that "we do take check by phone [sic], as well as major credit card, debit card." Tr., p. 3. He asked Ms. Douglas, "How would you like to get that closed out today?" Tr., p. 4.

15. Ms. Douglas responded, stating, "I do not wish to get that closed out." Tr., p. 4. Ms. Douglas declined to make a payment and indicated that she was simply trying to figure out the situation. POSF ¶ 15.

16. Summit Ridge Apartments was then identified by the debt collector as the source of the debt. Tr., p. 4. At that point, Mr. Dotson, plaintiff's credit advisor, began soliciting information about the amount of the debt. PSOF ¶ 16; Tr., pp. 4-5.

17. Mr. Dotson asked the debt collector whether the debt collector had media to substantiate their claim. PSOF ¶ 17; Tr., p. 5. In response, the debt collector offered to send out "what's called a validation of debt." Tr., p. 5.

18. After some back and forth about whether the debt collector was wrapping up the call and about the last date of activity on the account, Mr. Dotson told the debt collector that the debt collector should have disclosed the following information to Ms. Douglas during the call: that if Ms. Douglas were to make a payment it would renew the statute of limitations, and that the debt collector cannot sue Ms. Douglas on the debt. PSOF ¶ 20; Tr., p. 11.

19. The debt collector then stated, "there's nothing that we need to disclose in that regard to anyone." PSOF ¶ 21; Tr., p. 12.

20. Shortly after that, the phone call concluded. PSOF ¶ 22.

21. At no point during the call did the debt collector disclose that the debt is or may be time-barred. PSOF ¶ 24.

22. At no point during the call did the debt collector disclose that promising to pay, or actually remitting payment, might reset the statute of limitations on the debt. PSOF ¶ 25.

Discussion

Section 1692e of the FDCPA

Section 1692e provides, in part, as follows.

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: …
>
> (2) The false representation of –
>
> (A) the character, amount, or legal status of any debt; or …
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken. …

> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

The FDCPA is a remedial statute and should be construed liberally in favor of the consumer. Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002).

To prevail on a claim under the FDCPA, plaintiff must demonstrate that:

1) she is a consumer; 2) defendant is a debt collector; 3) defendant's challenged practice involves an attempt to collect a debt as the Act defines it; and 4) defendant, through its acts or omissions, violated a provision of the FDCPA in attempting to collect the debt. Tatis v. Allied Interstate, LLC, 882 F.3d 442, 427 (3d Cir. 2018). The first three elements are met on this record and are not in dispute.

When analyzing a claim under the FDCPA, the overwhelming majority of courts of appeals apply the "least sophisticated consumer" standard. As noted by the Tenth Circuit in Ferree v. Marianos, 129 F.3d 130, *1 (10th Cir. 1997) (unpublished), other courts of appeals have applied an objective standard, measured by how the least sophisticated consumer would interpret the notice received from the debt collector. As described in Ferree (citing decisions from other circuits), the test is how the least sophisticated consumer – one not having the astuteness of a "Philadelphia lawyer" or even the sophistication of the average, everyday, common consumer – understands the notice he receives. *Id*. The hypothetical consumer, however, can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care. *Id.* This order uses the least sophisticated consumer standard as described in Ferree.

The Alleged Non-Disclosures

The complaint alleges as follows.

> On about December 8, 2017, Plaintiff made a phone call to Defendant, Defendant requested payment but failed to disclose "making a partial payment or even promising to

> make a payment could restart the statute of limitations on the debt and or because of the age of the debt, we will not sue you" pursuant to 15 U.S.C. § 1692e.

Doc. no. 1, ¶ 8.

The Issue Presented

Thus, the conduct in question is the failure of the debt collector to disclose, during the December 8 phone call, that "making a partial payment or even promising to make a payment could restart the statute of limitations on the debt and or because of the age of the debt, we will not sue you." Doc. no. 1, ¶ 8.[5] The issue is whether these non-disclosures, viewed from the vantage point of the least sophisticated consumer, were false, deceptive or misleading misrepresentations used in connection with the collection of the debt. Because the material facts are not in dispute, the court finds that this is a question of law for the court.[6]

Before getting to this central issue it is necessary to address two additional matters.

Defendant's Argument that Plaintiff Has Not Shown, For Purposes of Her Cross-Motion, that the Debt is Time-Barred

Defendant argues (doc. no. 41, pp. 2-3 of 13) that the court is prevented from granting plaintiff's cross-motion for summary judgment because plaintiff has not established that the debt was actually time-barred by the date of the phone call, December 8, 2017. Defendant argues, for example, that the rental agreement is not in evidence; that there is no proof regarding the terms of the rental agreement,

[5] To the extent that plaintiff's briefing attempts to broaden the issue to include non-disclosures in other communications (such as dunning letters or solicitations for payments), the court rejects that attempt. A fair reading of the complaint shows that the only alleged non-disclosures are those relevant to the December 8, 2017 phone conversation.

[6] Dicta in Sheriff v. Gillie, ___ U.S. ___, 136 S. Ct. 1594, 1603, n.7 (2016), states that the application of the FDCPA to undisputed facts presents a question of law.

including no proof of any choice of law provision; and that plaintiff has not established the specific date on which she breached the rental agreement, simply arguing, without proof, that the breach occurred on October 25, 2011, and that the limitations period ran on October 25, 2016.

Defendant's argument is noted but is ultimately immaterial to the results stated in this order. This is because for purposes of the court's consideration of *defendant's* motion (as opposed to *plaintiff's* cross-motion), plaintiff has the benefit, as the non-movant, of any inferences that benefit her and that are reasonable based on the evidence. One such inference is that by the date of the phone call, the five-year limitations period had run on the debt. This inference is both beneficial to the plaintiff (without it, she has no basis for her claim that information regarding limitations should have been disclosed), and reasonable based on the evidence.[7] This order determines that even with this presumption in place, defendant is entitled to summary judgment because there was no violation of the FDCPA. Likewise, assuming *arguendo*, for purposes of plaintiff's cross-motion, that the debt is time-barred, no violation of § 1692e has been shown.

Oklahoma Law Regarding Impact of the Statute of Limitations

The other matter the court addresses before reaching the central issue under the FDCPA, is the law of Oklahoma regarding the impact, on a debt, of the running of the statute of limitations.

Under 12 O.S. Supp. 2018 § 95(A)(1), a civil action upon any contract, agreement, or promise in writing, must be brought within five years after the cause of action has accrued. Here, the basis of the debt is that on October 25, 2011,

[7] Taken as a whole, the undisputed facts stated earlier in this order give rise to an inference that the debt was time-barred at the time of the phone call. Among other things, it is undisputed that the debt collector had placed, for collection, "an outdated collection amount" of $4,033.00 on Ms. Douglas' credit report. Fact-finding no. 10, *supra.* As for choice of law, no party has suggested that the law of any state other than Oklahoma controls the limitations period.

plaintiff allegedly breached a lease (a contract) with Summit Ridge Apartments. Accordingly, plaintiff argues that a five-year limitations period applies to the debt and that this period expired on October 25, 2016.

In addition, under 12 O.S. 2011 § 101, Oklahoma law provides that partial payment on an account tolls or revives the statute of limitations. Central National Bank & Trust Co. v. Stettnisch, 821 P.2d 1066, 1067 (Okla. Civ. App. 1987), citing Drakos v. Edwards, 385 P.2d 459 (Okla. 1963), and McLaughlin v. Laffoon Oil Company, 446 P.2d 603 (Okla. 1968). The theory is that the payment, by its own vigor, revives the debt, no matter how old the debt may be. Stettnisch, at p. 1067.

Finally, with respect to Oklahoma law, the passing of the limitations period does not extinguish the debt. *See*, Consolidated Grain & Barge Co. v. Structural Systems, Inc., 212 P.3d 1168, 1171 (Okla. 2009) (the statute of limitations is an affirmative defense that may be waived by failure to assert it; it is a procedural law that operates only on the remedy). Thus, if a debt is outside the applicable statutory period, a prospective plaintiff is not prohibited from bringing a lawsuit regarding the debt; however, plaintiff may be prevented from attaining a judicial remedy depending upon the factual circumstances of the case, including whether the defendant asserts or waives the limitations defense.

Applying Section 1692e to the Facts of this Case

With those preliminary matters having been addressed, the court now comes to the central issue: potential liability under § 1692e in situations involving non-disclosure of information about the impact, on a debt, of the expiration of the limitations period. Neither party has cited any Tenth Circuit authority on this topic, and there is a split of authority in the other circuits.

The following decisions include statements or results favoring debt collectors.

-- Mahmoud v. De Moss Owners Association, Inc., 865 F.3d 322, 333-34 (5th Cir. 2017) (declining to extend potential FDCPA liability to the circumstances of

that case, which included fact that less than 25% of the debt was allegedly time-barred; at 333, n.3, the writer (Judge Edith H. Jones) acknowledges the court is bound by Daugherty, 836 F.3d 507 (5th Cir. 2016), but the writer states that she agrees with the broader principles of Huertas and Freyermuth as well as the dissent in Buchanan, specifically: in nearly every state, the fact that a debt is time-barred does not extinguish the obligation; that is particularly so where a collection letter threatens no legal action, as even an unsophisticated consumer knows enough to throw it away; and using moral suasion in these matters is not abusive or overbearing).

-- Huertas v. Galaxy Asset Management, 641 F.3d 28, 32-33 (3d Cir. 2011) (collection letter did not violate § 1692e(2)(A) where letter sought voluntary repayment of stale debt and did not threaten legal action).

-- Freyermuth v. Credit Bureau Services, Inc., 248 F.3d 767, 771 (8th Cir. 2001) (absent threat of litigation there was no violation of FDCPA despite the attempt to collect on a potentially time-barred debt which is otherwise valid).

The following decisions include statements or results favoring consumers.

-- Tatis v. Allied Interstate, LLC, 882 F.3d 422, 425, 428-30 (3d Cir. 2018) (distinguishing Huertas as relating to a violation under § 1692e(2)(A) only, and noting that the FDCPA sweeps more broadly than that provision; observing that three courts of appeals addressing this topic since Huertas have all held that even absent threats of litigation, it is plausible that offers to "settle" time-barred debts could mislead the least sophisticated debtor, referencing McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014), Buchanan v. Northland Group, Inc., 776 F.3d 393 (6th Cir. 2015), and Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507 (5th Cir. 2016); concluding that in light of the specific language used in the collection letter, which referred to "settlement" and "settlement offer," the least sophisticated consumer could plausibly have been misled).

-- Pantoja v. Portfolio Recovery Associates, LLC, 852 F.3d 679, 684, 687 (7th Cir. 2017) (collection letter offering settlement payment options on old debt violated FDCPA; letter did not threaten suit but did not even hint, much less make clear, that partial payment or a promise to make a partial payment risked loss of protection of limitations; letter did not make clear that the law prohibits the collector from suing to collect the old debt; court also found the letter was deliberately ambiguous, making summary judgment appropriate).

-- Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 509 (5th Cir. 2016) (collection letter which was silent as to litigation but which offered to "settle" a time-barred debt without acknowledging that such debt is judicially unenforceable, can be sufficiently deceptive or misleading to violate the FDCPA; while it is not automatically unlawful for a debt collector to seek payment of a time-barred debt, a collection letter violates the FDCPA when its statements could mislead an unsophisticated consumer to believe that her time-barred debt is legally enforceable regardless of whether litigation is threatened).

-- Buchanan v. Northland Group, Inc., 776 F.3d 393, 395, 399-400 (6th Cir. 2015) (debt collection letter could plausibly mislead reasonable, unsophisticated consumer as required to state actionable claim under the FDCPA, where the letter made a "settlement offer" to resolve an unpaid debt without disclosing that the statute of limitations had run on the debt and thus falsely implied that the collector could enforce the debt; distinguishing Huertas and Freyermuth as cases which held only that an attempt to collect a time-barred debt is not a thinly veiled threat to sue; stating that neither of these cases addressed the possibility that consumers might still be confused about the enforceability of the debt or the pitfalls of partial payment).

-- McMahon v. LVNV Funding, LLC, 744 F.3d 1010, 1020 (7th Cir. 2014) ("We do not hold that it is automatically improper for a debt collector to seek re-payment of time-barred debts; some people might consider full debt re-payment a

moral obligation, even though the legal remedy for the debt has been extinguished"; but "if the debt collector uses language in its dunning letter that would mislead an unsophisticated consumer into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation (the requirement the Third and Eighth Circuits added to the mix) the collector has violated the FDCPA"; "it is plausible that an unsophisticated consumer would believe a letter that offers to 'settle' a debt implies that the debt is legally enforceable…").

Given this split of authority, this case would present a difficult issue for determination but for certain undisputed facts which set it apart from all of the authorities cited above or in the parties' briefs. All of these authorities involve a fact scenario in which the communication by the debt collector was made in a collection letter or in some other type of written communication, which was then sent to the consumer by the debt collector. By contrast, here, plaintiff and her credit advisor initiated the contact with the debt collector. They placed a phone call to the debt collector, "to try to see what's going on" with the account. Tr., p. 2. Plaintiff relies on disclosures which she contends the debt collector should have made, orally, in the resulting phone conversation. Importantly, there is no evidence that absent the call initiated by the plaintiff, the debt collector would have reached out to plaintiff in an effort to collect the old debt.

The court declines to extend liability under the FDCPA to the circumstances of this action, in the absence of any judicial precedent, binding on this court or otherwise, for doing so. It is conceivable that an attempt – as plainly occurred in this case – to place a phone call to a debt collector for the purpose of manufacturing a violation of the FDCPA could, in some circumstances, succeed. But this is not that case. The court holds as a matter of law that the debt collector said nothing that was actionably misleading under the FDCPA.

The other fact that the court finds particularly supportive of a result in favor of the defendant, is that the phone call included no explicit or implicit threats of litigation. For example, the debt collector did not threaten suit or a offer a settlement. The closest the debt collector came to any such language was when the debt collector asked, "How would you like to get that closed out today?" Tr., p. 4. There is nothing about that statement that indicates, even to the least sophisticated consumer, that litigation was being threatened.

The court also notes that Oklahoma law holds the running of the limitations period does not extinguish the debt but merely makes a judicial remedy unavailable, and that limitations is an affirmative defense which can be waived. In light of these principles, the proposition that the FDCPA was violated by the debt collector's failure to tell plaintiff that "we will not sue you," is dubious at best. If the debt collector had made that statement, as plaintiff contends he should have, it might have been misleading; for example, even if the defendant did not file suit on the debt, the account could have been taken over by another debt collector which might have filed suit.

Lastly the court notes, but places no reliance on, the fact that plaintiff was not actually misled by the nondisclosures in question.[8] During the call, plaintiff clearly stated that she did not want to close out the account. Moreover, plaintiff and her credit advisor were obviously aware that the limitations period had run even before they placed the call, given the credit advisor's complaints – voiced to the debt collector during the call – that the debt collector had not disclosed information about the impact of the statute of limitations. Tr. at p. 11.

[8] The court places no reliance on this fact because it is not persuaded that plaintiff's knowledge of the limitations issue is material to whether the debt collector committed a violation under § 1692e.

On the undisputed facts of this case, the court concludes that the alleged non-disclosures did not violate 15 U.S.C. § 1692e.

Conclusion

After careful consideration, the motion for summary judgment of defendant NCC Business Services, Inc.'s is **GRANTED**, and the cross-motion of plaintiff Onesha Douglas is **DENIED**.

IT IS SO ORDERED this 7th day of November, 2018.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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