

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER SMITH,

Plaintiff,

v.

MOSS LAW FIRM, P.C.,

Defendant.

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NO. 3:18-CV-02449-D

DEFENDANT MOSS LAW FIRM, P.C.'S MOTION TO DISMISS

Defendant Moss Law Firm, P.C. submits its Motion to Dismiss with respect to Plaintiff Christopher Smith's claims for violation of the Fair Debt Collection Practices Act (FDCPA) and Texas Debt Collections Practices Act (TDCPA) pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state claims upon which relief can be granted. Defendant respectfully requests the Court dismiss all of Plaintiff's claims with prejudice.

I. UNDISPUTED FACTS

In 2015, Christopher O. Smith II ("Debtor") opened a credit card account with Barclays Delaware Bank ("Barclays"). After default, Moss Law Firm filed suit in October 2017 on behalf of Barclays to collect the delinquent debt from Debtor. *See* Pl.'s Compl. ¶ 20.

At all times, Moss Law Firm intended to collect the delinquent debt from Debtor, Christopher O. Smith II. Before filing suit, Moss Law Firm proceeded with its usual "skip-tracing" process, which involves researching a debtor's address for service on three independent sources, to ensure it served the correct person at the most recent address. All sources indicated that Debtor resided at 4108 Sun Valley Drive, Dallas, Texas 75216. On or about October 10,

2017, Defendant filed suit against Christopher O. Smith, II, evidenced by the name “Christopher O. Smith II” reflected on the credit card account statement attached to the state court petition in *Barclays Delaware Bank v. Christopher O. Smith*, Case No. JX 1700978H in the Justice Court, Precinct 1, Place 1 of Dallas County, Texas. *See App.* at 5.

On October 12, 2017, a private process server served Christopher O. Smith, Debtor’s father who has the same full name as the Debtor, with the state court petition at 4108 Sun Valley Drive, Dallas, Texas 75216. Although the account statement attached to the state court petition bore the name Christopher O. Smith II, indicating Barclays and Defendant intended to sue Christopher O. Smith II and not Christopher O. Smith, Debtor’s father, Plaintiff mistakenly accepted service. *See App.* at 5.

Plaintiff’s spouse telephoned Defendant on October 16, 2017. *See Pl.’s Compl.* ¶ 23. She stated the incorrect person had been served and provided Defendant with Plaintiff’s date of birth. *Id.* Although she refused to provide Defendant with the last four digits of Plaintiff’s social security number, Defendant advised Plaintiff’s wife that Barclays had not filed suit against Plaintiff and was not seeking judgment against him. Defendant twice offered to pick up the petition and summons from Plaintiff or requested Plaintiff mail the documents back to Defendant, to which Plaintiff’s spouse refused. Defendant immediately contacted the private process server and instructed him not to make any further service attempts at the address provided in the petition and to refrain from filing a return of service.

Although Plaintiff was on verbal and written notice that the suit was not pending against him and Defendant was not seeking to collect a debt from him, he retained an attorney, who filed an answer in the state court suit on Plaintiff’s behalf and confirmed to Defendant that Plaintiff

was not the Debtor. *See id.* ¶ 25. On November 7, 2017, Defendant filed a Motion for Non-Suit, which was granted on November 13, 2107. *Id.* Because Plaintiff disputed the debt in his Answer, Defendant sent Plaintiff's counsel a letter in response to the request for debt verification stating that Defendant was further investigating the validity of the debt, *see id.* ¶ 26, as such a timely written response is required by applicable state and federal law governing debt verification. Thereafter, Plaintiff initiated this suit seeking recovery under the FDCPA and TDCPA for alleged improper debt collection activities.

II. SUMMARY OF THE ARGUMENT

Although Defendant did not attempt to contact or otherwise engage in debt collection activities against Plaintiff, but rather, came into contact with Plaintiff while attempting to contact his son with the same name at the same address, and non-suited the case in which Plaintiff improperly accepted service, Plaintiff now brings suit alleging Defendant violated the FDCPA and TDCPA.

More specifically, Plaintiff claims Defendant violated the debt collection acts by initiating a lawsuit against the wrong person, *see id.* ¶¶ 21-22, "proceed[ing]" with said lawsuit after it was on notice that it was "pursing the wrong party for the debt," *see id.* ¶ 22, and sending Plaintiff's counsel a letter that it was "unable to verify the validity of said debt," *see id.* ¶ 27. Plaintiff claims that such activities violate: (1) 15 U.S.C. § 1692d by engaging in conduct the natural consequence of which was to harass, oppress, or abuse Plaintiff; (2) 15 U.S.C. § 1692e by using false, deceptive, and misleading representations in connection with the collection of the debt; (3) 15 U.S.C. § 1692f by using unfair and unconscionable means to collect the debt; and, (4) Tex. Fin. Code § 392.304(19) by using deceptive means to collect a debt. *See Pl.'s Compl.* ¶¶ 29-34.

“‘[W]hether or not a particular cause of action authorizes an injured Plaintiff to sue is a merits question . . . not a jurisdictional question,’” and requires a determination as to whether a plaintiff falls within the class Congress authorized to sue under a particular statute. *Camsoft Data Sys. v. Southern Elecs. Supply, Inc.*, 756 F.3d 327 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1162 (quoting *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 409 (5th Cir. 2008)); *see also Joseph Paul Corp. v. Trademark Custom Homes, Inc.*, Civ. Action No. 3:16-CV-1651-L, 2016 U.S. Dist. LEXIS 126206, at *12 (N.D. Tex. Sept. 16, 2016). Because it is a merits question, “[s]tatutory standing . . . ‘is not indicative of Article III jurisdictional standing’ and is more properly addressed under Rule 12(b)(6).” *Joseph Paul Corp.*, 2016 U.S. Dist. LEXIS 126206, at *12 (quoting *Camsoft*, 756 F.3d at 332; *Blanchard 1986, Ltd.*, 553 F.3d at 409). Plaintiff has the burden to establish that he has statutory standing to bring his claims. *See Cadle Co. v. Neubauer*, 562 F.3d 369, 371 (5th Cir. 2009).

B. The Court should dismiss Plaintiff’s claims because he lacks standing to sue, as Moss Law Firm’s alleged actions were not directed at Plaintiff.

Because the FDCPA is intended to protect *consumers* against abusive debt collection practices, “[a] third party, non-debtor does not have standing to assert a FDCPA violation based on collection efforts aimed at someone else.” *Prophet v. Joan Myers, Myers & Assocs., P.C.*, Civ. Action No. H-08-0492, 2009 U.S. Dist. LEXIS 43232, at *10 (S. D. Tex. May 21, 2009) (citations omitted). Likewise, the TDCPA requires debt collection efforts be directed at the plaintiff to have standing to bring claims for improper debt collection. *See Ledezma v. Wells Fargo Bank, N.A.*, Civ. Action No. H-13-1806, 2014 U.S. Dist. LEXIS 164455, at *11 (S.D. Tex. Nov. 24, 2014) (noting that “a nonconsumer may pursue a TDC[P]A claim only if abusive debt-collection practices are directed at that individual rather than the debtor.”).

Courts have allowed non-debtor plaintiffs to maintain actions under the FDCPA and TDCPA only when conduct is abusive, directed at the non-debtor, and results in actual damages. For example, courts have allowed family members of debtors to seek redress when a debt collector knowingly harasses the family members in an attempt to collect from the debtor. *See, e.g., Campbell v. Beneficial Finance Co. of Dallas*, 616 S.W.2d 373, 375 (Tex. App.–Texarkana 1981, no writ.) (allowing claims by a plaintiff against a bank for the bank’s repeated harassing phone calls asking plaintiff to divulge the debtor’s contact information). Conversely, even if the plaintiff misconstrues the debt collection efforts as aimed at the plaintiff, he does not have standing to sue based on debt collection efforts actually aimed at the debtor. *See, e.g. Prophet*, 2009 U.S. Dist. LEXIS 43232, at **13-15 (finding a demand letter addressed to the debtor, plaintiff’s son, but opened by the plaintiff father *who had the same name as the debtor* did not constitute collection efforts aimed at the plaintiff who, thus, lacked standing to bring FDCPA and TDCPA claims); *cf. Burdett v. Harrah’s Kansas Casino Corp.*, 294 F. Supp. 2d 1215 (D. Kan. 2003) and *Dewey v. Associated Collectors Inc.*, 927 F. Supp. 1172, 1174 (W.D. Wis. 1996) (both finding debtors’ spouses lacked standing to sue because collection efforts were aimed at debtors and not spouses, despite the fact that they shared a home).

Because Defendant did not direct any debt collection efforts at Plaintiff but, rather, Plaintiff mistakenly identified Defendant’s state court petition filed against Plaintiff’s debtor-son as filed against Plaintiff, he lacks statutory standing to sue under the FDCPA and TDCPA. Plaintiff claims that Defendant violated several provisions of the FDCPA and the TDCPA because it initiated and “proceeded” with a lawsuit and sent a written communication required by law to Plaintiff’s counsel in response to Plaintiff’s dispute of the debt. *See* Pl.’s Compl. ¶¶ 21-34.

Plaintiff has not alleged facts, however, that Defendant directed any improper debt collection activities at Plaintiff. *See id.* In reality, Defendant initiated a lawsuit against Plaintiff's debtor-son who bears the same name as Plaintiff, and Defendant's skip-tracing process indicated Plaintiff's debtor-son lived at the same address as Plaintiff; consequently, Plaintiff mistakenly accepted service of the suit. Similar to the plaintiff in *Prophet*, Plaintiff erroneously assumed the collector's efforts were directed at him because he bore the same name as the debtor; such a mistake on Plaintiff's part, however, does not subject Defendant to liability under the FDCPA and TDCPA. *See Prophet*, 2009 U.S. Dist. LEXIS 43232, at **13-14 (noting that the fact that a collection letter was addressed to a debtor with the same name as the plaintiff did not indicate the collection efforts were directed at plaintiff or otherwise confer standing to plaintiff to sue for such actions). As evidenced by the account statement attached to the petition that references Christopher O. Smith II—the debtor, Plaintiff's son—and Defendant's consistent verbal representations to Plaintiff that it was not seeking judgment against Plaintiff for the alleged debt, Defendant did not initiate a lawsuit against Plaintiff or otherwise engage in debt collection practices directed at Plaintiff.¹ Moreover, Defendant filed and secured a non-suit in the state court case and only further communicated with Plaintiff's counsel as to the debt verification required by state and federal law. Regardless of whether Plaintiff believed a lawsuit was filed against him, the suit itself indicated otherwise, and the FDCPA and TDCPA do not allow Plaintiff to recover for such a mistake. *See Christy v. EOS CCA*, 905 F. Supp. 2d 648, 652 (E. D. Penn. 2012) (quoting *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F. 3d 294, 299 (3d

¹ In fact, when Plaintiff's spouse contacted Defendant and indicated that Plaintiff had accepted service of the suit but was not the proper party to be sued for the alleged debt, Defendant assured Plaintiff's spouse it was not seeking a judgment against Plaintiff for the debt, offered to retrieve the served papers, and contacted the process server and directed him not to file a return of service in the case.

Cir. 2008) (internal quotations and citations omitted)) (“The statute does not protect ‘the willfully blind or non-observant. . . . Even the least sophisticated debtor is bound to read collection notices in their entirety.’”).

Plaintiff has alleged no set of facts that indicate Defendant engaged in improper debt collection activity directed at Plaintiff. Accordingly, Plaintiff lacks statutory standing to sue under either the FDCPA or the TDCA, and the Court should dismiss Plaintiff’s claims with prejudice for failure to state a claim upon which relief could be granted.

IV. CONCLUSION

Because Defendant did not engage in debt collection activities directed at Plaintiff and he lacks standing to sue under the FDCPA and TDCPA, Moss Law Firm respectfully requests the Court dismiss with prejudice all of Plaintiff’s claims pursuant to FCRP 12(b)(6) for failure to state a claim upon which relief may be granted and any other relief to which it is entitled.

Dated: October 8, 2018

Respectfully submitted,

MOSS LAW FIRM, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2018, the foregoing document was electronically filed with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.



Rebecca A. Moss