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United States District Court, N.D. California.

Rogerio A. VALDEZ, an individual, on behalf of himself and all others similarly situated, Plaintiff,
v.
HUNT AND HENRIQUES, Michael Scott Hunt and Janalie Henriques, Defendants.

No. C 01-01712 SC.

March 19, 2002.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CONTI, District J.

I. *INTRODUCTION*

***1** This is a putative class action on behalf of all persons who received a particular debt collection form letter from the law firm of Hunt and Henriques, between May 2, 2000 and May 2, 2001. Lead plaintiff Rogerio Valdez ("Plaintiff") received such a letter on or about September 13, 2000, attached to the Complaint as exhibit A (the "Letter"), and claims that the Letter violates the Fair Debt Collection Practices Act, 15 U.S.C. § § 1692 et seq. ("FDCPA"). Plaintiff sued Michael Hunt and Janalie Henriques individually, and the firm itself (collectively "Defendants").

Plaintiff and Defendants have now both moved this Court for summary judgment. For the reasons discussed below, summary judgment for Defendants is granted.

II. *BACKGROUND*

The facts alleged by Plaintiff are these: Plaintiff owed a debt to First Select. Defendants were employed as debt collections agents for First Select. As part of their collection efforts, Defendants sent Plaintiff a one-page letter demanding payment and threatening legal action.

Plaintiff asserts that this Letter violated the FDCPA in two primary ways. First, the Letter allegedly misstates the amount of the debt in violation of 15 U.S.C. § 1692g(a)(1). [FN1] Though the amount of Plaintiff's debt as of the date of the Letter, September 13, 2000, was $3,056.08, the caption of the Letter reads:

> FN1. Plaintiff also argues that because the Letter does not accurately state the amount of the debt, it violates the 15 U.S.C. § 1692e(10) prohibition on the "use of any false representation or deceptive means to collect or attempt to collect any debt."

OUR CLIENT: FIRST SELECT
ALLEGED DEBTOR: ROGERIO A. VALDEZ
ALLEGED DEBT: $3056.08 plus interest
(Compl.Ex. A.)

Second, Plaintiff claims that the Letter violates 15 U.S.C. § 1692g(a)(3-4) by creating confusion as to whom Plaintiff must contact if he wishes to "validate" the debt. [FN2] The Letter states:

> FN2. A borrower requesting "validation" of the debt will receive a

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> verification of the amount of the debt or a copy of a judgment for the amount of the debt. 15 U.S.C. § 1692g(a)(4).

If you wish to make settlement arrangements contact FIRST SELECT at 1-800- 280-0559.
UNLESS YOU NOTIFY ME IN WRITING WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS LETTER THAT YOU DISPUTE ALL OR ANY PORTION OF THIS DEBT, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU SUBMIT A WRITTEN DISPUTE WITHIN THIRTY (30) DAYS FROM RECEIPT OF THIS LETTER, MY OFFICE WILL OBTAIN WRITTEN DOCUMENTATION EVIDENCING THE DEBT AND WILL PROVIDE YOU WITH A COPY OF SUCH DOCUMENTATION.

(Compl.Ex. A.) According to Plaintiff, the instruction to contact First Select to arrange for settlement, makes it unclear whether a request for validation of the debt can be made to First Select and whether contacting First Select to make settlement arrangements would automatically trigger validation rights. In actuality, a debtor would be required to call Defendants, the debt collectors, to request validation and contacting First Select would not be effective for this purpose.

III. *LEGAL STANDARD*

The standards for considering a motion for summary judgment are well settled. Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the nonmoving party, the movant is clearly entitled to prevail as a matter of law. *See* Fed.R.Civ.P. 56(c); *Cleary v. News Corp.,* 30 F.3d 1255, 1259 (9th Cir.1994). Once a summary judgment motion is made and properly supported, the nonmoving party may not rest on the mere allegations of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See* Fed R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett,* 477 U.S. 317 (1986). In addition, to withstand a proper motion for summary judgment, the nonmoving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986).

***2** The FDCPA was designed to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. In the Ninth Circuit, whether a collection letter violates the FDCPA "depends on whether it is likely to deceive or mislead a hypothetical least sophisticated debtor." *Terran v. Kaplan,* 109 F.3d 1428, 1431 (9th Cir.1997). This objective least sophisticated debtor standard must form the basis of the Court's analysis.

IV. *DISCUSSION*

A. The Letter does not misstate the amount of the debt.

This case turns entirely upon whether the Letter, which both sides agree Defendants sent to Plaintiff, violates the FDCPA. It is therefore an excellent candidate for summary judgment, as only pure questions of law are presented.

It is important to begin by describing the

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exact nature of the alleged misrepresentation. As noted above, it is the *caption* of the Letter which lists the debt as "$3056.08 plus interest." The body of the Letter itself begins by stating, "[t]his office has been retained by FIRST SELECT, *to whom you owe $3056.08.* In spite of our client's repeated efforts to get *this balance* paid you have neglected your responsibility and have forced our client to turn this matter over to our firm." (Compl.Ex. A) (emphasis added.) Thus, although the caption is arguably misleading, the Letter itself states the exact amount of the debt as of the date of the Letter.

Plaintiff cites *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.,* 214 F.3d 872 (7th Cir.2000), for the proposition that failure to state the exact amount of the debt is actionable. In *Miller,* however, the collection letter stated only the amount of principal owing on the debt, without calculating the interest, late fees and other charges. *Id.* at 875. Because the exact amount of the debt including all extra charges is stated in the first sentence of the Letter at issue here, *Miller* is not directly applicable.

However, the *Miller* court cautioned that a letter stating the exact, current amount of the debt could still be actionable if it includes "other words that confuse the message" or if the message is "obscure[d] ... by adding confusing other information (or misinformation)." *Id.* at 876. Under this standard, the Letter presents a closer question--would the Letter read as a whole, including the caption, confuse the least sophisticated debtor as to the amount of the debt?

Defendants claim that the words "$3056.08 plus interest," "truthfully communicate[ ] to Valdez that if he does not take steps to resolve the debt, then the amount of interest owing on the debt will continue to accrue." (Defs.' Mot. for Summ. J. at 3.) This explanation strains credulity. It is highly doubtful that the least sophisticated consumer would read "ALLEGED DEBT: $3056.08 plus interest" as "ALLEGED DEBT: $3056.08 as of today, plus any future interest which may accrue." Even a sophisticated reader might be unlikely to divine such an interpretation of this phrase. On the other hand, given that the amount of the debt is unequivocally stated in the first line of the Letter, it is clear that the least sophisticated debtor would be forced to come to some reconciliation of the two amounts.

***3** Because the Ninth Circuit has repeatedly held that whether a collection letter would confuse the least sophisticated debtor is a question of law, the Court may not leave the resolution of this issue for trial. *See e.g., Terran v. Kaplan,* 109 F.3d 1428, 1432 (9th Cir.1997) ("[T]he caselaw makes clear that the question whether language in a collection letter ... [would] confuse a least sophisticated debtor is a question of law.") *But see Walker v. National Recovery, Inc.,* 200 F.3d 500, 503 (7th Cir.1999) ("Whether a given message is confusing is ... a question of fact, not of law or logic.") After careful review of the case law, and considering all the arguments presented in the briefs, the Court finds that the least sophisticated debtor would not be unduly confused by Defendants' Letter.

The Court agrees with Plaintiff, that it would have been preferable if the caption read "$3056.08, plus future interest which may accumulate," or simply "$3056.08 as of today." Nonetheless, the Court cannot agree that the caption so overwhelms the body of the letter as to negate the clear statement of the first sentence--"This office has been

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retained by FIRST SELECT to whom you owe $3056.08." The caption is merely a heading, intended to summarize the relevant information of the letter. It is not intended as a detailed recitation encompassing all facets of the information found below. The least sophisticated debtor would not likely be overly concerned with the caption, given that the first sentence of the letter contains the pertinent information in direct and unmistakable terms.

Though the language of the caption is unfortunate, the Court must conclude that its impact on the least sophisticated debtor would be too minimal to create confusion. Therefore, the letter accurately states the amount of the debt.

B. The Letter also does not create actionable confusion as to who must be contacted to validate the debt.

"Notices sent to debtors must not confuse them about the verification rights established by the FDCPA." *Walker,* 200 F.3d at 501. Plaintiff asserts that the Letter in the present case creates confusion as to the debtor's validation rights. [FN3] In particular Plaintiff points to the third paragraph, which is a single sentence reading, "[i]f you wish to make settlement arrangements contact FIRST SELECT at 1-800-280-0559." (Compl. Ex. A .) This sentence is followed immediately by the standard validation rights disclosure, which is written entirely in capital letters and bold-faced type, instructing the debtor to contact Defendants if he wishes to exercise his validation rights. Plaintiff claims that the instruction to contact both the creditor and the Defendants creates confusion to whom validation requests should be directed.

FN3. Defendants correctly note that Plaintiff's complaint contains no allegation concerning this source of confusion. Nonetheless, the Court may exercise discretion to treat the introduction of a new issue at this stage as a motion to amend the Complaint. *See* *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994).

In response, Defendants cite *Terran v. Kaplan,* in which the Ninth circuit held that a similar but considerably stronger admonition to call to arrange a settlement did not create confusion as to whom the debtor should contact for validation of the debt. In *Terran,* the collection letter stated, "[u]nless an immediate telephone call is made to ... a collection assistant of our office ... we may find it necessary to recommend to our client that they proceed with legal action." *Terran,* 109 F.3d at 1430. As in the present case, this instruction came immediately before the standard disclosure of validation rights. Unlike the present case, however, the validation rights were not written in capital letters or bold-faced type. Nonetheless, the Court found that the instruction to call the collection assistant did not overshadow or contradict the validation notice. *Id.* at 1434.

***4** The Letter engenders no confusion as to validation rights. It clearly instructs the debtor to contact the creditor to arrange for settlement, and to contact the Defendants to arrange for validation of the debt. Furthermore, the use of capital letters and bold-face type in the validation notice further diminishes the possibility that the provision of the creditor's phone number would create confusion. Plaintiff's allegations are substantially weaker than those rejected in *Terran,* therefore, summary judgment for Defendants is warranted.

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C. The Court will not consider Plaintiff's final claim, first raised in a supplemental filing after these motions were fully briefed.

By way of an ex-parte motion filed six days after the briefing of these cross- motions for summary judgment was concluded, Plaintiff requested that the Court consider an additional basis for Plaintiff's suit. Under that additional theory, the Letter violated the FDCPA by requiring the debtor to request validation of the debt *in writing*. By order of December 14, 2001, the Court ordered the parties to submit additional briefing limited to determining whether this issue was properly before the Court and, if so, whether the Letter violated the FDCPA in the manner alleged.

Plaintiff correctly notes that "[a]n addition of new issues during the pendency of a summary judgment motion can be treated as a motion for leave to amend the complaint." *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994). However, the Court must also consider whether bad faith or undue delay has led to the late injection of a new theory into the proceedings and whether prejudice to the opposing party will result from amendment. *Id.*

In the present case, it is clear from the correspondence that Plaintiff submitted to the Court that he was conversant with the legal issues surrounding this alleged violation by at least March 17, 2001, over a month before this Complaint was filed. (Mem. in Supp. of Ex-Parte Mot. filed November 27, 2001, Ex. A.) [FN4] Nonetheless, Plaintiff entirely omitted this theory of recovery from his Complaint. Plaintiff also failed to mention this allegation either in his Motion for Partial Summary Judgment or his Corrected Motion for Partial Summary Judgment, which came twenty days later.

FN4. Exhibit A to Plaintiff's "Memorandum in Support of Ex-Parte Motion" is a letter from Plaintiff to Defendants' counsel explaining, with case citations, Plaintiff's reasons for thinking the Letter's writing requirement violated the FDCPA. There can be no dispute that Plaintiff could have included these allegations in the Complaint, filed over one month later, if he had chosen to.

Plaintiff has knowingly foregone his opportunity to make this allegation at the appointed time. Theories of recovery known to a party may not simply be omitted for the entirety of the dispositive briefing process, then insinuated back into the case by way of an ex-parte motion. *See Acri v. International Ass'n of Machinists and Aerospace Workers,* 781 F.2d 1393, 1398 (9th Cir.1986). It would be particularly inappropriate for the Court to consider Plaintiff's new theory in light of the fact that the Court has already entertained one theory of recovery, discussed in Part B above, that was absent from the Complaint and raised for the first time in Plaintiff's Motion for Summary Judgment.

***5** There must be some point of finality in the judicial process. By filing ex-parte after the close of briefing, Plaintiff has missed it.

V. *CONCLUSION*

For the foregoing reasons, summary judgment for Defendants is HEREBY GRANTED.

IT IS SO ORDERED.

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