IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| KARINA BUVAYLIK,<br><br>Plaintiff,<br><br>v.<br><br>PORTFOLIO RECOVERY ASSOCIATES, LLC,<br><br>Defendant. | ) | Case No. 18-CV-251-JED-CDL |

# ORDER

Defendant Portfolio Recovery Associates purchases delinquent debt and attempts to collect upon those debts. Plaintiff Karina Buvaylik allegedly owes a consumer debt that Portfolio owns. In a state court action, Portfolio sued Buvaylik to collect the debt. Portfolio also reported Buvaylik's alleged delinquent debt to credit reporting bureaus. In the present action, Buvaylik sues Portfolio under the Fair Debt Collection Practices Act (FDCPA), claiming Portfolio violated the FDCPA when it reported the delinquent debt to credit reporting bureaus without communicating that Buvaylik disputed the debt. *See* 15 U.S.C. § 1692e.

Portfolio moves for summary judgment on all claims, arguing that it has not violated the FDCPA. Alternatively, Portfolio argues that any FDCPA violation was a bona fide error and thus Portfolio is insulated from liability. Buvaylik objects. For the forgoing reasons, Portfolio's motion for summary judgment (doc. no. 43) is DENIED.

## I. Standard of Review

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Universal Money Ctrs., Inc. v. AT&T,* 22 F.3d 1527, 1529 (10th Cir. 1994). When considering a motion for summary judgment, a court must construe the evidence "in the light most favorable to the [nonmoving] party." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). At this point in the proceedings, the question is "whether the evidence presents a sufficient disagreement to require submission to a [factfinder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986). If, after such consideration of "the factual record and reasonable inferences," a determination is made that no reasonable factfinder could find for the nonmoving party, "Rule 56(c) mandates the entry of summary judgment." *Applied Genetics*, 912 F.2d at 1241; *Lexington Ins. Company v. Newbern Fabricating, Inc.*, 2016 WL 4059251 (N.D. Okla. July 28, 2016).

## II. Background

The following facts are recited for the purpose of this summary judgment motion and are construed in Buvaylik's favor as the non-movant. *See Applied Genetics*, 912 F.2d at 1241.

### *A. The State Court Lawsuit*

In March 2017, Portfolio sued Buvaylik in Oklahoma state court to collect a debt of $681. Buvaylik, acting pro se, denied owing the debt. In her answer, filed in April 2017, Buvaylik wrote that she "is without sufficient information to either admit or deny the allegations contained and therein and therefore deny them." Doc. no. 43-8.

After this general denial, Buvaylik also listed multiple defenses in the format replicated below:

> Defendant(s) other defenses are:
>
> - ☐ General Denial: I deny the allegations in the Complaint
> - ☐ Plaintiff lacks standing and does not have authority to bring this lawsuit.
> - ☐ I do not owe this debt.
> - ☐ I disagree with the amount of the debt. The amount is incorrect.
> - ☐ Unjust enrichment (the amount demanded is excessive compared with the original debt).
> - ☐ The Complaint fails to state a claim upon which relief can be granted.

Doc. no. 43-8. Buvaylik's answer is two pages long and does not contain additional facts beyond her general denial and listed defenses. The state court lawsuit is still pending.

After Portfolio filed the state court lawsuit, Portfolio reported Buvaylik's alleged debt to credit reporting bureaus.[1] In doing so, Portfolio did not communicate that Buvaylik disputed the debt. Buvaylik filed the present lawsuit

[1] The precise dates and number of reports to credit reporting bureaus are unclear; however, both parties acknowledge that Portfolio reported Buvaylik's alleged debt at least once and that is sufficient here.

in federal court on May 9, 2018, claiming that Portfolio violated the FDCPA when it reported the alleged delinquent debt to credit reporting bureaus without communicating that Buvaylik disputed the debt. Portfolio withdrew the delinquent account from Buvaylik's credit report shortly after she field this federal lawsuit.

### *B. Portfolio's Accountability Procedures*

Portfolio recovers delinquent debt in many states.[2] To do so, it hires a variety of law firms to file lawsuits against debtors in each debtor's home jurisdiction. As part of its debt collection process, Portfolio may report a delinquent debtor to credit reporting bureaus. When Portfolio does report a delinquent debtor, Portfolio knows that it must note whether a debtor disputes their alleged debt. Portfolio maintains written policies and procedures regarding the reporting of disputed accounts to ensure that Portfolio accurately reports whether a debt is disputed.

According to Portfolio, its reporting procedures are transmitted to the law firms it hires, who agree to Portfolio's standard operating procedures. In this process, the hired law firm is supposed to report disputed debt to Portfolio through an electronic filing system. Portfolio relies on the local law firm to accurately report any alleged disputes.

In the present case, Portfolio contracted the Oklahoma law firm Rausch Sturm to collect Buvaylik's debt. Rausch filed the state court lawsuit on Portfolio's behalf. When

[2] Portfolio refers to the debt it purchases as "charged-off debt."

Buvaylik answered the state court lawsuit, Rausch could have reported a disputed debt to Portfolio but did not do so. Only Rausch reviewed Buvaylik's answer before Portfolio submitted Buvaylik's alleged delinquent debt to credit reporting bureaus; Portfolio did not independently review Buvaylik's answer. Because Rausch did not flag Buvaylik's answer as a dispute of debt, the case was not sent to Portfolio's dispute department for investigation.

According to Buvaylik, Portfolio does not know when or if its customer dispute procedures were ever transmitted to Rausch. This transfer is important because Portfolio does not provide training to the law firms it contracts to handle collection lawsuits. Instead, the law firms simply agree to Portfolio's standard operating procedures and policies in an engagement agreement. If the policies were never transferred, then it is unclear what policies Rausch followed to ensure they properly reported disputed debts. Additionally, Portfolio claims that it routinely audits its collection firms to ensure familiarity with Portfolio's standard operating procedures, but Portfolio does not know when or how frequently it audited Rausch prior to Buvaylik's complaint.

## III. Analysis

Portfolio advances two arguments. First, Portfolio argues that Buvaylik did not dispute the debt and therefore Portfolio did not communicate a disputed debt to credit reporting bureaus. Second, and in the alternative, Portfolio argues that it is insulated from liability because any communication of a disputed debt was a bona fide error. The court addresses each argument in turn.

### *A. Whether Portfolio Communicated a Disputed Debt*

The FDCPA was enacted "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. The statute prohibits debt collectors from using "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The statute also prohibits "[c]ommunicating … to any person credit information which is known or which should be known to be false, including the *failure to communicate that a disputed debt is disputed*." 15 U.S.C. § 1692e(8) (emphasis added).

"When reporting a disputed debt, a debt collector bears a legal duty to communicate that the debt is disputed." *Dixon v. RJM Acquisitions, LLC*, 640 F. App'x 793, 794 (10th Cir. 2016) (unpublished). And when "the existence of a dispute involved a material issue of fact," summary judgment should be not granted. *Id.* at 795. For example, in *Dixon* the trial court granted summary judgment to a debt collector after finding that the debtor did not dispute the debt. The Tenth Circuit reversed, finding that the debtor's statements "I don't agree that I owe that much, that's too much," "I don't owe that much," and "I feel that all I owe is $20" were disputes of a debt and therefore precluded summary judgment. *Id.* at 795.

In the present case, Portfolio admits that it communicated Buvaylik's debt to credit recovery bureaus. But Portfolio contends that Buvaylik did not dispute her debt,

and therefore none of Portfolio's communications with credit reporting bureaus were false communications in violation of the FDCPA.

In arguing that Buvaylik did not dispute her debt, Portfolio first notes that Buvaylik wrote she "is without sufficient information to either admit or deny the allegations." Doc. no. 43-8. But Portfolio fails to note the second clause in Buvaylik's answer, that she "therefore deny them [the charges]." *Id.* This statement, "therefore deny them," is a clear denial that Buvaylik owed the alleged debt. Put simply, Buvaylik disputed the debt.

Portfolio also notes that Buvaylik did not "check or otherwise indicate that she was selecting any of the listed affirmative defenses." Doc. no. 43. But Buvaylik testified that the boxes next to her listed defenses were bullet points, not checkboxes. Buvaylik therefore claims *each* of the unnumbered defenses—she did not intend to select or "check" only certain defenses. Buvaylik's inclusive list of defenses is another clear denial that she owed the alleged debt and is sufficient to put Portfolio on notice that Buvaylik disputed her debt.[3] On both points, Portfolio's misleading characterization of

[3] Buvaylik argues that her answer should be evaluated under the "least sophisticated consumer standard," meaning that FDCPA claims are evaluated by asking how the least sophisticated consumer understands the notice they receive. *Ferree v. Marianos*, 129 F.3d 130, 130 (10th Cir. 1997) (unpublished). Use of this standard is unresolved in the Tenth Circuit, although two unpublished circuit decisions and various district courts in this circuit have applied this standard. *See id.*; *Fouts v. Express Recovery Servs., Inc.*, 602 F.App'x. 417, 421 (10th Cir. 2015) (unpublished); *Smith v. Johnson Mark, LLC*, 2021 WL 66297, at *3 (D. Utah Jan. 7, 2021); *Molkandow v. Maury Cobb Attorney at Law, LLC*, 2019 WL 549440, at *2 (D.Colo. Feb. 12, 2019). Regardless of whether this court applies the least sophisticated consumer standard, Buvaylik's answer disputed her debt. As Portfolio notes in its reply brief, "[e]ven a least sophisticated consumer is able

Buvaylik's answer should cause Portfolio to reflect on the integrity of its allegations before filing similar motions in future cases.

In summary, Buvaylik advised Portfolio that she disputed her debt and Portfolio reported the alleged debt to credit reporting bureaus without noting that it was disputed in violation of the FDCPA.

### *B. Whether Portfolio's Violation of the FDCPA is a Bona Fide Error*

The FDCPA provides an affirmative defense of bona fide error for unintentional violations of the statute. *See* 15 U.S.C. § 1692k; *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1195 (10th Cir. 2021). The defense consists of a three-prong analysis. A debt collector claiming the defense must prove (1) that the violation was not intentional, (2) that the error made was bona fide, and (3) that the error occurred despite the debt collector maintaining "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). "[T]he intent prong of the bona fide error defense is a subjective test, [while] the bona fide and the procedures prongs are necessarily objective tests." *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006). The debt collector bears the burden of proof for each prong of the test by a preponderance of the evidence. 15 U.S.C.A. § 1692k; *Johnson*, 443 F.3d at 729. If the debt collector fails to meet his burden for even one of the prongs, he is subject to liability under the FDCPA. *See Lupia*, 8 F.4th at 1195.

---

to clearly articulate that a debt at issue is disputed." And a clearly articulated denial is precisely what Buvaylik delivered here.

The first prong of the analysis is a straightforward investigation into "the [debt collector's] subjective intent to violate the Act." *Caputo v. Pro. Recovery Servs., Inc.*, 261 F. Supp. 2d 1249, 1257 (D. Kan. 2003); *accord Johnson*, 443 F.3d at 728 ("We find it informative, in this regard, that § 1692k(c) requires proof that 'the violation' was not intentional, as opposed to proof that 'the conduct' was not intentional.").

The second prong "serves to impose an objective standard of reasonableness upon the asserted unintentional violation," such that a court working through this step might consider "whether a reasonable debt collector . . . would have appreciated that such conduct would be in violation of the [FDCPA]." *Caputo*, 261 F. Supp. 2d at 1257-58. Courts have defined "bona fide" errors as actions that were "made in good faith, inadvertent[], without fraud or deceit, and with faithfulness to one's duty or obligation." *Bynum v. Cavalry Portfolio Servs., LLC*, 2006 WL 850935, *5 (N.D. Okla. Mar. 30, 2006).

Analysis of the third and final prong of the bona fide error defense "involves a two-step inquiry: first, whether the debt collector 'maintained'—i.e., actually employed or implemented—procedures to avoid errors; and, second, whether the procedures were 'reasonably adapted' to avoid the specific error at issue." *Johnson*, 443 F.3d at 729. In practice, this prong necessitates "a fact-intensive inquiry," the specific parameters of which will vary "on a case-by-case basis." *Owen v. I. C. Sys., Inc.*, 629 F.3d 1263, 1274 (11th Cir. 2011) (internal quotations omitted).

In the present case, Portfolio argues that it has a robust internal policy where its hired law firms will report disputed debt. Portfolio contends that this internal policy

satisfies the three prongs of the bona fide error defense. Buvaylik counters that there is a genuine issue of material fact regarding Portfolio's reporting procedures. Specifically, Buvaylik contends that Portfolio's internal policy regarding reporting disputed debt was never communicated to its hired law firm in this case; therefore, Buvaylik disputes whether Portfolio in fact had a reporting process in place. The court now addresses each prong of the bona fide error defense in turn.

First, Buvaylik does not allege that Portfolio had a subjective intent to violate the FDCPA, thus the first prong is satisfied. *See Caputo*, 261 F. Supp. 2d at 1257.

Second, Portfolio has shown that the error was made in good faith, as opposed to a "contrived mistake." *Moore v. Express Recovery Serv., Inc.*, 2019 WL 77325, at * 4 (D. Utah Jan. 2, 2019). Despite Portfolio's policies and procedures, Rausch did not properly flag Buvaylik's answer as a disputed debt and thus the case did not reach Portfolio's dispute department.[4] A flagging error is a reasonable mistake and therefore the second prong is satisfied. *See Caputo*, 261 F. Supp. 2d at 1257-58.

Regarding the third prong, however, Buvaylik raises a genuine dispute of material fact concerning whether Portfolio's reporting procedures were "actually employed or implemented" and, if implemented, whether they were "reasonably adapted" to avoid the violation. *Johnson*, 443 F.3d at 729.

---

[4] In this case, Rausch was acting as Portfolio's agent and thus Portfolio may be liable for Rausch's omission or error. *See Western Diversified Serv., Inc. v. Hyundai Motor America, Inc.*, 427 F. 3d 1269, 1276 (10th Cir. 2005) ("It is well established that a corporation is chargeable with the knowledge of its agents and employees acting within the scope of their authority.").

Construing the facts in Buvaylik's favor, a jury could find that Rausch did not maintain Portfolio's procedures. Although Rausch knew of the reporting procedures, it is not clear whether Rausch actually implemented the procedures. *See* doc. no. 72 (showing that Rausch signed Portfolio's standard operating procedures). Without records of training or auditing, it is unclear what steps (if any) Portfolio took to ensure that Rausch was following Portfolio's procedures. *See Edwards v. McCormick*, 136 F. Supp. 2d 795, 802 (S.D. Ohio 2001) ("Though there is no doubt that a principal may lawfully assign to his agent the responsibility of performing the 'error-catching' procedure(s) required to invoke the protection of § 1692k(c), where the principal himself has an essential role *in* the actual procedure, an abdication of that responsibility necessarily destroys the effectiveness of the procedure itself."). Further, even if Rausch implemented Portfolio's procedures, a jury could find that the procedures were not reasonably adapted to prevent the error that led to this dispute. This prong is a "fact-intensive inquiry" that is, in this case, best decided by a jury. *Owen*, 629 F.3d at 1274.

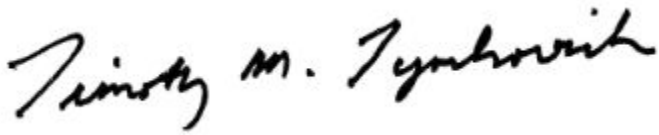
In summary, Portfolio has failed to show that there is no genuine dispute of fact regarding the third prong of the bona fide error defense.

## IV. Conclusion

Portfolio has failed to show that there are no genuine disputes of material fact about whether Buvaylik disputed the debt and whether Portfolio is eligible for the defense of bona fide error. Accordingly, Portfolio's motion for summary judgment (doc. no. 43) is DENIED.

SO ORDERED.

**DATED** this 31st day of January, 2022.



Timothy M. Tymkovich, Chief Judge
10th Circuit Court of Appeals