NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE MICKMAN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
PHILADELPHIA PROFESSIONAL COLLECTIONS, INC. and WHITE AND WILLIAMS, LLP	:	**NO. 21-4221**

MEMORANDUM

Savage, J. **July 26, 2022**

Pro se plaintiff Elaine Mickman asserts claims against Philadelphia Professional Collections, LLC (PPC) and White & Williams, LLP under the Fair Debt Collection Practices Act (FDCPA), 42 U.S.C. § 1983, and unidentified fraud statutes. She alleges that the defendants engaged in deceptive debt collection practices, deprived her of her constitutional rights during the underlying debt collection litigation, and committed fraud.

The defendants have moved to dismiss the amended complaint. They argue that her FDCPA claims are untimely and that she has not alleged sufficient facts to state causes of action for her other claims.

Accepting the plaintiff's facts as true and drawing all reasonable inferences from them in her favor, we conclude that her FDCPA claims are time-barred and she has not alleged sufficient facts to state causes of action for her other claims.

The facts Mickman alleges in her amended complaint are as follows. White & Williams represented her in an earlier litigation.[1] After she refused to pay her attorneys' fees, the law firm assigned the debt to PPC—a company Mickman alleges White &

[1] Am. Compl. at ¶¶ 10, 19 (ECF No. 5).

Williams owns.[2] In June 2015, PPC sued Mickman to collect the debt.[3] After unsuccessfully litigating against PPC, Mickman filed this lawsuit.

Standard of Review

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556).

A conclusory recitation of the elements of a cause of action is not sufficient. *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). The plaintiff must allege facts necessary to make out each element. *Id*. (quoting *Twombly*, 550 U.S. at 563 n.8). In other words, the complaint must contain facts which support a conclusion that a cause of action can be established.

In considering a motion to dismiss under Rule 12(b)(6), we first separate the factual and legal elements of a claim, accepting the well-pleaded facts as true and disregarding legal conclusions. Then, we determine whether the alleged facts make out a plausible claim for relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). All well-pleaded allegations in the complaint must be accepted as true and interpreted in the light most favorable to the plaintiff, and all inferences must

[2] *Id.* at ¶¶ 8-10.

[3] *Id.* at ¶¶ 8-9.

be drawn in the plaintiff's favor. *See McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009).

Analysis

FDCPA Claims

An FDCPA claim may be brought only against a debt collector. *Tepper v. Amos Fin., LLC*, 898 F.3d 364, 366 (3d Cir. 2018) (stating that the FDCPA "applies only to 'debt collectors'" (internal citation omitted)). The FDCPA defines "debt collector as any person who" either "uses any instrumentality of interstate commerce ... the principal purpose of which is the collection of any debts," or "regularly collects ... debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

White & Williams is not a debt collector as defined in the FDCPA. Mickman alleges that PPC litigated against her to collect the debt. She does not allege that the law firm attempted to collect the debt itself. Nor does she allege that White & Williams regularly collects debts. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017) (internal quotation marks omitted). White & Williams' alleged relationship to PPC does not make it a debt collector. 15 U.S.C. § 1692a(6)(B), *see Tepper,* 898 F.3d at 366 (explaining that the FDCPA "[s]pecifically exclude[s]. . . a company collecting debts only for its non-debt-collector sister company"). Thus, because White & Williams meets neither definition of "debt collector," Mickman may not pursue an FDCPA claim against it.

The defendants contend that Mickman's FDCPA claims are untimely. The statute of limitations is an affirmative defense that must be pled in a responsive pleading. FED. R. CIV. P. 8(c)(1); *Wisniewski v. Fisher*, 857 F.3d 152, 157 (3d Cir. 2017) (citations omitted); *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002). Although it is not

expressly permitted, a statute of limitations defense may be raised in a motion under Rule 12(b)(6) where the expiration of the limitations period is apparent on the face of the complaint. *Wisniewski*, 857 F.3d at 157 (citations omitted); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (citations omitted). That is the case here.

An FDCPA claim must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). If the claim is based on allegations of improper debt collection litigation, the statute of limitations begins running either when the underlying collection action is filed or when the debtor was served with the complaint. *Schaffhauser v. Citibank (S.D.) N.A.*, 340 F. App'x. 128, 130–31 (3d Cir. 2009) (per curiam) (first citing *Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997); and then citing *Johnson v. Riddle*, 305 F.3d 1107, 1113 (10th Cir. 2002)).[4]

PPC filed suit against Mickman in November 2014.[5] She was served in June 2015.[6] This lawsuit was not filed until 2021—six years later. Thus, the statute of limitations expired several years before she initiated this lawsuit.[7]

Apparently aware of the untimeliness of her claim, Mickman argues she is entitled to equitable tolling. Equitable tolling is available in FDCPA suits. *Rotkiske v. Klemm,* 890

[4] To the extent Mickman attempts to argue that her litigation with PPC constituted a "continuing violation" that would toll the statute of limitations, *see Am. Compl. at* ¶ 54, there is no support for that theory. *See Taggart v. New Century Financial Services, Inc.,* No. 20-4261,2022 WL 824099 at *4 (E.D. Pa., Mar. 18, 2022) (McHugh, J.) (citing *Schaffhauser*, 340 Fed. App'x. at 131).

[5] Am. Compl. at ¶ 9.

[6] *Id.*

[7] Under either approach, this FDCPA claim is untimely. *See Taggart,* 2022 WL 824099 at *4 (explaining that "a panel of the Third Circuit noted that courts are split as to whether the FDCPA's one year statute of limitations begins to run from the filing of the underlying collection action, or the date on which the purported debtor was served with the complaint" and holding that under "either measure, [the plaintiff's] FDCPA claims, are untimely" (citing *Schaffhauser*, 340 F. App'x. at 130))).

F.3d 422, 428 (3d Cir. 2018). It is used sparingly, when either "the defendant has actively misled the plaintiff respecting [his or her] cause of action," the plaintiff has been "prevented from asserting his or her rights" in some "extraordinary way," or when "the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Glover v. F.D.I.C.,* 698 F.3d 139, 151 (3d Cir. 2012) (quoting *Santos ex rel. Beato v. United States*, 559 F.3d 189, 197 (3d Cir. 2009)). Here, Mickman has alleged no special circumstances. She offers no factual bases to excuse her late filing. Therefore, her FDCPA claim is barred by the statute of limitations.

§ 1983 Claims

Mickman also alleges that the defendants violated her civil rights under 42 U.S.C. § 1983 during the underlying litigation. Specifically, she claims that PPC "procured a Motion in Limine" against her that deprived her of the ability to raise defenses and that this legal action deprived her of her substantive and procedural due process rights under the Fourteenth Amendment.[8]

Only a person acting under color of state law may be liable for a constitutional deprivation under § 1983. The defendant must be "clothed with the authority of state law." *West v. Atkins,* 487 U.S. 42, 49 (1988) (citations omitted). A private entity can only be liable under § 1983 if it is deemed a state actor. *P.R.B.A. Corp. v. HMS Host Toll Roads, Inc.,* 808 F.3d 221 (3d Cir. 2015) (analyzing whether a private corporation was considered a state actor for § 1983 liability).

A private party is deemed a state actor only if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated

[8] *See* Am. Compl. at ¶ 15.

as that of the State itself." *Id.* at 224 (quoting *Brentwood v. Tenn. Assembly Sch. Athletic Ass'n,* 531 U.S. 288, 295 (1982)). In other words, the test is whether there is pervasive entwinement of governmental authority in the composition and working of the private party. *Id.* (quoting *Brentwood,* 531 U.S. at 298). The requisite nexus exists when the private party exercises powers that are traditionally the exclusive prerogative of the State, the private party acted with assistance or in concert with the State, or whether it was in a symbiotic relationship with the State so that it is recognized as a joint participant in the challenged action. *Kach v. Hose,* 589 F.3d 626, 646 (3d Cir. 2009).

Mickman has not alleged that the defendants are state actors. They are private corporations who were not acting on behalf of the state. There are no facts showing any governmental involvement. Because Mickman has failed to allege facts showing that the defendants were state actors or acting on behalf of the state, her § 1983 claims fail.

Fraud Claims

Mickman alleges that PPC and White & Williams engaged in fraud against her.[9] Her allegations are insufficient to satisfy the heightened pleading standard for fraud under Federal Rule of Civil Procedure 9(b).

Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). To comply with Rule 9(b), a complaint must state "the 'date, place or time' of the fraud," or otherwise inject "precision and some measure of substantiation into [the] allegations of fraud." *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). Rule 9(b)

[9] Am. Compl. at ¶ 1.

requires a plaintiff to identify the source of the allegedly fraudulent misrepresentation or omission. *See Klein v. Gen. Nutrition Cos., Inc.*, 186 F.3d 338, 345 (3d Cir. 1999) (citation omitted). Mickman's amended complaint summarily accuses the defendants of defrauding her but is bereft of any particularities of fraudulent actions. Her claims of fraud are mere labels of causes of action without factual support. Thus, Mickman's fraud claims fail.

Conclusion

We conclude that Mickman's FDCPA claims are time-barred, her § 1983 claims cannot proceed as a matter of law, and her fraud claims fail for lack of particularity under Rule 9(b). Therefore, we shall dismiss the FDCPA and § 1983 claims with prejudice and dismiss her fraud claims without prejudice.