Filed 7/23/19 Timlick v. NCB Management Services CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ROBERT LOUIS TIMLICK, Plaintiff and Appellant, v. NCB MANAGEMENT SERVICES, INC., Defendant and Respondent.	A152467 (Lake County Super. Ct. No. CV-416919)

In *Timlick v. National Enterprise Systems, Inc.* (2019) 35 Cal.App.5th 674 (*Timlick*), we held the procedure for curing violations of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act; Civ. Code,[1] § 1788 et seq.) set forth in section 1788.30, subdivision (d) (hereafter section 1788.30(d)),[2] is available to debt collectors to correct curable violations of the minimum type-size requirement for consumer debt collection letters under sections 1812.700 to 1812.702.[3] (*Timlick*, at p. 678.) We further

[1] Unless otherwise indicated, all further statutory references are to the Civil Code.

[2] Section 1788.30(d) provides: "A debt collector shall have no civil liability under this title if, within 15 days either after discovering a violation which is able to be cured, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor."

[3] For purposes of this opinion, we will refer to sections 1812.700 to 1812.702 collectively as the Consumer Collection Notice law. Under this law, third-party debt collectors subject to the federal Fair Debt Collections Practices Act (FDCPA; 15 U.S.C. § 1692 et seq.) must, in their first written notice to debtors, provide a "description of

held that despite the defendant debt collector's act of curing its type-size violation as to the named plaintiff in that putative class action (Lisa Arlene Timlick), the trial court erred in dismissing the entire action without first affording her the opportunity to amend her complaint, redefine the putative class, or locate a suitable class representative. (*Ibid*.)

In the instant appeal, we are presented with what appears to be a nearly identical case brought by plaintiff Robert Louis Timlick against defendant third-party debt collector NCB Management Services, Inc. (NCB). As in *Timlick*, we conclude section 1788.30(d) was available to the debt collector to cure its alleged violation of the Consumer Collection Notice law, but we reverse the dismissal of the putative class action and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The operative class action complaint filed by plaintiff alleges as follows. After defaulting on a loan issued by Bank of America, N.A., plaintiff received a collection letter dated November 7, 2016, from third-party debt collector NCB. This was the first written communication from NCB to plaintiff regarding the subject debt. The letter did not comply with section 1812.701, subdivision (b) (hereafter section 1812.701(b)), of the Consumer Collection Notice law because certain statutorily-required language was not in a type-size that was at least the same as that used to inform plaintiff of the debt, or 12-point type. Plaintiff pleaded a single cause of action against NCB for violation of section 1812.701(b) and sought to recover statutory damages, costs, and attorney's fees. He also sought to represent a class of persons in California who received similar noncomplying consumer debt collection letters from NCB during the one-year period prior to the complaint's filing date.

NCB moved for summary judgment on the ground that, given the undisputed material facts, plaintiff could not prevail on his section 1812.701(b) claim because NCB

---

debtor rights" under state and federal law. (§ 1812.700, subd. (a).) The type-size used in this letter "shall be at least the same type-size as that used to inform the debtor of his or her specific debt, but is not required to be larger than 12-point type." (§ 1812.701, subd. (b).)

had timely cured the type-size violation pursuant to section 1788.30(d). NCB submitted evidence that on January 17, 2017, eight days after it was served with plaintiff's complaint, NCB sent a letter to plaintiff, in care of his counsel of record, enclosing a revised collection letter which set forth the required language in the same type-size as that used to inform him of his specific debt.

Plaintiff did not dispute NCB's evidence or material facts. Rather, he argued the inapplicability of section 1788.30(d)'s cure provision to type-size violations of section 1812.701(b).

The trial court disagreed with plaintiff and instructed NCB's counsel to draft an order granting its summary judgment motion. The order that was entered not only granted NCB's motion but also dismissed the complaint with prejudice and without leave to amend.

Plaintiff appealed.

DISCUSSION

On appeal, plaintiff reiterates his contentions below that section 1788.30(d)'s cure provision is unavailable for violations of section 1812.701(b)'s type-size requirement. Plaintiff additionally contends the trial court erroneously dismissed the entire putative class action, as this allowed NCB to pick him off as the named plaintiff.

A. Civil Code Section 1788.30(d)

Plaintiff argues that section 1788.30(d)'s cure provision does not apply to NCB's type-size violation for the following reasons. First, section 1788.30(d) was repealed when the Legislature enacted section 1788.17 to harmonize the Rosenthal Act with the FDCPA. Second, the cure provision applies only to violations under the title of the Civil Code in which it is codified (title 1.6C) and has no application to NCB's section 1812.701(b) violation, which falls under title 2.97. Third, NCB's type-size violation is not one "which is able to be cured" within the meaning of section 1788.30(d) because the Consumer Collection Notice law requires compliance in the debt collector's *first* written communication to the consumer debtor.

We addressed and rejected these contentions in *Timlick, supra,* 35 Cal.App.5th at pages 682–685. The parties in this action were given an opportunity to address *Timlick*'s effect on the issues here, and their supplemental briefing has been considered. As we explain below, plaintiff offers no legal authority or rationale supporting a different outcome here.[4]

Plaintiff first contends *Timlick* erred by citing the 2003 legislative history of the Consumer Collection Law to discern the legislative intent behind enacting section 1788.17 in 1999, as "[t]he declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law." (*Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal.4th 1158, 1171 (*Jones*).) This argument is off the mark.

In analyzing whether section 1788.17 repealed section 1788.30(d)'s cure provision so as to eliminate the curability of requirements imposed by the Consumer Collection Notice law, *Timlick* looked first to section 1788.17's plain language and then to its legislative history. (*Timlick, supra,* 35 Cal.App.5th at pp. 682–684.) Our review disclosed nothing indicating an intent by the Legislature to repeal section 1788.30(d). (*Timlick*, at p. 683.) Only then did *Timlick* observe—with the qualification that the legislative history of the later-enacted Consumer Collection Notice law had no bearing on the legislative intent of section 1788.17—that the Legislature's continued references to the cure provision four years after enacting section 1788.17 were logically inconsistent with the notion of repeal. (*Timlick*, at p. 684.) Our analysis in *Timlick* did not place significant weight on the comments made in the legislative history of the Consumer Collection Law, and therefore did not run afoul of the principle articulated in *Jones*.

---

[4] Both parties ask that we take judicial notice of lower court orders pursuant to Evidence Code section 452, subdivisions (c) and (d). Plaintiff requests judicial notice of a superior court order in an unrelated case that involved the same debt collector as in *Timlick*. NCB requests judicial notice of the superior court's order in *Timlick*. We deny both requests, as the documents are not relevant to our resolution of this appeal.

Plaintiff further argues that because type-size compliance must be made in the first written communication with the debtor, a subsequent collection letter simply cannot restore the debtor to the position he or she was in before receiving the initial communication. In support, he cites several federal decisions in which the courts held, for differing reasons, that a communication in violation of the FDCPA could not be cured or corrected. (*Arroyo v. Solomon & Solomon, P.C.* (E.D.N.Y. Nov. 7, 2001, 99-CV-8302 (ARR)) 2001 U.S.Dist. Lexis 21908, *37–38 [refusing to apply cure provisions of Higher Education Act of 1965, 20 U.S.C.S. § 1071 et seq. to FDCPA]; *Donohue v. Quick Collect, Inc.* (9th Cir. 2010) 592 F.3d 1027, 1032, fn. 1 [noting that sections 1692e and 1692f of FDCPA do not permit unlawful representations to be corrected by later communications]; *Eads v. Wolpoff & Abramson, LLP* (W.D.Tex. 2008) 538 F.Supp.2d 981, 986 [debt collector who filed state court petition seeking to recover more than actual value of debt could be liable under FDCPA even though petition was amended].) Based on these authorities, plaintiff argues the Rosenthal Act should not be interpreted in a way that deviates from the interpretations of its federal analog.

But these federal cases are clearly distinguishable due to the absence of a cure provision in the FDCPA. While the FDCPA and the Rosenthal Act both provide debt collectors with a statutory defense for nonintentional violations that result notwithstanding the maintenance of procedures reasonably adapted to avoid such violations (15 U.S.C. § 1692k(c); § 1788.30, subd. (e)), plaintiff cites no provision in the FDCPA analogous to section 1788.30(d) that provides debt collectors with a window of time to correct curable violations of the FDCPA. Therefore, the foregoing federal decisions provide no guidance for interpreting a defense that is unique to the Rosenthal Act.

Plaintiff also relies on the Ninth Circuit Court of Appeals' decision in *Romero v. Dep't Stores Nat'l Bank* (9th Cir. 2018) 725 Fed.Appx. 537 (*Romero*)—a case we, too, cited in *Timlick* but without elaboration. (See *Timlick, supra*, 35 Cal.App.5th at pp. 683, fn. 5, 684–685, fn. 6.) *Romero* held that a Rosenthal Act violation is not curable within the meaning of section 1788.30(d) "if the creditor cannot undo the harm to a debtor that

its violation has already caused." (*Romero*, at p. 539.) "That California would require a creditor to return a debtor to the position she was in before the Rosenthal Act violation in order to 'cure' that violation finds support in other contexts, where future compliance is an insufficient 'cure' if the ill effects of a violation have not been or cannot be remedied. [Citations.] Because the Banks' violation here is the type that has allegedly caused harm like interruption of Romero's solitude, which cannot be cured merely by ceasing calls going forward, the district court erred in granting judgment for the Banks on this claim on the basis of the mere assertion of the defense." (*Id.* at p. 540.)

Romero does not support plaintiff's position, as the Ninth Circuit's analysis focused on the "harm" and the "ill effects" caused by the violation in determining whether it was curable within the meaning of section 1788.30(d). (*Romero, supra*, 725 Fed.Appx. at pp. 539–540.) In this sense, the violation and the harm are not one and the same. Indeed, if it were otherwise, no Rosenthal Act violation could be cured. Instead, section 1788.30(d) would be rendered a nullity because the debtor could never be returned to a state in which the violation never occurred. Plaintiff did not allege in his complaint or submit evidence in opposition to the summary judgment motion that he suffered any harm resulting from the type-size violation in NCB's initial collection letter, and he likewise disclaimed any consequent harm at oral argument. He does not claim, for example, that he was unable to enforce his rights as a debtor due to the illegibility of the disclosures in the initial collection letter. On this record, then, the type-size violation did not cause a harm or ill effect that could not be undone (see *Romero*, at p. 540), and the violation was therefore one that was curable by a timely and type-size-compliant follow-up letter. Thus, we conclude section 1788.30(d) allowed NCB to cure its violation of section 1812.701(b).

B. The Pick Off Exception in Putative Class Actions

Although preexisting language in the Rosenthal Act limits the law's remedies to individual actions, *Timlick* held that section 1788.18 subsequently made class action remedies available in Rosenthal Act suits by incorporating the class action remedies of the FDCPA "[n]otwithstanding any other provision of" the Rosenthal Act. (*Timlick*,

supra, 35 Cal.App.5th at pp. 685–689.) *Timlick* further held it was error for the trial court there to dismiss the entire putative class action after finding that the defendant had sent the named plaintiff a revised collection letter curing the alleged statutory violation. (*Id*. at pp. 689–690.) In so holding, *Timlick* found it appropriate to consider application of the "pick off exception," which recognizes that the involuntary receipt of relief by a named plaintiff does not, by itself, prevent him or her from continuing as a class representative. (*Ibid*.) As *Timlick* explained, the policy concerns underlying the pick off exception are implicated even when a debt collector obtains a victory on the merits of the named plaintiff's claim by voluntarily correcting—and thereby implicitly conceding—a type-size violation as to the named plaintiff only. (*Ibid*.) Just as in a typical pick off scenario, the debt collector voluntarily gives special treatment to the named plaintiff only, resulting in the elimination of his or her standing to maintain a putative class action. (*Schoshinski v. City of Los Angeles* (2017) 9 Cal.App.5th 780, 804.) In such cases, the dismissal effectively results in the deprivation of redress for putative class members lacking the financial means to initiate or join the litigation, and "any relief for the putative class members would require multiple individual suits, resulting in the kind of revolving door litigation that wastes judicial resources." (*Timlick*, at p. 690; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 873 (*La Sala*).)

Plaintiff acknowledges he did not proffer the pick off contention below but attributes this to the fact that NCB did not seek dismissal of the entire putative class action in its motion for summary judgment. This point is well-taken. The record shows that NCB moved for summary judgment based on an affirmative defense that applied only against the plaintiff's individual claim, not against the claim brought on behalf of the putative class. There was no mention of dismissing the entire putative class action in the notice, briefing, or arguments at the hearing. It was only in NCB's post-hearing proposed order that dismissal of the entire putative class was first mentioned. Under these circumstances, it appears the trial court granted relief to NCB that exceeded the scope of its motion.

We reverse the judgment of dismissal, observing that the dismissal appears to have exceeded the scope of NCB's motion, and remand the matter for the trial court's reconsideration of dismissal in light of *Timlick*, *supra*, 35 Cal.App.5th at pages 689–690, and *La Sala*, *supra*, 5 Cal.3d at page 873.

In closing, we note NCB claims to have cured the type-size violation as to all members of the putative class. NCB, however, concedes there is no evidence supporting its cure claim in the record on appeal. We may not give any consideration to alleged facts that are outside the record on appeal (*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn. 1), and we express no opinion as to how NCB's claim might be appropriately considered by the trial court.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

_____
Fujisaki, J.

WE CONCUR:

_____
Siggins, P. J.

_____
Petrou, J.

A152467