IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANTHONY MERCHANT, Plaintiff, v. NATIONWIDE RECOVERY SERVICE, INC., Defendant.	CIVIL ACTION FILE NO. 1:18-cv-4356-TCB

O R D E R

This case comes before the Court on Magistrate Judge J. Clay Fuller's final report and recommendation (the "R&R") [23], which recommends that Defendant Nationwide Recovery Service, Inc.'s motion [17] for summary judgment be granted. Plaintiff Anthony Merchant has filed objections [25].

I. Legal Standard

A. Review of an R&R

A district judge has a duty to conduct a "careful and complete" review of a magistrate judge's R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. Unit B 1982)). This review may take different forms, however, depending on whether there are objections to the R&R. The district judge must "make a de novo determination of those portions of the [R&R] to which objection is made." 28 U.S.C. § 636(b)(1)(C). In contrast, those portions of the R&R to which no objection is made need only be reviewed for "clear error." *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006) (per curiam) (quoting *Diamond v. Colonial Life & Accident Ins.*, 416 F.3d 310, 315 (4th Cir. 2005)).[1]

[1] *Macort* dealt only with the standard of review to be applied to a magistrate's factual findings, but the Supreme Court has indicated that there is no reason for the district court to apply a different standard to a magistrate's legal conclusions. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Thus, district courts in this circuit have routinely reviewed both legal and factual conclusions for clear error. *See Tauber v. Barnhart*, 438 F. Supp. 2d 1366, 1373–74 (N.D. Ga. 2006) (collecting cases). This is to be contrasted with the standard of review on appeal, which distinguishes between the two. *See Monroe v. Thigpen*, 932 F.2d 1437, 1440 (11th Cir. 1991)

"Parties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Nettles*, 677 F.2d at 410 n.8. "This rule facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." *Id.* at 410.

After conducting a complete and careful review of the R&R, the district judge "may accept, reject, or modify" the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1)(C); *Williams*, 681 F.2d at 732. The district judge "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

B. Motion for Summary Judgment

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as

(holding that when a magistrate's findings of fact are adopted by the district court without objection, they are reviewed on appeal under a "plain error standard" while questions of law always remain subject to de novo review).

to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex*, 477 U.S. at 324). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex*, 477 U.S. at 323).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex*, 477 U.S. at 324).

II. Background

The Court provides a summary of the facts but incorporates by reference the fact summary in the R&R.

Nationwide is a debt collector. In spring 2017, an outstanding medical bill to be paid by Merchant was assigned to Nationwide for collection.

During the eight-month period between March 10 and October 5, 2017, Nationwide made eight attempts to speak over the phone with

Merchant in order to collect the debt, and successfully spoke with him on four occasions.[2] Each call was made between 11:00 a.m. and 7:00 p.m.[3]

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[2] In his deposition, Merchant testified that he received calls approximately once every two weeks, rather than once a month, which would total approximately sixteen calls rather than eight. However, in response to Nationwide's statement of material facts, in which it contended that it called him eight times and spoke with him four times, he merely "denies that [Nationwide] called only eight times, or that [he] only spoke with [a representative] four times." [20] at 1.

This response plainly violates LR 56.1(B), which provides that when a movant for summary judgment files a statement of material facts, those facts are deemed admitted unless the respondent (1) "directly refutes the movant's fact with concise responses supported by specific citations to evidence"; (2) "states a valid objection to the admissibility of the movant's fact"; (3) correctly points out that the movant's record cite does not support the fact; or (4) properly asserts that the fact is immaterial. LR 56.1(B)(2)(a)(2), NDGa. Compliance with this rule is "the only permissible way for [a respondent] to establish a genuine issue of material fact" at the summary judgment stage. *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008). Accordingly, the stated number of calls is considered undisputed. *See* FED. R. CIV. P. 56(c)(1), (e)(2); LR 56.1(B)(2)(a)(2), NDGa.

Moreover, even if Nationwide had called Merchant sixteen times rather than eight, this marginally higher number of calls is far less than the number of calls other courts have found to give rise to harassment under the FDCPA. *See Meadows v. Franklin Collection Serv., Inc.*, 414 F. App'x 230, 233–34 (11th Cir. 2011) (per curiam) (finding a genuine dispute regarding the defendant's intent to harass where plaintiff received approximately 300 calls over a two-and-a-half month period, sometimes as many as three times a day).

[3] In his deposition, Merchant testified that he received one call before 10:00 a.m. In response to Nationwide's statement of material facts, however, he admits that the calls were all made between 11:00 a.m. and 7:00 p.m. Accordingly, there is no genuine issue of material fact as to the time of the calls.

The telephone calls in which Nationwide successfully spoke with Merchant occurred on April 26, August 18, September 19, and October 5. Each of these phone calls was recorded, per Nationwide policy regarding phone calls to debtors.

Nationwide argues that Merchant never asked its representatives to stop calling him. Merchant does not dispute what was said during the calls, but argues that what he said during the calls was sufficient to communicate to Nationwide that the calls were unwanted.

In the first call, Merchant learned that he was speaking to a Nationwide representative and stated that he was at work before hanging up. In the second call, he told the representative that he could not pay and directed the representative to call the Department of Veterans' Affairs for payment. When the representative told him that it could not stop collection efforts to await payment from the VA, he responded "Yeah, that's fine." [17] at Exh. D. In the third call, he told a representative that he would converse only with the business to which he owed the debt, not a collection agency. Then he hung up. Finally, in the fourth call, he said that he did not accept calls from collection agencies and hung up.

On October 9, counsel for Merchant sent a letter to Nationwide requesting that it no longer contact him regarding the debt. Nationwide complied with this request.

On September 17, 2018, Merchant filed this suit, seeking relief pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. He argues that Nationwide violated §§ 1692d and 1692d(5) of the FDCPA when it repeatedly called him to collect the debt, despite his repeated requests that the calls cease.

III. Discussion

The R&R notes that there is no question that Merchant was the subject of Nationwide's debt collection activity. Nevertheless, the R&R concludes that Nationwide did not violate §§ 1692d or 1692d(5). For the reasons enumerated below, the Court agrees.

Section 1692d of the FDCPA prohibits a debt collector from "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. "'[A]ctionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls.'" *Brown v. Credit Mgmt.*, 131 F. Supp. 3d 1322, 1340 (N.D. Ga. 2015) (quoting *Brandt v. I.C. Sys., Inc.*, No. 8:09-cv-126, 2010 WL 582051, at *2 (M.D. Fla. Feb. 19, 2010) (citations omitted)).

Furthermore, "[i]t is not enough that a debt collector's actions caused the consumer 'embarrassment, inconvenience, and further expense,' but rather those actions must 'manifest a tone of intimidation.'" *Middlebrooks v. Sacor Fin., Inc.*, 775 F. App'x 594, 597 (11th Cir. 2019) (quoting *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1305 (11th Cir. 2015)).

Under § 1692d(5), a debt collector violates the FDCPA if it "caus[es] a telephone to ring or engag[es] any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." 15 U.S.C. § 1692d(5). Thus, while the FDCPA is generally a strict liability statute, "Congress took care to require an element of knowledge or intent" in § 1692d(5). *Clark* *v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006) (internal quotations and citation omitted).

"[I]ntent may be inferred by evidence that the debt collector continued to call the debtor after the debtor had asked not to be called and had repeatedly refused to pay the alleged debt, or during a time of day which the debtor had informed the debt collector was inconvenient." *Brown*, 131 F. Supp. 3d at 1340 (quoting *Brandt*, 2010 WL 582051 at *2).

Merchant contends that the evidence shows that Nationwide intended to harass him because it continued to contact him even after he told its representatives that the VA was responsible for the bill; told its representatives that he would not speak with a collection agency; and hung up the telephone.

However, the Court, like the magistrate judge, is unpersuaded that any one of these communications constitutes a request to cease calling of the type that triggers liability under the FDCPA. *See Druschel v. CBB Credit Servs., Inc.*, No. 8:10-cv-838-T-33TBM, 2011 WL 2681637, at *5 (M.D. Fla. June 14, 2011) (finding that the plaintiff did not request that the defendant stop calling him when he explained to the defendant's representative that his financial situation and disabled status prevented him from making the payment because "even if Plaintiff's circumstances left him more susceptible to harassment or annoyance than the typical consumer, . . . the conduct of Defendant in this instance is not of the type conduct precluded by the FDCPA").

Such a finding is consistent with the purpose of the FDCPA, which "was passed in response to '[collection abuse [in the form of] obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer,' and other threatening and intimidating tactics." *Isaac v. RMB, Inc.*, No. 2:12-cv-2030-TMP, 2014 WL 1278096, at *7 (N.D. Ala. Mar. 27, 2014) (citing S. REP. NO. 95–382, at 5 (1977)).

Moreover, even if Merchant did in fact request that the calls cease, this alone would not automatically indicate that Nationwide intended to harass him. Instead, courts examining FDCPA claims consider the totality of the circumstances surrounding the call. *See Reddin v. Rash*

Curtis & Assocs., No. 2:15-01305 WBS CKD, 2016 WL 3743148, at *4 (E.D. Cal. July 13, 2016) (finding that there was some evidence "weighing slightly in favor of plaintiff's claim" because she had instructed the defendant not to call her again, but concluding based on the number of calls and the nature of the communications that summary judgment was owed as to both §§ 1692d and 1692d(5)); *see also Carman v. CBE Grp., Inc.*, 782 F. Supp. 2d 1223, 1232 (D. Kan. 2011) (noting that a genuine issue of material fact requires consideration of whether there was a high call volume and other indicia of "egregious conduct"); *Katz v. Capital One*, No. 1:09CV1059(LMB/TRJ), 2010 WL 1039850, at *3 (E.D. Va. Mar. 18, 2010) (granting summary judgment to defendant who contacted plaintiff 15 times after plaintiff's attorney contacted defendant to dispute the debt and instructed the defendant not to contact the plaintiff, because "[w]ithout any indicia of an unacceptable pattern of calls, this does not constitute harassment").

Here, the Court finds based on the totality of the circumstances that no reasonable jury could find that Nationwide's intent was to harass, oppress, or abuse Merchant. It contacted him, on average, once a month about a debt that he admitted that he owed. It did not call him in the middle of the night, contact his relatives, or use profane language to threaten him. Instead, Merchant admits that he confirmed to Nationwide that he owed the debt, its representatives called him only a few times over a period of months, and when a representative told him that the calls would continue even if the VA was ultimately going to pay the debt, he said "Yea, that's fine . . . ." [17] at D.

This is not a case where the plaintiff received approximately 300 calls over a two-and-a-half-month period (sometimes three times a day) from an automated dialer regarding debts she did not owe, even after she informed the collection agency that she did not live with or know the debtors. *See Meadows*, 414 F. App'x at 233–34. Nor is this a case in which the debt collector immediately called the plaintiff back five times in a row after the plaintiff hung up on the collector, *see Chiverton v. Fed. Fin. Grp., Inc.*, 399 F. Supp. 2d 96, 100 (D. Conn. 2005), or where the debt collector "was intimidating or threatening in her phone communications," *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994).

Accordingly, the Court agrees with the conclusion of the magistrate judge that Nationwide did not violate § 1692d(5) because the evidence does not demonstrate an intent to harass. For the same reasons, no reasonable jury could find that the "natural consequence" of Nationwide's calls were to harass, oppress, or abuse Merchant, as required for an FDCPA claim based solely on § 1692d.

IV. Conclusion

For the foregoing reasons, the Court agrees with the findings of the R&R [23] and concludes that, because no reasonable jury could find that Nationwide's calls constituted harassment or abuse or were intended to do so, summary judgment is appropriate as to both claims. Accordingly, the Court adopts as its Order the R&R [23] and overrules Merchant's objections [25]. The motion [17] for summary judgment is granted, and the Clerk is directed to close this case.

IT IS SO ORDERED this 24th day of February, 2020.

Timothy C. Batten, Sr.
United States District Judge