In the United States District Court for the Southern District of Texas

GALVESTON DIVISION

No. 3:21-cv-238

RODOLFO RAMIREZ, *PLAINTIFF*,

v.

SEQUIUM ASSET SOLUTIONS, LLC, *DEFENDANT*.

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

Before the court are the defendant's motions for summary judgment and sanctions. Dkts. 21; 25. The court grants summary judgment and denies the sanctions.

I. BACKGROUND

The plaintiff, Rodolfo Ramirez, brings this action for damages against Sequium Asset Solutions, LLC, for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., and the Texas Debt Collection Act ("TDCA"), Tex. Fin. Code Ann. § 392 *et seq*. Dkt. 1.

Ramirez alleges that in the summer of 2021, he began receiving calls to his previous cellular phone number from Sequium. *Id*. ¶ 10. Ramirez then

acquired his current phone and number. *Id.* ¶ 11. Subsequently, Ramirez again received calls from Sequium to this current phone number. *Id.* ¶ 12. Ramirez alleges that Sequium used a variety of numbers when placing calls to his cell phone. *Id.* ¶ 14.

Ramirez alleges that Sequium's calls were to collect a debt owed by someone Ramirez did not recognize. *Id.* ¶¶ 17, 19. Ramirez alleges that he demanded on many occasions that Sequium cease calling him. *Id.* ¶ 18. Instead of stopping, he received at least 50 calls after demanding Sequium stop, sometimes multiple times a day. *Id.* ¶¶ 22–24.

Ramirez sued Sequium alleging violations of the FDCPA and TDCA. *Id.* ¶¶ 28–54. Ramirez seeks declaratory and injunctive relief, as well as statutory, compensatory, and punitive damages and fees. *Id.*

Sequium has moved for summary judgment. Dkt. 21.

II. LEGAL STANDARD

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence in the light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The movant bears the burden of presenting the basis for the motion and the elements of the causes of action on which the

nonmovant will be unable to establish a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to offer specific facts showing a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

The court "may not make credibility determinations or weigh the evidence" in ruling on a summary-judgment motion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). But when the nonmoving party has failed "to address or respond to a fact raised by the moving party and supported by evidence," then the fact is undisputed. *Broad. Music, Inc. v. Bentley*, No. SA-16-CV-394-XR, 2017 WL 782932, at *2 (W.D. Tex. Feb. 28, 2017). "Such undisputed facts may form the basis for summary judgment." *Id.*

A motion for summary judgment "cannot be granted simply because there is no opposition." *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 362 n.3 (5th Cir. 1995). When no response is filed, the court may accept as undisputed the facts set forth in support of the unopposed motion and grant

summary judgment when the movant makes a prima facie showing he is entitled to judgment. *See Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988); *Rayha v. United Parcel Serv., Inc.*, 940 F. Supp. 1066, 1068 (S.D. Tex. 1996). The court may grant summary judgment on any ground the record supports, even if the movant does not raise that particular ground. *United States v. Hous. Pipeline Co.*, 37 F.3d 224, 227 (5th Cir. 1994).

III. ANALYSIS

A. FDCPA and TDCA Claims

Sequium argues Ramirez's FDCPA and TDCA claims fail because he never requested the defendant cease calling. Dkts. 21 at 4; 52, 54. The court considers this argument in the context of both statutes, in turn.

1. FDCPA Claim

To bring a FDCPA claim, Ramirez must allege facts in support of each of the following elements: (1) the plaintiff is a consumer; (2) the debt at issue is a consumer debt; (3) the defendant is a debt collector; and (4) the defendant has violated 15 U.S.C. § 1692. *See Whittiker v. Deutsche Bank Nat. Tr. Co.*, 605 F. Supp. 2d 914, 926 (N.D. Ohio 2009) (mem. op.); *see also Garcia v. Jenkins/Babb LLP*, No. 3:11-CV-3171-N-BH, 2013 WL 3789830, at *5–8 (N.D. Tex. July 22, 2013); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

Ramirez alleges that Sequium violated the following sections of the FDCPA—15 U.S.C. §§ 1692b, b(3), c(a)(1), c(b), d, d(5), e, e(10), and f. Dkt. 1 ¶¶ 28–45. These myriad claims, however, boil down to the single allegation that Ramirez requested Sequium stop calling him and that Sequium refused to stop. *Id.* ¶¶ 34, 36, 44.

Despite the plaintiff's allegations to the contrary, Sequium presents competent summary-judgment evidence that it argues conclusively establishes that Ramirez never asked Sequium to stop calling. Dkt. 21 at 5. This evidence includes two sets of account notes, one call log, and six recordings that are relevant to Ramirez's claims. *See* Dkts. 21-1 to 21-6. Moreover, Sequium argues that the evidence shows that not only did Ramirez never request the calls stop, but that Sequium never even spoke with Ramirez. Dkt. 21 at 5. Ramirez admitted in his deposition to never speaking with Sequium:

> Q. Okay. How many times did you speak with Sequium?
>
> A. I never really spoke with them. I always answered and it would take too long for somebody else to answer back. So one time I told them to stop calling me.[1]
>
> Q. Okay. You mentioned -

[1] Ramirez later clarified his testimony that while he may have asked for calls to stop, he made that request knowing that there was nobody on the phone on Sequium's end. Dkt. 21-6 at 21:13–15.

> A. But the only re -
>
> Q. Go ahead. I'm sorry.
>
> A. No. The only reason I knew -- I found out it was Sequium because I wrote down the number and, you know, went on Google, and I was trying to find out who it was. And I would block one of the numbers from them and they would call me from another number, and that happened about four times. I would block one number and they would call me from another number.
>
> Q. Okay. Now, did I hear you correctly that you said you never spoke with anyone at Sequium?
>
> A. Yeah, I never – **I never spoke with anyone**.

Dkt. 21-6 at 20:13–21:6 (emphasis added).

Sequium also presents substantial, corroborating evidence that confirms Ramirez never requested the company stop calling. *See* Dkts. 21-1 to 21-6. Sequium's account notes, call log, and call recordings all conclusively establish that Ramirez's claims are without merit. The record before the court demonstrates there is no genuine issue of material fact as to the failure of Ramirez's claims. Accordingly, the court grants summary judgment in Sequium's favor on Ramirez's FDCPA claims.

2. TDCA Claims

Ramirez alleges that Sequium violated two provisions of the TDCA. First, Ramirez alleges that Sequium violated § 392.302(4), which states that "a debt collector may not oppress, harass, or abuse a person by causing a

telephone to ring repeatedly or continuously, or making repeated or continuous telephone calls, with the intent to harass a person at the called number." Tex. Fin. Code § 392.302(4). Second, Ramirez alleges that Sequium violated § 392.304(19), which prohibits a debt collector from "using any . . . false representation or deceptive means to collect a debt or obtain information concerning a consumer." Tex. Fin. Code § 392.304(19).

"The conduct prohibited under the TDCA is coextensive with that prohibited under the FDCPA, at least insofar as '[t]he same actions that are unlawful under the FDCPA are also unlawful under the TDCA.'" *Gomez v. Niemann & Heyer, L.L.P.*, No. 1:16-CV-119 RP, 2016 WL 3562148, at *6 (W.D. Tex. June 24, 2016) (citing *Bullock v. Abbott & Ross Credit Servs., L.L.C.*, No. A-09-CV-413, 2009 WL 4598330, at *2 n.3 (W.D. Tex. Dec. 3, 2009)). Because the FDCPA and TDCA are isomorphic (that is, they share the same general structure but are identified by different names), courts generally apply the same analysis to assess the sufficiency of a FDCPA claim and a TDCA claim. *Fiddick v. Bay Area Credit Serv., LLC*, No. 3:18-CV-00416, 2019 WL 1858824, at *4 (S.D. Tex. Apr. 25, 2019).

As above, the record before the court demonstrates there is no genuine issue of material fact as to the failure of Ramirez's claims. Accordingly, the court grants summary judgment on Ramirez's TDCA claims.

B. Sanctions

Sequium has also moved for sanctions under 28 U.S.C. § 1927. Dkt. 25. Sequium seeks its attorney's fees and costs from Ramirez's lead counsel, Nathan Volheim of Sulaiman Law Group LTD ("SLG"). *Id.* at 1. Sequium argues that Volheim's conduct warrants sanctions because his actions during the entire litigation unreasonably and vexatiously multiplied the proceedings in this case. *Id.* Specifically, Sequium contends that Volheim and SLG possessed evidence showing that their client's claims were without merit, and that his client in fact no longer wished to pursue his claims. *Id.*

Sequium also seeks to recover its attorney's fees and costs under 15 U.S.C. § 1692k(a)(3). *Id.* at 2. The FDCPA allows defendants to recover their reasonable attorney's fees and costs when a case is brought in bad faith and for harassment. Sequium argues that this standard is met because Ramirez's deposition testimony contradicts his own allegations. *Id.* Although he alleges that he requested that Sequium cease calling him on multiple occasions and that, despite said requests, calls did not cease, Ramirez testified that he has in fact never spoken with anyone at Sequium. *Id.*

1. Legal Standard

a. Section 1927

Title 28 U.S.C. § 1927 provides in pertinent part:

An attorney or other person admitted to conduct cases in any

> court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. To justify such sanctions, the three elements of the statute must be met. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003). First, an attorney must engage in unreasonable and vexatious conduct. *Id.* Second, this conduct must multiply the proceedings. Third, the amount of the sanction cannot exceed the costs incurred due to the unreasonable conduct. *Id.*

Sanctions under 28 U.S.C. § 1927 require "evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." *Bryant v. Mil. Dep't of Miss.*, 597 F.3d 678, 694 (5th Cir. 2010) (quoting *Proctor & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525–26 (5th Cir. 2002)). Under § 1927, the Fifth Circuit generally requires a detailed finding that the proceedings were both "unreasonable" and "vexatious." *FDIC v. Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994). Thus, the court must make a separate determination on both the issue of the reasonableness of the claims and the purpose of the suit. *Calhoun*, 34 F.3d at 1300 (citing *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994)).

A determination of bad faith, satisfying the "unreasonable" prong, is proper where an attorney knowingly or recklessly pursues a frivolous claim. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993); *Manax v. McNamara*, 842 F.2d 808, 814 (5th Cir. 1988). An improper motive, which satisfies the "vexatious" prong, does not necessarily refer to bad faith or intent to harass. *Ratliff v. Stewart*, 508 F.3d 225, 235 n. 13 (5th Cir. 2007). Vexation implies something broader than that. *Id.*

To "vex" is defined, among other things, as "to bring trouble or distress to," "to subject to mental suffering," "to irritate or annoy," as well as "to tease or torment." *Id.* (quoting Webster's Third New International Dictionary of the English Language 2548 (1981)). Consistent with this, the Fifth Circuit in *Calhoun* held that a showing of bad faith is not the only way to establish an "improper purpose." *Ratliff*, 508 F.3d at 235 n.13. Indeed, any "reckless disregard of the duty owed to the court" can suffice. *Id.* (citing *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998)).

When an attorney's conduct is so obviously unreasonable that a court can infer an "improper purpose" from the fact that the attorney persisted in it, the court need not explain at length why the vexatiousness prong is met. *Ratliff*, 508 F.3d at 234. "Like a sliding scale, the degree and extent to which a specific explanation must be contained in the record will vary accordingly

with the particular circumstances of the case, including the severity of the violation, the significance of the sanctions, and the effect of the award." *Id.* (quoting *Thomas v. Cap. Sec. Servs.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc)).

Courts may apply § 1927 only to punish attorneys. *Proctor & Gamble*, 280 F.3d at 525. Only fees and costs associated with "the persistent prosecution of a meritless claim" may be awarded. *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991). When the entire course of proceedings was unwarranted and should neither have commenced nor persisted, an award under § 1927 may shift the entire financial burden of an action's defense. *Id.* Courts considering whether an attorney acted in bad faith do not consider the attorney's subjective intent, but rather the attorney's objective conduct. *Amlong & Amlong P.A., v. Denny's, Inc.*, 500 F. 3d 1230, 1241 (11th Cir. 2007) ("In short, a district court may impose sanctions for egregious conduct by an attorney even if the attorney acted without specific purpose or intent to multiply the proceedings.").

b. Section 1692k

The FDCPA authorizes a court to award defendants their reasonable attorney's fees and costs in defending a case brought in bad faith and for the purpose of harassment. 15 U.S.C. § 1692k(a)(3). Bad faith is found where

plaintiffs (1) knew their claim was meritless, and (2) pursued it to harass the defendant. *Gillis v. Deutsche Bank Tr. Co. Ams.*, No. 2:14-cv-418, 2016 WL 551765, at *3 (M.D. Fla. Jan. 26, 2016). Deposition testimony that contradicts the claims contained in the complaint can prove that a plaintiff knew a claim was meritless. *Id.* at *10–11.

2. Discussion

Sequium argues that as early as January 2022, Volheim possessed evidence showing that his client lacked factual support, yet he continued prosecuting the case. Dkt. 25 at 5. Ramirez's FDCPA and TDCA claims were both predicated on the assertion that he spoke to Sequium and informed the company that it was calling the incorrect number and attempting to reach the wrong person, and that, despite this, Sequium continued to call him. *Id.* at 6. Sequium contends this did not occur, and Volheim knew it. *Id.*

Sequium states its counsel made Volheim aware that his client's claim lacked any merit very early on in the case. *Id.* at 7. On December 16, 2021, Sequium's counsel informed Volheim that "Sequium's position is that there is no liability." Dkt. 25-2. In response, Volheim stated that he would "take a look at discovery and act from there." *Id.*

Sequium provided discovery responses to Volheim on January 19, 2022. *See* Dkts. 25-3 to 25-4. Supplemental responses and documentation

were also provided to Volheim on January 21, February 1, and March 24, 2022. *See* Dkts. 25-5 to 25-13. Sequium contends these responses and documentation show that Ramirez never requested calls to cease and, in fact, never even spoke to Sequium. Dkt. 25 at 7. Sequium further argues that despite these discovery responses showing that his client's claims had no merit, and his prior assertion that he would review same and "act from there," Volheim continued to pursue the claims. Dkt. 25-2.

Counsel for Sequium again advised Volheim that its position was that of no liability and offered to discuss any perceived violations or issues with the discovery responses once Volheim had a chance to review them. *See* Dkt. 25-14. At this point, Volheim attempted to assert that the basis of his client's claims was that Sequium "recklessly skip-traced [Ramirez] and made a series of wrong-party calls." Dkt. 25-15. Regardless of the validity or viability of skip-tracing as a violation of either the FDCPA or the TDCA, Ramirez neither asserted such a claim in his complaint nor attempted to amend it to include such a claim, so it could not form the basis for continuing to pursue his case.

Ramirez's deposition testimony, provided on May 10, 2022, clearly demonstrated that his claims lacked merit. Dkt. 21-6 at 20:13–21:6. Specifically, his testimony showed the falsity in Ramirez's initial assertions that he spoke to Sequium and asked Sequium to stop calling him. *Id*. at 21:4–

19. Sequium also contends that Ramirez's deposition testimony further demonstrated that Volheim was aware his client no longer wanted to pursue the case. *Id.* at 31:11–13. In spite of this testimony, Volheim insisted on pursuing this case and demanding a settlement from Sequium. Dkt. 25-17.

Counsel for Sequium tried to reason with Volheim before incurring further fees for drafting a motion for summary judgment, but Volheim refused to acknowledge the case's deficiencies, and continued to demand settlement from Sequium. *Id.* Sequium filed its motion for summary judgment on June 3, 2022. Dkt. 21. Thereafter, Volheim filed a motion to dismiss his client's complaint with prejudice on July 8, 2022. Dkt. 24.

Volheim responds that Sequium's motion is premised entirely upon a faulty assumption—the meritless and frivolous nature of Ramirez's claims. Dkt. 27. Volheim argues that Ramirez's claims were not frivolous when filed, and that Ramirez's claims remained colorable even after his deposition. *Id.* Volheim contends that Ramirez's decision to dismiss his claims with prejudice does not indicate any sort of vexatious or bad-faith approach to the instant matter; rather, it reflects Ramirez's desire to move on with his life and no longer deal with this case. *Id.*

The truth lies somewhere in between Volheim's and Sequium's positions. Volheim was certainly unreasonable in his refusal to dismiss the

complaint before Sequium filed its motion for summary judgment, but the court cannot say on this record that his conduct was vexatious. The record does not support the finding that there was an improper motive or purpose. Rather, it more clearly supports the finding that Volheim relied, to his detriment, on his plaintiff's weak claims and on legal arguments he had made in other courts that, though not meritless, were not winning arguments. *See Shannon v. State Collection Serv., Inc.*, No. 19-CV-983-WMC, 2021 WL 495150, at *4 (W.D. Wis. Feb. 10, 2021) (finding plaintiff did not give the defendant debt collector notice to stop calling when he merely "made the request in response to a recorded voice message" without following the prompts to connect with a live representative).

At best, such conduct reveals an overzealous advocate. At worst, it shows an officer of the court's unreasonable refusal to acknowledge that—in light of weak claims and an unwilling plaintiff—his case was at its natural conclusion. Such conduct, while deserving of reproach, does not merit sanctions. The court admonishes Mr. Volheim to do better.

* * *

For the reasons stated above, the court grants the motion for summary judgment and denies the motion for sanctions. Dkts. 21; 25. Final judgment to be separately entered.

Signed on Galveston Island this 29th day of November, 2022.

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE