

**APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK FOR THE 9TH & 10TH JUDICIAL DISTRICTS**

Argued - April 3, 2025 Term

JERRY GARGUILO, P.J.
GRETCHEN WALSH
JOSEPH R. CONWAY, JJ.

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DECISION & ORDER

David Ginocchio, Respondent, v Resurgent
Receivables, LLC, Appellant.

Appellate Term Docket No.
2024-407 S C

Lower Court # CV-000774-22/BR
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J. Robbin Law, PLLC (Austin O'Brien of counsel), for appellant.

Barshay, Rizzo & Lopez, PLLC (David M. Barshay of counsel), for respondent.

Appeal from an order of the District Court of Suffolk County, Sixth District (James F. Matthews, J.), entered April 5, 2024. The order, insofar as appealed from, denied, as premature, defendant's motion for summary judgment dismissing the complaint, without prejudice to renewal following the completion of discovery.

ORDERED that the order, insofar as appealed from, is reversed, without costs, and defendant's motion for summary judgment dismissing the complaint is granted.

Plaintiff commenced this action by summons and verified complaint dated March 22, 2022 to recover damages for violations of General Business Law § 349 and the Fair Debt Collection Practices Act (FDCPA) (15 USC § 1692 *et seq.*) and for negligence per se, negligence, and negligent misrepresentation in connection with his receipt of a debt collection letter from defendant. The complaint asserted two principal theories of liability: the mailing vendor theory (i.e., that defendant disclosed plaintiff's private information to a third-party mailing vendor without plaintiff's consent), the basis of the first through fourth causes of action, alleging violations of General Business Law § 349, violations of the FDCPA, negligence per se, and negligence, respectively; and the unknown creditor theory (i.e., that defendant did not own the debt it was attempting to collect), the basis of the fifth through ninth causes of action, alleging violations of General Business Law § 349, violations of the FDCPA, negligence per se, negligence, and negligent misrepresentation, respectively.

Defendant moved for summary judgment dismissing the complaint. Plaintiff, in effect, opposed on the grounds that the motion was premature and without merit and cross-moved for an order prohibiting defendant from introducing evidence demanded by plaintiff in discovery but not provided by defendant. Defendant appeals from so much of an order of the District Court (James F. Matthews, J.) entered April 5, 2024 as denied defendant's motion as premature, without prejudice to renewal following the completion of discovery.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “If the moving party meets this burden, the burden then shifts to the non-moving party to ‘establish the existence of material issues of fact which require a trial of the action’ ” (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In support of the branches of its motion seeking summary judgment dismissing the first through fourth causes of action, defendant conceded that it had shared information about plaintiff's account with a third party in order to collect the debt at issue, but argued that this practice does not violate General Business Law § 349 or the FDCPA and does not constitute negligence per se or negligence.

The District Court should have granted that branch of defendant's motion which was for summary judgment dismissing the first cause of action, alleging a violation of General Business Law § 349. “A cause of action under General Business Law § 349 requires evidence that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice” (*Aracena v BMW of N. Am., LLC*, 159 AD3d 664, 666 [2018] [internal quotation marks omitted]; see *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). Defendant's submissions established, prima facie, that it did not engage in consumer-oriented acts or practices that were deceptive or misleading in a material way (see *Silver v CitiMortgage, Inc.*, 162 AD3d 812, 813-814 [2018]; *Aracena v BMW of N. Am., LLC*, 159 AD3d at 666; *Disa Realty, Inc. v Rao*, 137 AD3d 740, 742 [2016]; *Amalfitano v NBTY, Inc.*, 128 AD3d 743, 745 [2015]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172 [2012]). In opposition, plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

We agree with those courts that have concluded that “[u]sing a mailing vendor to contact a consumer in a legitimate attempt to collect a debt is not a practice the [FDCPA] was meant to prohibit” (*Barclift v Keystone Credit Servs., LLC*, 93 F4th 136, 147 n 6 [3d Cir 2024], cert denied ___ US ___, 145 S Ct 169 [2024]; see *Madlinger v Fin. Recovery Servs., Inc.*, 2023 WL 3240795, *5, 2023 US Dist LEXIS 80956, *15 [DNJ, Jan. 9, 2023, No. 21-01288 (FLW)]; *Navarroli v Medcredit, Inc.*, 2022 WL 4465840, *6, 2022 US Dist LEXIS 174289, *13 [ND Ill, Sept. 26, 2022, No. 21-cv-6203]; *Nabozny v Optio Solutions, LLC*, 583 F Supp 3d 1209, 1215 [WD Wis 2022], aff'd 84 F4th 731 [7th Cir 2023]; *Cavazzini v MRS Assoc.*, 574 F Supp 3d 134, 143 [ED NY 2021]; *Sputz*

v Alltran Fin., LP, 2021 WL 5772033, *6, 2021 US Dist LEXIS 233292, *14 [SD NY, Dec. 5, 2021, No. 21-CV-4663 (CS)]; *but see Jackin v Enhanced Recovery Co., LLC*, 606 F Supp 3d 1031, 1036 [ED Wash 2022]; *Ali v Credit Corp. Solutions, Inc.*, 2022 WL 986166, *2, 2022 US Dist LEXIS 59126, *5 [ND Ill, Mar. 30, 2022, No. 21 C 5790]). Thus, we find that defendant is entitled to summary judgment dismissing the second cause of action, alleging violations of the FDCPA based on the mailing vendor theory.

The third cause of action for negligence per se must be dismissed in light of the dismissal of plaintiff's General Business Law § 349 and FDCPA causes of action based on the mailing vendor theory (*see Kopsachilis v 130 E. 18 Owners Corp.*, 11 NY3d 512, 516 [2008]; *Elliott v City of New York*, 95 NY2d 730, 734 [2001]).

With respect to the fourth cause of action for negligence, “[t]o prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries” (*Withopf v Rapid Tr. Servs., Inc.*, 210 AD3d 827, 829 [2022] [internal quotation marks omitted]; *see Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]). “In the absence of duty, there is no breach and without a breach there is no liability” (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *see Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 18 [2019]). Under the circumstances here, we find that defendant did not owe a duty to plaintiff not to transmit information about plaintiff's account to the third-party mailing vendor (*see generally Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 826 [2016]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 349-350 [2001]; *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]; *Pulka v Edelman*, 40 NY2d at 785-786; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d at 21; *Coolbaugh v International Bus. Machs. Corp.*, 116 AD3d 907, 908 [2014]; *Kadaa v Kadaa*, 80 AD3d 728, 728 [2011]; *Sharp v Long Is. Corporate Off. of Home Depot*, 70 Misc 3d 132[A], 2020 NY Slip Op 51557[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020]; *cf. Weisbrod-Moore v Cayuga County*, ___ NY3d ___, 2025 NY Slip Op 00903, *1-2 [2025]; *Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6-7 [2013]; *St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc.*, 93 AD3d 658, 660-661 [2012]; *Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d 1083, 1088-1089 [2011]). Therefore, defendant is entitled to summary judgment dismissing the fourth cause of action.

In support of the branches of its motion seeking summary judgment dismissing the fifth through ninth causes of action, defendant submitted affidavits, bills of sale, and assignments of accounts and receivables in order to show that plaintiff's debt was validly assigned to defendant from the original creditor, Credit One Bank, N.A. (Credit One). In opposition, plaintiff alleged that defendant's submissions are inadmissible hearsay and challenged the validity of the signatures on the bills of sale and assignments of accounts and receivables.

“To be admissible as a business record, a document must have been made in the regular course of business, and it must have been the regular course of the business to make such a record, at the time of the act, transaction, occurrence, or event recorded, or within a reasonable time thereafter” (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494, 495 [2007]; *see CPLR 4518 [a]*). “[A]s a general rule, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records” (*Bank of N.Y.*

Mellon v Gordon, 171 AD3d 197, 209 [2019] [internal quotation marks omitted]; *see People v Cratsley*, 86 NY2d 81, 90 [1995]). “However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker’s business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient’s own records and routinely relied upon by the recipient in its own business” (*Bank of N.Y. Mellon v Gordon*, 171 AD3d at 209; *see People v Cratsley*, 86 NY2d at 90-91; *People v DiSalvo*, 284 AD2d 547, 548-549 [2001]; *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728 [1986]).

Here, contrary to plaintiff’s contention, the affidavits of Patricia Sexton, a paralegal at defendant’s records custodian and master servicer, and Michael Wiese, Vice President of Collections and Recovery at Credit One, established a proper foundation for the admission of the bills of sale and assignments of accounts and receivables (*see U.S. Bank N.A. v Haber*, 230 AD3d 530, 533 [2024]; *HSBC Mtge. Corp. USA v Tehrani*, 229 AD3d 772, 776 [2024]; *Deutsche Bank Natl. Trust Co. v Szabo*, 217 AD3d 837, 838 [2023]; *Nationstar Mtge., LLC v Medley*, 168 AD3d 959, 961 [2019]; *People v Williams*, 71 Misc 3d 131[A], 2021 NY Slip Op 50318[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2021]). Moreover, this court could properly consider the Wiese affidavit, which was submitted with defendant’s reply papers, as plaintiff was able to respond to the affidavit in his reply papers in further support of his cross-motion (*see Zelenka v Hertz*, 230 AD3d 539, 540 [2024]; *U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757, 761 [2021]).

Plaintiff’s challenge to the validity of the signatures on the bills of sale and assignments of accounts and receivables is without merit. Plaintiff’s counsel submitted an affirmation arguing that the relevant documents “are not signed, but are instead cut and pasted from other [documents] used and reused over many years” and that, therefore, these documents are “bogus” or “sham.” This amounts to an allegation that the documents evidencing the transfer of plaintiff’s debt to defendant are inauthentic because the signatures thereon are electronic rather than handwritten. However, that the relevant documents were signed electronically “has no bearing on authenticity, as such signatures are statutorily entitled to ‘the same validity and effect as . . . a signature affixed by hand’ (State Technology Law § 304 [2])” (*Knight v New York & Presbyt. Hosp.*, 42 NY3d 699, 707 [2024]; *see People v Johnson*, 31 Misc 3d 145[A], 2011 NY Slip Op 50933[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2011]). Furthermore, Wiese, Vice President of Collections and Recovery at Credit One, stated in his affidavit that “[i]t was Credit One’s understanding that all such rights, title and interest [to plaintiff’s account and debt] would ultimately be transferred, sold, assigned, conveyed, granted and delivered to Defendant”; and that “there is no dispute between the parties to the transaction as to the validity of the transfer of [plaintiff’s] Account and Debt or the authenticity of the signatures.”

Taken together, defendant’s evidence established, *prima facie*, that, as of the date of the collection letter at issue, defendant owned the debt it sought to collect. In opposition, plaintiff failed to raise a triable issue of fact. Consequently, defendant is entitled to summary judgment dismissing the fifth cause of action, alleging violations of General Business Law § 349 (*see Silver v CitiMortgage, Inc.*, 162 AD3d at 813-814; *Aracena v BMW of N. Am., LLC*, 159 AD3d at 666; *Disa Realty, Inc. v Rao*, 137 AD3d at 742; *Amalfitano v NBTY, Inc.*, 128 AD3d at 745; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d at 1172); the sixth cause of action, alleging violations of the FDCPA (*see generally JPMorgan Chase Bank, N.A. v Mantle*, 134 AD3d 903, 905 [2015]; *Sydney Realty, LLC v Desiderio*, 17 Misc 3d 137[A], 2007 NY Slip Op 52302[U] [App Term, 2d Dept, 9th

& 10th Jud Dists 2007]); the seventh cause of action, alleging negligence per se (*see Kopsachilis v 130 E. 18 Owners Corp.*, 11 NY3d at 516; *Elliott v City of New York*, 95 NY2d at 734); the eighth cause of action, alleging negligence (*see Valente v Persico Realty Corp.*, 183 AD3d 561, 561 [2020]; *Rodriguez v County of Suffolk*, 155 AD3d 915, 917 [2017]; *Ciaravino v Bulldog Natl. Logistics, LLC*, 146 AD3d 925, 926 [2017]; *Glasheen v Long Is. Diagnostic Imaging*, 306 AD2d 515, 515 [2003]); and the ninth cause of action, alleging negligent misrepresentation (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 178 AD3d 987, 990-991 [2019]; *Arjune v Commonwealth Land Tit. Ins. Co.*, 137 AD3d 1061, 1061 [2016]; *Tapia v Prudential Richard Albert Realtors*, 79 AD3d 735, 736 [2010]).

The District Court erred in concluding that defendant's motion for summary judgment dismissing the complaint was premature. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Sapienza v Harrison*, 191 AD3d 1028, 1031 [2021], quoting *Singh v Avis Rent a Car Sys., Inc.*, 119 AD3d 768, 770 [2014]; *see* CPLR 3212 [f]). Here, plaintiff's counsel argued that additional discovery was needed concerning the legitimacy and effectiveness of the documents recording the transfer of plaintiff's debt to defendant. However, as previously discussed, defendant's submissions adequately establish the legitimacy and effectiveness of those documents, and "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Ok Sun Chong v Scheelje*, 218 AD3d 693, 693 [2023]; *see Valencia v Glinski*, 219 AD3d 541, 545-546 [2023]; *Merriitt Constr., Inc. v Town of Kent*, 164 AD3d 490, 492 [2018]; *Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329 [2017]; *Cajas-Romero v Ward*, 106 AD3d 850, 852 [2013]).

Accordingly, the order, insofar as appealed from, is reversed and defendant's motion for summary judgment dismissing the complaint is granted.

GARGUILO, P.J., WALSH and CONWAY, JJ., concur.

ENTER:


Paul Kenny
Chief Clerk