

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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: CAROLYN HERBERT,
: Plaintiff,
: v. Civ. No. 3:96CV00665(AWT)
: MONTEREY FINANCIAL
SERVICES, INC., :
: Defendant. :
: :
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MEMORANDUM OPINION

Plaintiff Carolyn Herbert ("Herbert") claims that the defendant, Monterey Financial Services, Inc. ("Monterey"), violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692(e), ("FDCPA") and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq. ("CUTPA") by (1) reporting that Herbert owed a debt, without reporting that the debt was disputed and (2) failing to notify the credit bureaus that the debt owed by Herbert had been discharged. The defendant contends, as to the first claim, that any violation was the result of a bona fide error which occurred in spite of Monterey's adoption of procedures designed to avoid such an error, as contemplated by 15 U.S.C. § 1692k(c). As to the second claim, the defendant contends that it reported the debt as discharged immediately after receiving notification that the

debt had been discharged.

After a bench trial, the court makes the following findings of fact and conclusions of law, and finds for the defendant on all claims.

I. FACTUAL BACKGROUND

In 1990, the plaintiff entered into an "Interval Ownership Purchase and Sale Agreement" with Inn Group Associates ("Inn Group") for the purchase of a "time-share" vacation home. The plaintiff financed this purchase with a promissory note which was secured by a mortgage on the time-share. In August 1992, the mortgage securing the promissory note issued by Herbert was foreclosed on by the Inn Group for non-payment. The foreclosure sale of the plaintiff's vacation time-share produced proceeds of \$1,000, which was applied against the debt owed by Herbert to the Inn Group.

In September 1992, Monterey, a debt collection agency that had been hired earlier by the Inn Group to collect its delinquent accounts, commenced taking steps to collect the remaining amount owed by Herbert to the Inn Group. The parties agree that Monterey is a "debt collector" within the meaning of the FDCPA. 15 U.S.C. § 1692a(6).

After attempting to collect the debt, without success, Monterey designated Herbert's account as "uncollectible". Pursuant to Monterey's Collection Agency Manual, it is standard

procedure to continue to report uncollected accounts to credit bureaus unless Monterey is informed by its client - in this case, the Inn Group - to do otherwise. Therefore, Monterey continued to report the debt as delinquent to credit bureaus after designating it "uncollectible". Further, it is Monterey's standard practice not to delete credit information from its files unless its client makes a written request that Monterey do so.

Herbert's attorney notified Monterey, in two letters dated October 1992 and November 1992, that Herbert's position was that the debt was not valid, that Monterey's records did not reflect a \$1,000 payment made on August 7, 1992, and that Herbert refused to pay. The letters stated that Herbert "vigorously dispute[d]" the debt.

In May 1993, the plaintiff's debt to the Inn Group was discharged, and the original promissory note executed by Herbert was returned to her marked "void". The Inn Group did not notify Monterey that the debt had been discharged. Neither Herbert nor her attorney notified the defendant at that time that the debt had been discharged.

It is Monterey's policy that when a debtor indicates in correspondence that a debt is disputed, the debtor's correspondence is referred to a manager. During the period relevant here, the manager would verify the debt and then go to the information system office and give an instruction that an

indication be made in the account file that the debt was disputed by entering a particular code in the computer. This policy is covered in Monterey's operating manual, and collectors and managers at Monterey are instructed as to this policy during their training. Also, one or two Monterey managers walk around at all times in the area in which collectors sit as they place and receive telephone calls, in order to listen in on those calls and ensure that this and other policies are being followed. This policy has been in place as described since at least 1992, when the events at issue here took place. However, in this case, Herbert's dispute was not referred to a manager, and although the correspondence was placed in Herbert's file, the computer record of Herbert's account was never updated to indicate that the debt was disputed.

The policy as to disputed debts was not the only instance where Monterey required collectors to notify a manager. Not only did all attorney letters have to be reviewed by management, but collectors had to also notify a manager of any correspondence from any government department or the media, any unusual threats of violence, any viable lawsuits and any important issues or problems related to the client (e.g., the Inn Group). Thus, this information as to how to handle disputed debts was presented to collectors as being something that was important to Monterey.

Although the plaintiff was aware that Monterey was servicing her account for the Inn Group, neither the plaintiff nor her attorney notified Monterey of the discharge of the debt until March 18, 1996, when Monterey received a letter from Herbert's attorney indicating that the debt had been discharged. When Monterey received this letter, it contacted the Inn Group to confirm that the debt had in fact been discharged. Monterey then took action to stop reporting Herbert's account to credit bureaus as delinquent. Herbert's account nonetheless was reported as being delinquent in a credit report dated May 1996.

II. DISCUSSION

A. Count One: FDCPA

It is a violation of the FDCPA for a debt collector to make a "false representation of . . . the character, amount, or legal status of any debt . . ." 15 U.S.C. § 1692e(2)(A) (West 2001). The plaintiff argues that Monterey committed two such violations: one when it failed to report that the debt was disputed after receiving notice from the plaintiff's attorney of a dispute in November 1992, and a second when it reported Herbert's account as being delinquent after receiving notice in March 1996 that the debt had been discharged.

The FDCPA provides that "any debt collector who fails to comply with any provision of this subchapter with respect to

any person is liable to such person" for actual damages suffered plus an additional amount not to exceed \$1,000. 15 U.S.C. § 1692k(a) (West 2001). However, the statute also contains an affirmative defense:

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c) (West 2001).

First Claim: Failure to Report Debt as Disputed

The defendant concedes that it failed to properly report that the plaintiff's claim was disputed after receiving notice of the dispute in November 1992. However, the defendant produced evidence at trial showing that the failure to report the debt as disputed was not intentional, but was the result of a bona fide error which occurred in spite of Monterey's maintaining procedures reasonably adapted to avoid such errors.

Robert Steinke ("Steinke"), the president of Monterey, testified at trial, in detail, regarding the defendant's policies and procedures relating to the marking of records when a debt is disputed. As set forth above, when a debtor or her representative reports that a debt is disputed, the collector who receives that information is supposed to refer the case to a manager. Monterey's procedure is that the manager then confirms that the debt is valid and makes a notation in the

file that the debt is disputed. In addition, the manager takes appropriate steps to see that a code is entered into the debtor's computer file indicating that the debt is disputed. All collectors and managers receive training in this procedure.

In this case, the collector who received the correspondence from Herbert's attorney stating that the debt was disputed apparently did not follow Monterey's established procedure. Although the collector made a notation in Herbert's file regarding the correspondence, he did not refer the case to a manager. Consequently, there was never notification to the person who was charged with the responsibility for making sure that the computer file for Herbert was updated to reflect the fact that the debt was disputed. As a result, the debt was subsequently reported numerous times to credit bureaus without any notation that it was disputed. This happened despite the fact that Monterey had in place a procedure reasonably adapted to avoid such a mistake. The changing of the computer file was entrusted to a manager, and collectors were under instructions to report a series of significant occurrences to their manager -- not just this one item. In addition, Monterey periodically monitored the collectors while they were at work, to ensure that Monterey's policies and procedures were being followed.

The evidence establishes that Monterey did not intentionally fail to designate Herbert's debt as disputed. The file maintained at Monterey did, in fact, reflect the

dispute; the error came in a failure to enter a particular computer code which would have flagged the debt as disputed when it was reported to credit bureaus. Every indication in this record is that had the collector referred the correspondence to a manager, the appropriate information would have been entered in the computer concerning Herbert's account.

The court finds that Monterey has established, by a preponderance of the evidence, that this was a bona fide error which occurred notwithstanding the fact that Monterey had in place "procedures reasonably adapted to avoid any such error", as required by the statute. The court also finds that Monterey has proven that the violation was not intentional. Therefore, the defendant has met its burden pursuant to 15 U.S.C. § 1692k(c), and is entitled to judgment in its favor on this claim.

Second Claim: Failure to Report Debt as Discharged

The defendant presented evidence that it promptly notified the credit bureaus that Herbert's debt had been discharged and instructed the credit bureaus to remove Herbert's account from their databases once it received confirmation that the debt had in fact been discharged. This evidence was in the form of computer backup disks which contain copies of the information sent by Monterey to the credit bureaus on April 11, 1996.

Monterey sends reports to the credit bureaus once a month,

indicating the current status of each account for which it is responsible. The April 11, 1996 report to the credit bureaus was the first report issued by Monterey after receiving the March 18, 1996 letter indicating that Herbert's debt had been discharged. The computer backup disks show that in the April 11, 1996 report, Monterey instructed each of the credit bureaus to remove the Herbert account from their databases, because the debt had been discharged. Thus, Monterey did not report Herbert's account to the credit bureaus as active and delinquent at any time after March 18, 1996, and the April 11, 1996 report did not contain any false or misleading information regarding Herbert's account.

The plaintiff contends that Monterey should have taken additional steps to see that the credit bureaus corrected their records sooner as to the status of the plaintiff's debt, but the defendant has shown that its procedure was reasonable. The plaintiff's argument amounts, under the circumstances of this case, to a position that daily updates should be sent by a collection agency to the credit bureaus. There is no support for such a proposition.

Therefore, the plaintiff has failed to establish a violation of the FDCPA on this ground, and the defendant is entitled to judgment in its favor on this claim.

B. Count Two: CUTPA

In Count Two, the plaintiff claims that Monterey's actions constitute unfair and deceptive acts in the conduct of trade or commerce in violation of CUTPA. CUTPA provides in relevant part that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a) (2001). The Connecticut Supreme Court has stated:

It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the 'cigarette rule' by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen).

All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. Thus a violation of CUTPA may be established by showing either an actual deceptive practice or a practice amounting to a violation of public policy. Furthermore, a party need not prove an intent to deceive to prevail under CUTPA.

Cheshire Mortgage Serv. Inc. v. Montes, 612 A.2d 1130, 1143-44 (Conn. 1992).

The court has found that Monterey did not make any false representation regarding Herbert's account after it was notified that the debt had been discharged; therefore, the plaintiff can not prevail on her CUTPA claim on that ground.

As to the failure to indicate that the debt was disputed, the court has found that Monterey made a bona fide error, of the sort that is bound to occur even when safeguards, such as those instituted by Monterey, are in place. This error does not "offend[] public policy", nor is it "immoral, unethical, oppressive, or unscrupulous". Nor is there any evidence that Monterey's error caused "substantial injury to consumers". Thus, the error in failing to report the debt as disputed does not constitute a violation of CUTPA. The defendant is entitled to judgment on the CUTPA claim.

III. CONCLUSION

For the reasons set forth above, the court finds for the defendant, Monterey Financial Services, Inc., as to all claims. Accordingly, judgment shall enter in favor of the defendant.

It is so ordered.

Dated this 28th day of September, 2001, at Hartford, Connecticut.

Alvin W. Thompson
United States District Judge