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At an IAS Part of the Supreme Court of the State of New York held in and for the County of Kings at the Courthouse thereof 320 Jay Street, Brooklyn, New York 11201, Part 13 on the 3rd day of May, 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 13

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JOEL FISHER,

Plaintiff,

vs.

Motion Seq. No.: 1
Cal. No.: 19
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LVNV FUNDING, LLC and FINANCIAL
RECOVERY SERVICES, INC.,

DECISION & ORDER

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendants LVNV FUNDING, LLC (“LVNV”) and FINANCIAL RECOVERY SERVICES, INC. (“FRS”) (together, “Defendants”), motion pursuant to CPLR § 3212 for an order granting summary judgment and dismissing Plaintiff JOEL FISHER’s (“Plaintiff”) entire Complaint: NYSCEF Doc. Nos.: 10 – 42.

UPON the motion having come on regularly to be heard on May 3, 2023, with Plaintiff’s counsel having failed to appear, and the motion having been marked submitted on the record on the same date, appearing to the satisfaction of this Court from the aforesaid documents and reasons stated on the Record,

The Court finds the following:

On September 21, 2017, Plaintiff obtained a credit card from Credit One Bank, N.A. (“Credit One”), with an account number having the last four numbers 7323 (“Account”). *See*

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Affidavit of Patricia Sexton, ¶ 9; *see also* O'Brien Aff.'s **Exhibit A**. On or about December 5, 2017, Plaintiff defaulted on the Account by failing to pay amounts owed as they became due ("Debt"). *See* Affidavit of Patricia Sexton, ¶ 10; *see also* O'Brien Aff.'s **Exhibit A**. The Account and Debt were thereafter sold, assigned, and conveyed to LVNV. *See* Affidavit of Patricia Sexton, ¶ 11. All rights held by Credit One to the Account were sold to LVNV. *See* Affidavit of Patricia Sexton, ¶ 11. Plaintiff neither disputes the underlying Debt, nor that he defaulted on the Debt. *See* O'Brien Aff., ¶ 3; *see also* O'Brien Aff.'s **Exhibit A** (Complaint), *generally*.

On or about January 12, 2021, FRS sent a letter (the "Letter") to Plaintiff, notifying him of their current ability to offer discounted options to settle the collection account identified within the letter. *See* Affidavit of Brian C. Bowers, ¶ 7; *see also* O'Brien Aff.'s **Exhibit A**, Exhibit 1. This Letter identified the original creditor as Credit One, noted the last four numbers of the account number, noted the current amount due, and identified LVNV as the current creditor on the account. *See id.* Plaintiff complains this Letter is false, deceptive, and misleading because "Plaintiff never entered into any transaction with LVNV," "LVNV never offered to extend any credit to Plaintiff," "LVNV did not extend any credit to Plaintiff at any time," and "LVNV is a stranger to Plaintiff." *See* O'Brien Aff., ¶ 3; *see also* O'Brien Aff.'s **Exhibit A**, ¶¶ 44-47. Additionally, Plaintiff complains that, prior to commencing this action, he "sought validation of the alleged Debt as it specifically pertained to the Chain of Title" and that he "sought validation of the alleged Debt as it specifically pertained to the purported ownership of the debt." *See* O'Brien Aff.'s **Exhibit A**, ¶¶ 51-52. Plaintiff further complains that both FRS and LVNV "failed to provide information sufficient to establish" LVNV's "putative ownership of the alleged Debt." *See* O'Brien Aff.'s **Exhibit A**, ¶¶ 52-53.

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On or about August 9, 2021, Plaintiff's counsel sent a letter to FRS ("Dispute Letter"), indicating that they were writing on behalf of Plaintiff, and they believed "there to be some inaccuracy or insufficiency in the information provided regarding the alleged debt," and they requested validation of the debt pursuant to 15 U.S.C. §1692g. *See* Affidavit of Patricia Sexton, ¶ 13; *see also* Affidavit of Patricia Sexton's **Exhibit 1**.

On or about August 18, 2021, Resurgent Capital Services ("Resurgent") timely responded to the Dispute Letter advising that Resurgent manages the referenced account for LVNV and that Resurgent had initiated a review of the inquiry recently received from Plaintiff's counsel. *See* Affidavit of Patricia Sexton, ¶ 14; *see also* Affidavit of Patricia Sexton's **Exhibit 2**. This Acknowledgement Letter again verified the last four digits of Plaintiff's account number, identified the original creditor as Credit One, the current owner as LVNV, and provided information on Plaintiff's last payment date and the current account balance. *See id.*

Also, that same day, Resurgent sent a subsequent letter and provided further proof of its current ownership along with a detailed account summary and verification of debt to Plaintiff's counsel ("Validation Letter"). *See* Affidavit of Patricia Sexton, ¶ 15; *see also* Affidavit of Patricia Sexton's **Exhibit 3**. The Validation Letter again provided all of the account information, including the last four digits of Plaintiff's account number, the original creditor as Credit One, the current Creditor as LVNV, Plaintiff's last payment date, and the current account balance. *See id.* As further support, the Validation Letter included Plaintiff's prior Credit One credit card statements with his address noted on the statements as well as a detailed chain of title and ownership history. *See id.*, pp. 2-4. Following the Validation Letter, Defendants received no further communication from Plaintiff and no documentation calling into question the Validation Letter.

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On January 10, 2022, Plaintiff initiated this action by filing a Summons and Complaint in Kings County Supreme Court (“Action”). Within his Complaint, Plaintiff alleged three (3) causes of action for alleged violations of the FDCPA related to the Letter. *See* O’Brien Aff., ¶ 2; *see also* O’Brien Aff.’s **Exhibit A** (Complaint).

Plaintiff’s first cause of action alleges that FRS violated 15 U.S.C. §§ 1692e, 1692 e(2)(A) and 1692e(10) because Plaintiff did not owe the Claimed Amount and did not owe money to LVNV. *See* O’Brien Aff., ¶ 4; *see also* O’Brien Aff.’s **Exhibit A** (Complaint), ¶¶ 60-76.

Plaintiff’s second cause of action alleges that FRS’s allegation that Plaintiff owed a debt to LVNV when Plaintiff did not owe a debt to LVNV is a false, deceptive and misleading representation made by FRS in violation of 15 U.S.C. §§ 1692e(2)(A) and 1692e(10). *See* O’Brien Aff., ¶ 5; *see also* O’Brien Aff.’s **Exhibit A** (Complaint), ¶¶ 78-95.

Lastly, Plaintiff’s third cause of action alleges that LVNV violated 15 U.S.C. §§ 1692e(8), 1692e(12), and 1692e(2)(A) by reporting the alleged debt to Consumer Credit Reporting Agencies and that LVNV made a false representation in violation of 15 U.S.C. § 1692e(1) by its false representation of the entity and legal owner of the alleged debt. *See* O’Brien Aff., ¶ 6; *see also* O’Brien Aff.’s **Exhibit A** (Complaint), ¶¶ 97-104.

On January 26, 2022, Defendants filed a Notice of Removal with the Office of the Clerk of the United States District Court for the Eastern District of New York, under Case Number 22-cv-00447. *See* O’Brien Aff., ¶ 7; *see also* O’Brien Aff.’s **Exhibit B** (Notice of Filing and Notice of Removal).

On February 16, 2022, Defendants filed an Answer with Affirmative Defenses to Plaintiff’s Complaint in the United States District Court for the Eastern District of New York. *See* O’Brien Aff., ¶ 8; *see also* O’Brien Aff.’s **Exhibit C** (Answer).

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By Order dated June 29, 2022, and filed with the Kings County Clerk's Office on July 8, 2022, the United States District Court for the Eastern District of New York remanded this action to the Kings County Supreme Court on grounds that Plaintiff has failed to allege any actual damages. *See* O'Brien Aff., ¶ 9; *see also* O'Brien Aff.'s **Exhibit D** (Remand Order).

Defendants thereafter filed the instant motion pursuant to CPLR 3212 for summary judgment seeking the dismissal of Plaintiff's Complaint, in its entirety, with prejudice.

It is well established that summary judgment may be granted only when no triable issue of fact exists (*see Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). The burden is upon the moving party to make prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see Giuffrida v. Citibank*, 100 NY2d 72 [2003]). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*see Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If a *prima facie* showing of entitlement to judgment as a matter of law has been made, the burden then shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez*, 68 NY2d at 3240).

"The FDCPA creates a private right of action for debtors who have been harmed by abusive debt collection practices" (*Benzemen v. Citibank N.A.*, 806 F.3d 98, 100 [2d Cir. 2015] [citing 15 U.S.C. § 1692k]). Pursuant to section 1692e, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692. Examples of such deceptive acts listed by the FDCPA, and asserted by Plaintiff here, include false representations as to "the character, amount, or legal status of any debt," 15 U.S.C.

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§ 1692e(2)(A), or the use of any other “false representation or deceptive means.” 15 U.S.C. § 1692e(10).

There is nothing in the FDCPA requiring a debt collector to educate the debtor “with proof, or at least a narrative, as to how it came to acquire the debt from [the] original creditor” (*Rosenberg v. Frontline Asset Strategies, LLC*, 556 F. Supp. 3d 157 [EDNY. August 16, 2021]). Similarly, the FDCPA does not require “that the defendant notify the plaintiff of a sale of plaintiff’s debt” (*Solovyova v. Grossman & Karaszewski PLLC*, No. 19-cv-2996, U.S. Dist. LEXIS 27837 [EDNY Feb. 12, 2021]).

“[W]hether a communication complies with the FDCPA is determined from the perspective of the least sophisticated consumer” (*Kolbasyuk v. Capital Mgmt. Servs., LP*, 918 F3d 236, 239 [2d Cir. 2019] [internal citations and quotations omitted]). “The hypothetical least sophisticated consumer does not have the astuteness of a ‘Philadelphia lawyer’ or even the sophistication of the average, everyday, common consumer, but is neither irrational nor a dolt” (*Ellis v. Solomon & Solomon, P.C.*, 591 F3d 130, 135 [2d Cir. 2010]). Courts must undertake “an objective analysis that seeks to protect the naive from abusive practices, while simultaneously shielding debt collectors from liability for bizarre or idiosyncratic interpretations of debt collection letters” (*Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 363 [2d Cir. 2005] [internal citations omitted]). The least sophisticated consumer could misunderstand a collection letter if it is “reasonably susceptible to an inaccurate reading” (*DeSantis v. Computer Credit, Inc.*, 269 F3d 159, 161 [2d Cir. 2001]).

The matters of *Ortiz v. Frontline Asset Strategies, LLC*, 2022 U.S. Dist. LEXIS 57127, 2022 WL 939771 (E.D.N.Y. March 29, 2022) and *Rogers v. LVNV Funding*, 2021 U.S. Dist. LEXIS 200502 (E.D.N.Y. Oct. 18, 2021) are directly on point and specifically analyze near

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identical complaints brought to contest near identical collection letters to the Letter at issue here. In both cases, the court held plaintiff's conclusory lack of knowledge of the chain of title leading to the current debt holder's acquisition of the debt, absent the allegation of specific facts suggesting that the purported current debt holder is not, in fact, the owner of the debt, is *not* a violation of the FDCPA.

Here, Defendants have met their burden under CPLR § 3212, and Plaintiff has failed to demonstrate or otherwise raise a triable issue of material fact that Defendants made a false, deceptive, or misleading statement about the Debt in violation of the FDCPA because the affidavit of Patricia Sexton affirmatively establishes LVNV's ownership of the Debt, thereby negating Plaintiff's conclusory allegation that he does not owe the Debt to LVNV. Taken together with the Affidavit of Brian C. Bowers, the Affidavit of Patricia Sexton establishes that such Ownership preceded the mailing of the Letter complained of by Plaintiff. Indeed, here Plaintiff has offered no facts to contradict the Bills of Sale and Assignments of Account affixed to the Affidavit of Patricia Sexton, and the Affirmation of Plaintiff's counsel is insufficient to raise an issue of fact. Further, Plaintiff's allegation that Defendants' motion is premature because discovery has not been conducted is unfounded. Plaintiff has failed to comply with CPLR § 3212(f), as no affidavit has been provided detailing what facts may be discoverable that are necessary to oppose the Defendants' motion. Likewise, Plaintiff's arguments that the Bills of Sale are inadmissible are again unfounded, as Patricia Sexton avers that these transactions, such as the purchasing of Plaintiff's Debt, are made in the regular course of business and that she has knowledge of such transactions and the contemporaneously made business records confirming the transactions. It is therefore

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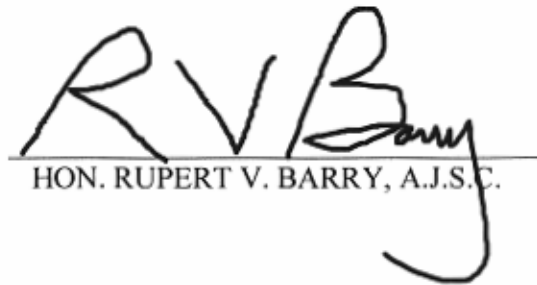
ORDERED, that for the reasons stated on the Record and those in the papers filed regarding this motion (Motion Seq. No." 1), Defendants' motion for summary is GRANTED in its entirety; and it is further

ORDERED, that Plaintiff's Complaint is dismissed, in its entirety, with prejudice; and it is further

ORDERED, that Defendants shall serve a copy of this Order with Notice of Entry upon Plaintiff within thirty (30) days of entry of this Order.

Dated: May 24, 2023

ENTER:


HON. RUPERT V. BARRY, A.J.S.C.

KINGS COUNTY CLERK
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