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United States District Court,
C.D. California.

Mark P. PFLUEGER, et al.
v.
AUTO FINANCE GROUP, INC., et al.

No. CV–97–9499 CAS(CTX).
|
April 26, 1999.

Synopsis

Background: Borrower's who automobile was repossessed sued creditor, repossessor and certain of their officers, alleging, inter alia, violations of the Fair Debt Collection Practices Act (FDCPA) and the California FDCPA.

Holdings: On a motion for summary judgment brought by the repossessor and its officers, the District Court, Snyder, J., held that:

[1] the repossessor was not a "debt collector" for purposes of the FDCPA or the California FDCPA, but

[2] genuine issues of material fact existed as to whether a breach of the peace occurred during an attempted repossession of the automobile.

Ordered accordingly.

West Headnotes (4)

[1] Finance, Banking, and Credit Debt collectors and debt collection in general

Repossession agency is not a "debt collector" for purposes of the Fair Debt Collection Practices Act (FDCPA). 15 U.S.C.A. § 1692(e); 15 U.S.C.A. § 1692a(6).

11 Cases that cite this headnote

[2] Finance, Banking, and Credit Debt collectors and debt collection in general

Automobile repossessor did not "regularly" collect debt, and therefore would not be considered a "debt collector" for purposes of the Fair Debt Collection Practices Act (FDCPA), where the undisputed facts showed that only approximately one to two percent of the repossessor's work consisted of the collection of debts for creditors. 15 U.S.C.A. §§ 1692(e), 1692a(5), (6).

8 Cases that cite this headnote

[3] Federal Civil Procedure Debt collection practices, cases involving

Genuine issues of material fact as to whether a breach of the peace occurred during the attempted repossession of an automobile precluded summary judgment as to whether the repossessor was exercising its present right to possession, as would have precluded imposition of liability under the Fair Debt Collection Practices Act (FDCPA) provision prohibiting the taking of nonjudicial action to effect the dispossession of property without a right to possession of the property claimed as collateral through an enforceable security interest. 15 U.S.C.A. § 1692f(6); West's Ann.Cal.Com.Code § 9503.

7 Cases that cite this headnote

[4] Finance, Banking, and Credit Persons and transactions subject to or protected by regulation

Automobile repossessor was not a "debt collector" for purposes of California's Fair Debt Collection Practices Act (FDCPA); undisputed facts showed that the repossessor did not regularly engage in debt collection. West's Ann.Cal.Civ.Code § 1788.2(c), (d), (f).

4 Cases that cite this headnote

Attorneys and Law Firms

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MINUTE ORDER

SNYDER, J.

PROCEEDINGS: MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES BY DEFENDANTS CALIFORNIA COASTAL RECOVERY, INC., CHERYL INNIS, AND MARGARET ALAJACIK

I. BACKGROUND

***1** Plaintiffs Mark P. Pflueger, Kari L. Pflueger, (hereafter, "the Pfluegers") and Charles Townsend ("Townsend") filed the present action on December 24, 1997, against defendants Auto Finance Group, Inc. ("Auto Finance"), Timothy Martin, Monica Roe, Donata Roe, California Coastal Recovery, Inc. ("California Coastal"), Cheryl Innis ("Innis"), and Margaret Alajacik ("Alajacik").[1] The complaint contains claims for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA" or "the Act"), the California Fair Debt Collection Practices Act, Cal. Civ.Code § 1788 *et seq.* ("California FDCPA"), invasion of privacy, intentional infliction of emotional distress, and defamation.

The facts underlying this lawsuit arise from the repossession of the Pfluegers' automobile. On August 29, 1996, the Pfluegers entered into an agreement to purchase a 1994 Mitsubishi Galant financed through defendant Auto Finance. *See* Declaration of Kari Pflueger, ¶ 2. Plaintiffs apparently filed for Chapter 7 bankruptcy sometime in late 1996 or early 1997. *See id.*, ¶ 3. Plaintiffs also became delinquent in their payments to Auto Finance at some point following the purchase of the car. At a hearing on March 18, 1997, the Bankruptcy Judge ordered the automatic stay be lifted to allow Auto Finance to "exercise its lawful rights and remedies" with respect to the Mitsubishi Galant, including "repossession and sale of the subject motor vehicle per State Law." Exhibit 1 to Plaintiffs' Evidence in Opposition to Motion

for Summary Judgment, or in the Alternative, for Summary Adjudication ("Plaintiffs' Opposition").

On approximately March 20, 1997, Auto Finance engaged the services of California Coastal to repossess the car. *See* Exhibit 2 to Plaintiffs' Opposition. Auto Finance authorized California Coastal to "repossess the security listed below [the 1994 Mitsubishi Galant] and certify that we are the legal owner of the below described security, unless otherwise instructed in this agreement." *See id.* The agreement sent from Auto Finance to California Coastal also includes specific information describing the car, the Pfluegers' home and work addresses, and the amount due to Auto Finance. *See id.*

On approximately March 21, 1997, the supervisor of the Riverside branch of California Coastal issued a repossession order to Derek South ("South"),[2] an employee of California Coastal, for the Pfluegers' car. Exhibit 3 to Plaintiffs' Opposition. The supervisor instructed South to attempt to obtain the key codes for the vehicle from a Mitsubishi dealer. *Id.* California Coastal states that when it discovered that these key codes were unavailable, South was ordered to repossess the vehicle using a tow truck. *Id.*

From the record before the Court, it appears that employees of California Coastal made several unsuccessful attempts to repossess the car before towing it away. *See* Exhibit 4 to Plaintiffs' Opposition. California Coastal ultimately repossessed the vehicle by towing it on March 28, 1997, at 2:50 p.m. *See id.* However, on the day before the repossession actually took place, two employees of California Coastal went to plaintiffs' residence without a tow truck in an apparent attempt to get the car keys from the Pfluegers.

***2** The Pfluegers were not at home when this attempt was made, sometime in the afternoon of March 27, 1997. Their son, Townsend, who was seventeen at the time, was home alone. Declaration of Charles Townsend, ¶ 3. Townsend states that he had just finished taking a shower when he heard yelling and screaming outside the house. *Id.*, ¶ 2. He also heard loud noises from objects hitting his bedroom window. *Id.*, ¶ 4. When he looked outside, he saw two large men outside who continued to hit the window and throw rocks at the side of the apartment house. *Id.*, ¶ 5. The men yelled profanities at Townsend and demanded that he open the door. *Id.*, ¶ 6. A neighbor, Margaret Storm ("Storm"), described a similar series of events. She states that she witnessed the two men outside the Pfluegers' home who were attempting to get inside. Deposition of Margaret Storm, at 9:1–12. She claims that the men were angry, and yelling at the door of the house. *Id.* at 10:6–12. They asked Storm if she could get into the house. *Id.* She states that they were throwing dirt and rocks at the side of the house. *Id.* at 12:10–17. The incident lasted approximately fifteen to twenty minutes. *Id.* at 25:5–11. After this unsuccessful attempt to get the keys from Townsend and Storm, the employees "put a Club on the steering wheel and pulled some wires in the engine" in order to disable the vehicle. *See* Exhibit 4 to Plaintiffs' Opposition.

Plaintiffs subsequently filed the present lawsuit against California Coastal and two of its employees, Innis and Alajacik, based on the March 27, 1997 incident.[3] Plaintiffs' claims against Auto Finance and its employees arise out of the alleged harassment of the Pfluegers prior to the repossession.

In the instant motion, defendants California Coastal, Innis, and Alajacik seek summary judgment, or in the alternative, summary adjudication of the following issue:

> CALIFORNIA COASTAL RECOVERY, INC., is a repossession agency and falls outside the ambit of the Federal and California Fair Debt Collection Practices Act.

Defendants' Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication of the Issues at 2.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed.R.Civ.P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment

must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pac. Corp.*, 114 F.3d 898, 902 (9th Cir.1997).

***3** In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 & n. 3 (9th Cir.1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

III. DISCUSSION

A. *FDCPA Claims*

[1] Plaintiffs allege that the attempt to repossess the vehicle on March 27, 1997, by California Coastal and its employees violated the Fair Debt Collection Practices Act. California Coastal argues that it is a repossession agency, and thus falls outside the scope of the FDCPA. Consequently, as an initial matter, the Court must determine whether the FDCPA applies to the conduct of repossession agencies.

The purpose of the FDCPA includes, *inter alia*, the elimination of "abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). The FDCPA defines a "debt collector" as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due and asserted to be owed or due another. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of any security interests.

15 U.S.C. § 1692a(6). This section then lists six classes of persons not considered "debt collectors" under the Act. Repossession agencies are not among those specifically excluded.

Other district court cases interpreting the language of this section have concluded that the term "debt collector" does not apply to repossession companies. *See Jordan v. Kent Recovery Services, Inc.*, 731 F.Supp. 652 (D.Del.1990); *Clark v. Auto Recovery Bureau Conn., Inc.*, 889 F.Supp. 543 (D.Conn.1994); *Seibel v. Society Lease, Inc.*, 969 F.Supp. 713 (M.D.Fla.1997). Under general principles of statutory construction, the definition in section 1692a(6) does not include repossession companies within the definition of "debt collector." *See Jordan*, 731 F.Supp. at 657. "Section 1692a(6) indicates that the term 'debt collector' *also* includes an enforcer of a security interest for purposes of § 1692f(6). Such a purposeful inclusion for one section of the FDCPA implies that the term 'debt collector' does not include the enforcer of a security interest for any other section of the FDCPA.... It thus appears that Congress intended an enforcer of a security interest, such as a repossession agency, to fall outside the ambit of the FDCPA except for the provisions of § 1692f(6)." *Id.* (discussing the legislative history of the FDCPA) (emphasis in original).

***4** Therefore, it appears that for purposes other than section 1692f(6) of the FDCPA, repossession agencies do not fall within the definition of a "debt collector." In the present action, plaintiffs allege that California Coastal violated two sections of the FDCPA which prohibit debt collectors from harassing debtors. *See* 15 U.S.C. §§ 1692c(b), 1692d. Because these sections of the FDCPA apply only to "debt collectors," plaintiffs' claims under these provisions must fail if California Coastal is in fact solely a repossession agency.

Thus, for purposes of determining this motion, the Court must consider two separate issues. First, the Court must determine whether California Coastal is only a repossession agency, or if it falls within the definition of "debt collector" as defined by the Act. Second, even if California Coastal is not a "debt collector" for all other purposes of the Act, the Court must determine if its conduct violated section 1692f(6) of the FDCPA, which specifically applies to repossession agencies.

1. *Debt Collector*

[2] As discussed above, a "debt collector," is a person who: (1) regularly collects or attempts to collect consumer debts owed to others; or (2) uses any instrumentality of interstate commerce or mails in a business whose principal purpose is collecting consumer debts. 15 U.S.C. § 1692a(6). From the record, it appears undisputed that the principal purpose of California Coastal's business is repossession, and not debt collection. *See* Declaration of Steve Innis, ¶ 6. The FDCPA defines "debt" as "the obligation of a consumer to pay money." 15 U.S.C. § 1692a(5). Therefore, so long as the principal purpose of California Coastal's business is recovering collateral and not money, it does not fall within the second definition of "debt collector" listed above.

However, plaintiffs contend that California Coastal "regularly" engages in the collection of debts in the course of its business, and should be considered a "debt collector" on that basis. Plaintiffs argue that employees of California Coastal have testified that they collect money from debtors on some occasions, and that the volume of this work is sufficient to be considered "regular."

The undisputed facts do not establish that California Coastal "regularly" collects debts on behalf of its clients, but that it only does so occasionally. The facts indicate that the majority of the "repossession assignments" performed by California Coastal consist of the repossession of collateral when a debtor is in default or delinquent. *See* Deposition of Steve Innis at 18–19 ("Steve Innis Depo."). It appears that California Coastal has a small percentage of cases known as "field calls" in which the primary purpose is to collect money for the creditor. *See id.* Alajacik testified that California Coastal collects money instead of collateral approximately two times out of every 150 assignments. Deposition of Margaret Alajacik at 34:6–12. Steve Innis, the supervisor of California Coastal at the time of the incident in this case, testified that approximately "a quarter of a percent" of the assignments involve the collection of money. *See* Steve Innis Depo. at 19:11–13.

***5** "[T]he FDCPA only reaches those who 'regularly collect debts for others' and 'exclude[s] a person who collects a debt for another in an isolated instance.' " *Jordan*, 731 F.Supp. at 660. "The word 'regularly' means 'normally, usually, or customarily.' " *Holmes v. Telecredit Corp.*, 736 F.Supp. 1289, 1290 (D.Del.1990) (citation omitted).

The undisputed facts show that approximately one to two percent of California Coastal's work consists of the collection of debts for creditors. This is not sufficient to establish that California Coastal "regularly" collects debt, and should be considered a "debt collector" for purposes of the FDCPA. Thus, defendants California Coastal and its employees are entitled to summary judgment with respect to plaintiffs' claims of violations of sections 1692c(b) and 1692d because defendant does not fall within the statutory definition of a "debt collector."

2. *Violation of Section 1692f*

[3] The complaint does not specifically allege that defendants violated section 1692f(6) of the FDCPA. However, plaintiffs argue that the facts of the present case establish a violation of this section. Section 1692f(6) prohibits:

> Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if-
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest.

15 U.S.C. § 1692f(6). Plaintiffs contend that defendants' actions on March 27, 1997, violated this section because defendants did not have a present right to possession of the vehicle at the time. The resolution of this issue requires an interpretation of the phrase "present right to possession." When California Coastal attempted to repossess the vehicle, it was attempting to enforce the rights in the secured property held by Auto Finance. If defendants had a "present right" to possession of the property, plaintiffs cannot establish a violation of section 1692f(6).

In order to determine whether the secured party had a "present right" to possession of the collateral, the court must look to state law regarding security interests. *See Clark*, 889 F.Supp. at 546; *James v. Ford Motor Credit Co.*, 842 F.Supp. 1202, 1207 (D.Minn.1994). In this case, the provisions of the California Commercial Code set forth the circumstances under which a secured party has the right to self-help repossession. Section 9503 provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without a breach of the peace or may proceed by action.

Cal. Com.Code § 9503. Plaintiffs argue that because defendants breached the peace in the process of attempting to take nonjudicial action "to effect dispossession or disablement of property" they did not have a present right of possession at that time. *See Clark*, 889 F.Supp. at 546 (noting that by protesting a

repossession, the debtor may "undermine the creditor's right to repossess collateral"). Defendants argue that the attempted repossession was in compliance with section 1692f(6).[4]

***6** California statutes and caselaw do not define "breach of peace." However, other cases involving repossession companies have found that incidents which tend to provoke violence can be considered a "breach of peace." *See Williams v. Ford Motor Company*, 674 F.2d 717, 719–720 (8th Cir.1982). In the present case, there appear to be disputed factual issues concerning whether or not a breach of peace in fact occurred during the incident on March 17, 1997. Townsend and Storm have testified that employees of California Coastal were throwing objects at the home as well as shouting obscenities. In light of the fact that there are material issues of disputed fact concerning whether a breach of the peace occurred, the Court cannot determine whether California Coastal was exercising its present right to possession at the time of the attempted repossession.[5] Thus, summary judgment with respect to plaintiffs' claims under section 1692f(6) of the FDCPA is inappropriate.

B. *California FDCPA Claims*

[4] The California FDCPA governs the collection of "consumer debts" by "debt collectors." Cal. Civ.Code §§ 1788.2(c), 1788.2(f). For purposes of this Act, the term "debt collector" includes any person who "in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." Cal. Civ.Code § 1788.2(c). Although the definition of "debt" in the California FDCPA differs slightly from the definition in the federal FDCPA, the enforcement of security interests does not fall within the scope of "debt collection" as defined in the Act. *See* Cal. Civ.Code § 1788.2(d). The undisputed facts show that California Coastal does not regularly engage in debt collection, for purposes of the California statute as well as the federal FDCPA. Therefore, summary judgment in favor of defendants is appropriate with respect to plaintiffs' claims under the California FDCPA.

The cutoff for the hearing of dispositive motions is extended to June 7, 1999, at 10:00 a.m., the Pretrial Conference is continued to Monday, July 12, 1999, at 1:30 p.m., and the trial in this case is rescheduled to Tuesday, August 24, 1999, at 9:30 a.m.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 33740813

Footnotes

1 The deposition of Margaret Alajacik indicates that the correct spelling of her last name is Aleksiejczyk. However, because the complaint and the parties refer to her as Alajacik, the Court will adopt this spelling for ease of reference for purposes of this order.

2 In the declaration of Steve Innis, he states that he issued a repossession order to "Derek Smith" on March 21, 1997. Declaration of Steve Innis, ¶ 4. However, in the answer to interrogatories, defendants state that they issued a repossession order on that date to "Derek South." Exhibit 3 to Plaintiffs' Opposition. Smith/South appears to be the same person.

3 The complaint specifically states that the claim for violations of the FDCPA is alleged solely against defendant California Coastal. Plaintiffs' claims under the California FDCPA also appear to be alleged against California Coastal, Innis, and Alajacik. However, it is unclear from the complaint whether plaintiffs' state law claims are alleged against these defendants. In the present motion for summary judgment, the parties have only addressed plaintiffs' claims under the FDCPA and the California FDCPA. Therefore, for purposes of this order, the Court will only address plaintiffs' claims against California Coastal and its employees for violations of the FDCPA and the California FDCPA.

4 Defendants also contend that because the repossession in this case took place pursuant to the Bankruptcy Court's order, the

attempt to repossess constituted "judicial action." However, the reference to "nonjudicial action" appears to refer to actions not involving government enforcement agencies. In addition, the Bankruptcy Court order required Auto Finance to carry out the repossession "per State Law." *See* Exhibit 1 to Plaintiffs' Opposition. Accordingly, California Coastal was required to comply with California law regarding repossession, as stated in Cal. Com.Code § 9503.

5 Defendants rely on *James v. Ford Motor Credit Co.,* 842 F.Supp. 1202 (D.Minn.1994), for the proposition that a breach of peace occurs only if there is an entry on to the debtor's property after the debtor has revoked permission to repossess the collateral. While the district court in *James* discussed whether a breach of peace requires the actual entry onto the debtor's property, the court also found that a separate question arises if there is "actual violence or the threat of violence." *James,* 842 F.Supp. at 1209. The fact that the conduct here did not involve the debtor's revocation of the right to repossess the vehicle is not determinative as to whether a breach of peace occurred.

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