

~~FEB 25 2010~~

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 09-74093
	:	
CHAD JORGE A. MCMILLEN,	:	
	:	CHAPTER 13
Debtor.	:	
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CHAD JORGE A. MCMILLEN,	:	
	:	ADVERSARY PROCEEDING
Plaintiff,	:	NO. 09-6611-JB
	:	
v.	:	
	:	
CENTRAL FINANCIAL CONTROL,	:	
	:	
Defendant.	:	

ORDER

Chad McMillen, a Chapter 13 debtor, has filed an adversary proceeding alleging a violation of specific provisions of the Fair Debt Collection Practices Act (the "FDCPA"), the sole basis of which is that defendant Central Financial Control filed duplicate proofs of claim. Before the Court is the debtor's motion for default judgment which cannot be granted.

First, the plaintiff has not demonstrated proper service of the complaint and summons. The certificate of service shows service by mail addressed to Donald Boyd, Bankruptcy Claims Processor, Central Financial Control, P.O. Box 66040, Anaheim, CA, 92816-6040. Federal Rule of Bankruptcy Procedure 7004(b)(3) provides for service by first class mail upon a corporation, partnership, or unincorporated association. Fed. R. Bankr. P. 7004(b)(3). The plaintiff must serve a copy of the summons and complaint on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive

service of process. The plaintiff has failed to serve the complaint properly. Plaintiff has served Donald Boyd, the individual that signed a \$550.00 proof of claim as a "POC Clerk". There is no indication that Mr. Boyd is an officer, a managing or general agent or any kind of agent authorized by appointment or by law to receive service of process for defendant Central Financial Control. The Court will not grant a default judgment when the plaintiff has not complied with Federal Rule of Bankruptcy Procedure 7004.

Second, the complaint does not appear to state a claim upon which relief can be granted. The two page complaint alleges only that defendant filed two proofs of claim for the same debt and that this amounts to a violation of 15 U.S.C. § 1629e(5), (10) and (2)(A). In his complaint, Mr. McMillen seeks \$1,000.00 in statutory damages, \$5,000.00 in actual damages and attorney's fees. At a routine status conference, attorney Ralph Goldberg appeared for the debtor. The Court advised Mr. Goldberg that the law appeared clear that an FDCPA cause of action cannot be based on the filing of duplicate proofs of claim in a bankruptcy proceeding. Counsel disagreed, and the Court urged Mr. Goldberg to review the case law on this subject. Counsel stated that he had law to support his position, and he filed a brief on February 5, 2010.

As previously stated, the complaint has not been properly served. However, in view of the record and the authority that suggests no claim exists under the FDCPA, the Court will explain the difficulties with the arguments contained in Mr. Goldberg's brief.

The facts from the record relating to the proofs of claim are as follows. Central Financial Control filed two virtually identical proofs of claim on June 10, 2009. Both proofs of claim were for \$550.00, and the basis of the claim was a service at North Fulton Regional Hospital on March 12, 2009. The proofs of claim were identified in the claims register as

Claim No. 2 and Claim No. 3. The only differences between the two claims are the number by which the creditor identified the debtor and the proof of claim clerk listed for Central Financial Control. One proof of claim (Claim No. 3) was signed by a Kim Steves as "POC Clerk", and the other proof of claim (Claim No. 2) was signed by a Donald Boyd as "POC Clerk". On July 31, 2009, debtor filed an objection to Claim No. 3 on the grounds that it was duplicative of Claim No. 2. The Court sustained the objection and disallowed Claim No. 3. In addition, Central Financial Control withdrew Claim No. 2 on October 12, 2009 with the following language, "I Donald Boyd on behalf of Central Financial Control am requesting the withdrawal of Claim # 2 for \$550.00 for Case # 09-74093 for Chad McMillan filed twice in error". Thus, Central Financial Control withdrew one of the two claims as filed in error, the other claim was disallowed as duplicative, and the Chapter 13 Trustee paid no funds from the estate to Central Financial Control. Debtor did not object to Central Financial Control's claim on the merits and has not claimed that he did not incur a debt for services rendered at North Fulton Regional Hospital.

Under the FDCPA, 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. § 1692e.

To state a claim under the FDCPA, a plaintiff must allege that defendants are "debt collectors" that sought to collect on a consumer debt in a manner that is prohibited by the FDCPA. *Jacques v. U.S. Bank N.A. (In re Jacques)*, 416 B.R. 63, 74 (Bankr. E.D. N.Y. 2009); *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1273 (M.D. Fla. 2008). The complaint does not allege that debtor was the object of any debt collection activity. The only activity mentioned in plaintiff's complaint is that defendant filed, in error, a duplicate proof of claim

in a bankruptcy proceeding, and defendant voluntarily withdrew one of the proofs of claim. No allegations suggesting collection activity on defendant's part have been made, and filing a proof of claim, by itself, is not a debt collection activity. *Jacques*, 416 B.R. at 80. To the contrary, creditors have a right to file a proof of claim and are advised of the deadline to file the claim in the Chapter 13 order for relief. 11 U.S.C. § 501; Fed. R. Bankr. P. 3001. As the court held in *Jacques*, "the filing of a proof of claim is meant to assert a right to payment against a debtor's estate, so that the court can determine whether the claim is allowed under the Bankruptcy Code, [and] [i]t is not viewed as an effort to collect a debt from the debtor, who enjoys the protections of the automatic stay." *Jacques*, 416 B.R. at 80 (citations omitted). The Bankruptcy Code and Federal Rules of Bankruptcy Procedure provide for a procedure whereby a debtor can object to a claim. 11 U.S.C. § 502; Fed. R. Bankr. P. 3007. Courts recognize the efficiencies of the claims objection process and the need for practitioners to respect that process and refrain from filing unwarranted FDCPA claims. *Pariseau v. Asset Acceptance, LLC (In re Pariseau)*, 395 B.R. 492, 495-496 (Bankr. M.D. Fla. 2008); *B-Real, LLC v. Rogers*, 405 B.R. 428, 432 (M.D. La. 2009). The right of a creditor to file a proof of claim is explicit and fundamental to the proper administration of a bankruptcy case, and courts are "wary of any ruling that impinges on a creditor's right to follow the procedural provisions of the Bankruptcy Code." *B-Real, LLC v. Rogers*, 405 B.R. at 432.

In addition, filing a duplicate proof of claim in error is not the type of behavior that is prohibited under the FDCPA. Plaintiff alleges violations under 15 U.S.C. § 1692e(2)(A), (5), and (10). Under 15 U.S.C. § 1692e(2)(A), debt collectors are prohibited from giving a "false representation of the character, amount, or legal status of any debt." Filing a duplicate proof

of claim in error is not a “false representation.” Section 1692e(5) forbids debt collectors from “threat[ening] to take any action that cannot legally be taken or that is not intended to be taken.” 11 U.S.C. § 1692e(5). Mistakenly filing a duplicate proof of claim is not a “threat” to take an action that cannot legally be taken. Again, the Bankruptcy Code authorizes the filing of proofs of claim, and doing so is not an illegal action. *Jacques*, 416 B.R. at 80. Finally, 15 U.S.C. § 1692e(10) forbids debt collectors from “us[ing] . . . false representation or deceptive means to collect or attempt to collect any debt,” and filing a duplicate proof of claim in error is not a “false representation” or a “deceptive act” to collect a debt.

Debtor’s counsel’s insistence that a creditor who files duplicate proofs of claim in error should be assessed damages and attorneys fees for a “false representation” under the FDCPA is particularly odd in view of the fact that debtor’s counsel filed duplicate adversary proceedings against Central Financial Control. Debtor’s counsel filed the first complaint on September 21, 2009, Adversary Proceeding No. 09-6542, and debtor’s counsel filed an identical complaint five weeks later on October 28, 2009, Adversary Proceeding No. 09-6611. It was only after the Court noticed status conferences in both adversary proceedings that debtor’s counsel filed a dismissal of one of these matters, Adversary Proceeding No. 09-6542. The Court recognizes the filing of duplicate complaints as a probable clerical error and would not consider sanctioning debtor’s counsel or Mr. McMillen for filing duplicate complaints. It is ironic in view of debtor’s counsel’s own error that he persists in claiming a violation of the FDCPA based on two proof of claim clerks having erroneously filed duplicate proofs of claim.

As the Court advised plaintiff’s counsel at the status conference, there are many cases where courts have dismissed complaints holding that an FDCPA cause of action cannot be

based on filing a proof of claim during a bankruptcy proceeding or that an FDCPA cause of action based on a proof of claim is precluded by the Bankruptcy Code. It is unclear whether counsel considered these cases before filing the complaint. They include *Jacques v. U.S. Bank N.A. (In re Jacques)*, 416 B.R. 63, 80 (Bankr. E.D. N.Y. 2009) (holding that filing a proof of claim is not a prohibited activity under the FDCPA); *B-Real, LLC v. Chaussee (In re Chaussee)*, 399 B.R. 225, 237 (B.A.P. 9th Cir. 2008) (holding that the Bankruptcy Code precludes the application of the FDCPA when debtor's only contention is that defendant filed proofs of claim); *B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("It is difficult for this court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis of a violation under the FDCPA."); *Middlebrooks v. Interstate Credit Control, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008) ("[W]here the alleged misconduct giving rise to an FDCPA claim occurred as part of the bankruptcy proceedings, 'allowing a bankrupt debtor to assert an FDCPA claim could potentially undermine the Bankruptcy Code's specific provisions for administration of the debtor's estate.'" (quoting *Molloy v. Primus Auto Fin. Servs.*, 247 B.R. 804, 820 (C.D. Cal. 2000))); *Gray-Mapp v. Sherman*, 100 F.Supp. 810 (N.D. Ill. 1999); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 WL 284788 (N.D. Ill. Apr. 26, 1999); *Pariseau v. Asset Acceptance, LLC (In re Pariseau)*, 395 B.R. 492, 496 (Bankr. M.D. Fla. 2008); *Gilliland v. Captial One Bank (In re Gilliland)*, 386 B.R. 622 (Bankr. N.D. Miss. 2008).

Plaintiff's brief focuses primarily on the Seventh Circuit case of *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). The *Randolph* case is easily distinguishable from the case at bar and has already been ably distinguished by several courts. *B-Real, LLC v. Chaussee*, 399

B.R. at 237; *B-Real, LLC v. Rogers*, 405 B.R. at 431; *Jacques*, 416 B.R. at 80. *Randolph* did not hold that a debtor has a cause of action under the FDCPA against a creditor who files a duplicate proof of claim in error. *Randolph* addressed the overlap between the Bankruptcy Code and FDCPA when a debt collector allegedly violates the automatic stay under 11 U.S.C. § 362. In that case, a Chapter 13 debtor included her debt to a dentist in her confirmed plan as a debt to be paid over time. When the dentist died, a collection agency was hired to collect his old accounts, and the debt collector sent collection letters to the debtor violating the automatic stay. The Court in *Randolph* narrowly held that the Bankruptcy Code does not impliedly repeal the FDCPA, and it then vacated the judgments and remanded the matters to determine if a violation under the FDCPA actually occurred. *Id.* at 732-733. Even if *Randolph* were to stand for the proposition that the debt collector in *Randolph* violated the FDCPA, sending letters that violate the automatic stay are an attempt to collect a debt *outside the bankruptcy system*; filing a proof of claim is a permitted act in a bankruptcy case, and the debtor can protect his rights by filing a simple objection to the duplicate proof of claim.

Case law cited by plaintiff other than *Randolph* deals primarily with the relationship between the Bankruptcy Code and the FDCPA when a creditor violates the discharge injunction under 11 U.S.C. § 524 by attempting to collect a debt *after* the debtor has received a bankruptcy discharge and the bankruptcy case is over. Again, these cases deal with behavior outside the bankruptcy system and do not support debtor's argument that filing a duplicate proof of claim in error is a violation of the FDCPA.

In accordance with the above reasoning, plaintiff's motion for default judgment is DENIED. If Mr. McMillen wishes to pursue this matter, he must effectuate proper service of

the complaint, summons, his brief, and this Order within 60 days of the entry of this Order, or this adversary proceeding will be dismissed. *See* Fed. R. Civ. P. 4(m); Fed. R. Bankr. P. 7004(a); BLR 7004-1(b), NDGa.

IT IS SO ORDERED, this 24th day of February, 2010.



JOYCE BIARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

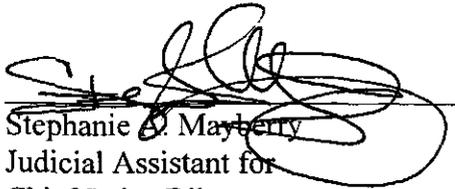
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Chief Judge Bihary

Mailed: 02/24/2010