

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:13-bk-5446-PMG

Bobby Seak and
Sokratana Kem Seak,

Debtors.

Chapter 13

Bobby Seak,

Plaintiff,

vs.

Adv. No. 3:14-ap-330-PMG

Antio, LLC, and
Weinstein & Riley, P.S.,

Defendants.

**ORDER ON DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

THIS CASE came before the Court for hearing to consider the Motion of the Defendants, Antio, LLC and Weinstein, Pinson & Riley, P.S., to Dismiss Plaintiff's First Amended Complaint. (Doc. 14).

In Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit Court of Appeals held that the filing of a time-barred proof of claim in a Chapter 13 bankruptcy case may violate the Fair Debt Collection Practices Act (FDCPA).

In this case, the Debtor alleges in his First Amended Complaint that the Defendants filed a Proof of Claim in his Chapter 13 case, that the Claim reflected a “charge off date” that preceded the bankruptcy case by more than four years, and that the assertion of the Claim violated the FDCPA.

The Court has considered the Debtor’s allegations and the Eleventh Circuit’s decision in Crawford, and finds that Count II and Count III of the Complaint state plausible claims for relief under the FDCPA. Accordingly, the Defendants’ Motion to Dismiss Counts II and III should be denied.

Background

The Debtor, Bobby Seak, filed a petition under Chapter 13 of the Bankruptcy Code on September 9, 2013.

On November 18, 2013, a Proof of Claim (Claim No. 7) was filed in the bankruptcy case by Weinstein & Riley, P.S., as the authorized agent for Antio, LLC. The Claim was filed in the amount of \$5,091.23, and states that the basis for the Claim was “credit card/other.” An Account Summary attached to the Claim reflects that the card issuer was Citibank, that the last purchase date was July 18, 2008, and that the “charge off date” was February 27, 2009.

On August 27, 2014, the Debtor filed a Complaint for Injunctive Relief and Damages against the Defendants. (Doc. 1).

On September 23, 2014, the Defendants filed a Withdrawal of Proof of Claim Number 7. (Main Case, Doc. 47).

On November 14, 2014, the Debtor filed a First Amended Complaint for Damages against the Defendants. (Doc. 12). The First Amended Complaint contains four Counts. Count I is an Objection to the Claim; Count II is an action against Antio, LLC for violations of the FDCPA; Count III is an

action against Weinstein & Riley, P.S. for violations of the FDCPA; and Count IV is an action against the Defendants for equitable subordination of the Claim.

Discussion

The Defendants primarily assert that Count II and Count III of the First Amended Complaint should be dismissed because (1) the Complaint does not allege sufficient facts to show that the Claim is time-barred; and (2) the FDCPA claims are precluded by the Bankruptcy Code. (Transcript, pp. 9-15).

To survive a motion to dismiss for failure to state a claim, a claimant “must allege facts to make his or her claim for relief ‘plausible on its face.’” In re Fundamental Long Term Care, Inc., 494 B.R. 548, 554 (Bankr. M.D. Fla. 2013)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 126 S.Ct. 1955, 167 L.Ed.2d 868 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

In this case, Count II and Count III state claims for relief under the FDCPA that are plausible on their face, and the Defendants’ Motion to Dismiss Counts II and III should be denied.

A. The limitations issue

In Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1257 (11th Cir. 2014), LVNV had filed a proof of claim in the debtor’s Chapter 13 case, “notwithstanding that the limitations period had expired four years earlier,” and the debtor alleged in an adversary proceeding that LVNV’s attempt to claim the time-barred debt violated the FDCPA. The Eleventh Circuit Court of Appeals evaluated the consumer-protection purposes of the FDCPA, and concluded that “under the ‘least-sophisticated consumer standard’ in our binding precedent, LVNV’s filing of a time-barred proof of claim against

[the debtor] in bankruptcy was ‘unfair,’ ‘unconscionable,’ ‘deceptive,’ and ‘misleading’ within the broad scope of §1692e and §1692f’ of the FDCPA. Crawford v. LVNV Funding, 758 F.3d at 1261. Consequently, the Court found that “LVNV violated the FDCPA by filing a stale claim in bankruptcy court.” Id. at 1262.

In this case, the Defendants filed Proof of Claim Number 7 in the Debtor’s bankruptcy case, and the Account Summary attached to the Claim reflects that the “last purchase date” was July 18, 2008, and that the “Charge Off Date” was February 27, 2009. (See Doc. 12, First Amended Complaint, ¶ 14). The Debtor’s Chapter 13 case was filed on September 9, 2013, more than four years after the Charge Off Date, and more than five years after the last purchase.

In Counts II and III of his First Amended Complaint, the Debtor alleges that the Defendants “willfully attempted to collect a time-barred debt and failed to provide written notice that it had been assigned the alleged debt before taking action to collect it.” The Debtor alleges, therefore, that the Defendants violated a number of the FDCPA’s provisions, including §1692e and §1692f. (Doc. 12, First Amended Complaint, ¶¶ 25-29, 31-35).

In response to the Debtor’s assertion that they are attempting to claim a time-barred debt, the Defendants assert that the relevant date for purposes of the statute of limitations is the date on which the last payment was due on the debt. (Transcript, p. 7). The Defendants contend, therefore, that the Complaint does not state a claim for relief under the FDCPA, because it does not allege the date on which the last payment was due, and does not allege the applicable limitations period.

The Defendants’ Motion to Dismiss Counts II and III of the First Amended Complaint should be denied. According to the Complaint, the Claim is based on an account that had been inactive for approximately five years before the Debtor filed his bankruptcy petition. For purposes of the

Defendants' motion to dismiss, the Complaint includes sufficient facts to allege that the Claim is based on a time-barred debt, and Counts II and III state plausible claims for relief under the FDCPA.

B. The preclusion issue

In the Motion to Dismiss, the Defendants also assert that Counts II and III should be dismissed because the Debtor's FDCPA claims are precluded by the Bankruptcy Code.

In Davis v. NCO Financial Systems, Inc., 2014 WL 4954705 (M.D. Fla.), NCO had made allegedly harassing communications with the debtor after the debtor had filed a Chapter 13 case, and the debtor filed separate actions against NCO for violating the stay and for violating the FDCPA. The District Court found that the debtor was permitted to seek remedies under both the Bankruptcy Code and the FDCPA, because "one federal statute does not preempt another," and because no irreconcilable conflict existed between the remedies. Davis v. NCO Financial Systems, Inc., 2014 WL 4954705, at 2-3(citing Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004), and quoting Bacelli v. MFP, Inc., 729 F.Supp.2d 1328, 1336 (M.D. Fla. 2010)). In other words, the Court concluded that a debtor's remedies under the Bankruptcy Code are not his sole remedies for a creditor's wrongful conduct in a bankruptcy case, if the conduct also constitutes a violation of the FDCPA. Davis, 2014 WL 4954705, at *4.

Significantly, the District Court's decision in Davis was entered after the Eleventh Circuit's decision in Crawford. In Crawford, the Eleventh Circuit Court of Appeals did not expressly "weigh in" on the preemption issue. Crawford, 758 F.3d at 1262 n.7; Davis, 2014 WL 4954705, at *4. The Eleventh Circuit did, however, allow a bankruptcy debtor to pursue his claims under the FDCPA, and did not determine that the debtor's remedies were limited to the claims process under the Bankruptcy Code.

In this case, the Defendants assert that Count II and Count III of the First Amended Complaint should be dismissed, because the FDCPA claims are precluded by the Bankruptcy Code. For the reasons discussed in Davis, the Motion to Dismiss Counts II and III should be denied at this time.

C. Count I and Count IV

Count I of the First Amended Complaint is an objection to Claim Number 7, and Count IV of the Complaint is an action for equitable subordination of Claim Number 7.

On September 23, 2014, after this adversary proceeding was commenced, the Defendants filed a Notice of Withdrawal of Proof of Claim Number 7. (Main Case, Doc. 47).

Consequently, the Defendants contend that Counts I and IV should be dismissed as moot, because the Claim that the Debtor challenges in those Counts has been withdrawn. (Transcript, p. 4).

In response to the request for dismissal, the Debtor asserts that Counts I and IV are not moot, because the withdrawal was not effective. (Transcript, p. 16). According to the Debtor, Rule 3006 of the Federal Rules of Bankruptcy Procedure prohibited the Defendants from withdrawing the Claim after the adversary proceeding was filed, "except on order of the court after a hearing on notice to the trustee or debtor in possession." F.R.Bankr.P. 3006.

The Court finds that the Defendants should be permitted to withdraw the Claim. The withdrawal of the Claim was unconditional, and the Debtor received notice of the withdrawal at the time that it was filed. (Main Case, Doc. 47). The Debtor also received notice of the hearing on the motion to dismiss his objection to the Claim. (Doc. 11). Accordingly, the Defendants' withdrawal of the Claim may be allowed pursuant to Rule 3006, because the Debtor was provided with such notice and hearing as is appropriate in the particular circumstances of this case. See 11 U.S.C. §102(1).

At the hearing on the Defendants' Motion to Dismiss the Debtor's First Amended Complaint, the Debtor did not assert any substantive grounds to disallow the Defendants' withdrawal of Claim Number 7. (Transcript, pp. 16-17). In this Order, therefore, the Court will allow the Defendants to withdraw the Claim pursuant to Rule 3006 of the Federal Rules of Bankruptcy Procedure. Consequently, the Defendants' Motion to Dismiss Count I and Count IV of the Debtor's First Amended Complaint should be granted.

Accordingly:

IT IS ORDERED that:

1. The Motion of the Defendants, Antio, LLC and Weinstein, Pinson & Riley, P.S., to Dismiss Plaintiff's First Amended Complaint is denied as to Count II and Count III of the First Amended Complaint.

2. The Defendants' Withdrawal of Proof of Claim Number 7 is authorized pursuant to Rule 3006 of the Federal Rules of Bankruptcy Procedure, and Claim Number 7 is withdrawn.

3. The Defendants' Motion to Dismiss Plaintiff's First Amended Complaint is granted as to Count I and Count IV, and Counts I and IV of the First Amended Complaint are dismissed.

DATED this 22nd day of January, 2015.

BY THE COURT



PAUL M. GLENN
United States Bankruptcy Judge