MTGLQ Investors, LP v. Wellington et al

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO MTGLQ INVESTORS, LP, Plaintiff, v. No. 1:17-cv-00487-KG-LF MONICA L. WELLINGTON, THE MONICA L. WELLINGTON DECLARATION OF TRUST DATED DECEMBER 28, 2007, ALTURA VILLAGE CHASE BANK, N.A., Defendants.

MEMORANDUM OPINION AND ORDER Second Amended Counterclaim/Third- her proposed

- -1). On July 2, 2018, MTGLQ Investors, LP reply. (Docs. 84

denies it, in part.

I. Background

This is Ms. Welling third-party claims against Weinstein & Riley, P.S. , Elizabeth V. Friedenstein, and Rushmore Loan Management Services, LLC . On May 21,

2017, Ms. Wellington first filed her counterclaims alleging that MTGLQ, Weinstein & Riley, Ms. Friedenstein seeking declaratory judgment against MTGLQ, JPMorgan Chase Bank, N.A., and Profolio Home Mortgage Corporation . (Doc. 6). Ms. Wellington properly amended her first counterclaims, as a matter of right, and dropped the declaratory judgment claim against Profolio Home Mortgage Corporation. (Doc 12).

MTGLQ, Weinstein & Riley, Ms. Friedenstein, and Rushmore, together and separately, brought motions to dismiss. See (Docs. 8, 11, and 24). In a Memorandum Opinion and Order, (Doc. 72), filed April 27, 2018, the Court granted the motions to dismiss amended counterclaims, concluding that she failed to allege sufficient facts to plausibly show that MTGLQ, Weinstein & Riley, Ms. Friedenstein, and Rushmore are debt collectors under the FDCPA. (Doc. 72) at 8- declaratory judgment claim failed as a matter of law because she lacked standing to challenge the assignments of her Note and Mortgage. Id. at 14-16. II. Motion for Leave to Amend and Proposed Second Amended Counterclaim

In her Motion for Leave to Amend, Ms. Wellington seeks leave from the Court under Fed. R. Civ. P. 15(a)(2) to file her proposed Second Amended Counterclaim. Ms. Wellington asserts that she has corrected the deficiencies of her previous counterclaims, specifically alleging sufficient facts to plausibly show that MTGLQ, Weinstein & Riley, Ms. Friedenstein, and Rushmore are debt collectors under the FDCPA. In response, MTGLQ argues that Ms.

will create undue delay, result in undue prejudice, the amendment is made in bad faith, and is futile. MTGLQ also urges the Court to consider judicial economy in deciding this motion. In

her reply, Ms. Wellington contends that this case is still in its infancy, there is no prejudice to MTGLQ, and allowing amendment would not be a futile exercise.

previous counterclaims. (Doc. 81-1). The most substantial changes are additional factual allegations as to MTGLQ, Weinstein & Riley, Ms. Friedenstein practices. Otherwise, Ms. Wellington maintains the same thirteen causes of action under the FDCPA that she alleged in her previous filings. Also, Ms. Wellington omits any declaratory ju . (Doc. 72). III. Legal Standard

A. Rule 15(a)(2) Rule 15(a)(

e part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the U.S. ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1166 (10th Cir. 2009) (citing Forman v. Davis, 371 U.S. 178, 182 (1962)).

B. Rule 12(b)(6)

Fields v. City of Tulsa, 753 F.3d 1000, 1012 (10th Cir. 2014) (internal quotation defendant is liable for the misc Id. at 1012-1013 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

In ruling on a Rule 12(b)(6) motion to dismiss, the Court must accept all well-pleaded allegations as true and must view them in the light most favorable to the plaintiff. See Zinermon v. Burch, 494 U.S. 113, 118 (1990); Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984). Rule

through more than labels, conclusions and a formulaic recitation of the elements of a cause of action. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts sufficient to state a plausible claim of relief. Id. at 570. A claim is facially plausible if the plaintiff pleads facts sufficient for the court to reasonably infer that the defendant is liable for the alleged misconduct. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). Fi pro se Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520-521 (1 proper function of the district court to assume the role of advocate for the pro se

Bellmon construct a legal theory for [a pro se Dunn v. White, 880 F.2d 1188, 1197 (10th Cir. 1989) (per curiam).

IV. Discussion

At the outset, the Court concludes the proposed Second Amended Counterclaim would not create delay, result in undue prejudice, nor was brought in bad faith. The Court also finds

that there is no evidence of dilatory motive by Ms. Wellington or failure to cure deficiencies previously noted. Thus, the Court addresses would be futile as to any of her thirteen causes of action.

The first cause of action alleges a violation of 15 U.S.C. 1692i; the second, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action allege violations of § 1692e; the third cause of action alleges a violation of § 1692f(1); and, the seventh cause of action nterclaims are not futile if she alleges sufficient facts to state plausible claims for relief under the FDCPA. See Twombly, 550 U.S. at 570.

suggest that [defendant] is a debt collector whose efforts to collect a debt from [them] violated

Mbaku v. Carrington Mortgage Servs., LLC, --- Fed. Appx. ---, 2018 WL 2715055, at *2 (10th Cir.) (citing Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1238-1239 (10th Cir. 2013)). Thus, as a threshold matter, to successfully plead a claim under the FDCPA a plaintiff must show that the defendant is a debt collector. See 15 U.S.C. §

A. Debt Collector Under the FDCPA See 15 U.S.C. § commerce or the mails in any business the principal purpose of which is the collection of any

Id.; see also Skinner v. LVNV Funding, LLC, 2018 WL 319320, at *2-3 (N.D. Ill.) Second, a § 1692a(6); see also Skinner, 2018 WL 319320, at *2-3 (labeling second definition under Se definition).

1. MTGLQ Ms. Wellington alleges that main, if not exclusive, business of MTGLQ Investors, LP is obtaining defaulted consumer debts, particularly mortgage claims, and then seeking to collect the full a -1) at 3, ¶ 5. She also alleges that -defaulted using the mail or electronic communications in its collections. Id.

Taken as true and viewed in the light most favorable to Ms. Wellington, she alleges that MTGLQ has sought to collect on thousands of defaulted debts over the past five years. Perhaps, and taking the allegations as true, the allegations fail to show to any extent this debt collection Ms. Wellington fails to allege ss that is debt collection. This Court cited approvingly Hunte v. Safeguard Props. Mgmt., LLC, 255 F. Supp. 3d 722 (N.D. Ill. 2017).

This Court has quoted Hunte: F. Supp. 3d at 726. egations fail to provide context that would

the Court finds, in view of the alleged attempt to collect that the allegations show a principal purpose to collect already defaulted debts. Furthermore, for purposes of Rule 12(b)(6) the Court does not require the purpose to the Court

concludes that Ms. Wellington alleges sufficient facts to plausibly show that MTGLQ is a debt collector under the principal purpose definition of the FDCPA.

2. Weinstein & Riley and Ms. Friedenstein Regarding Weinstein & Riley, Ms. Wellington alleges it seeks personal judgments and property foreclosures on behalf of those who acquire already-defaulted consumer debts and to this end have filed thousands of claims within the past few years. Id. at 2, ¶ 3. Similarly, Ms. Wellington alleges that Ms. Friedenstein seeks personal judgments and property foreclosures on behalf of her clients, filing dozens of debt collection claims in New Mexico in recent months. Id. at 2-3, ¶ 4. Also, Ms. Wellington alleges that Weinstein & Riley, and Ms. Friedenstein are registered as debt collectors under NMSA 1978, § 61-18A-1. Id. at 2-3, ¶¶ 3-4.

Viewing these allegations in the light most favorable to Ms. Wellington, she alleges that Weinstein & Riley and Ms. Friedenstein regularly attempt to collect debts on behalf of others. Thus, the Court concludes that Ms. Wellington alleges sufficient facts to plausibly show that Weinstein & Riley and Ms. Friedenstein are debt collectors under the regularly collects definition.

3. Rushmore As to Rushmore, Ms. Wellington alleges that it an agent for, MTGLQ Investors, LP since at least February 2016, and has routinely sought to

collect thousands of debt claims acquired by MTGLQ Investors, and others, after they are in Id. at 3, ¶ 6. Viewing these allegations in the light most favorable to Ms. Wellington, she alleges that Rushmore regularly attempts to collect debts on behalf of others. Thus, the

Court concludes that Ms. Wellington alleges sufficient facts to plausibly show that Rushmore is a debt collector under the regularly collects definition.

B. First Cause of Action 15 U.S.C. § 1692i Martinez v. Albuquerque Collection Servs., Inc., 867 F. Supp. 1495, 1502 (D.N.M. 1994) (citing

Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1511 (9th Cir. 1994); Scott v. Jones, 964 F.2d 314, 318 (4th Cir.1992); Dutton v. Wolhar, 809 F.Supp. 1130, 1140 (D.Del.1992)); see also 15 U.S.C. § 1692i(a). Ms. Wellington claims that MTGLQ, Weinstein & Riley, and Ms. Friedenstein are liable under Section 1692(i)(a)(2) for bringing a personal judgment claim in New Mexico rather than in California. See (Doc. 81-1) at 4, ¶¶ 8-14 (first cause of action).

In other words, the personal judgment action could be filed by MTGLQ in either New Mexico or

California depending on where Ms. Wellington signed the Note and where she resided at the commencement of this action.

Ms. Wellington alleges that MTGLQ filed a Complaint against her in New Mexico state court, seeking a personal judgment claim. (Doc. 81-1) at 4, ¶¶ 9-10. Ms. Wellington also alleges County, California, and the alleged note attached to the complaint fails to show it was executed

in New Mexico, the action for this claim Id. at 4, ¶ 12. Taking these factual allegations as true, Ms. Wellington fails to plead a plausible claim for relief in that MTGLQ, Weinstein & Riley, and Ms. Friedenstein brought a legal action in an improper

venue in violation of Section 1692i(a)(2). Ms. Wellington fails to allege that the Note was executed outside of New Mexico and, therefore, it was improper to file the personal judgment claim in this state. Furthermore, Ms. Wellington fails to allege that she resided in Alameda County at the commencement of this suit. Thus, Ms. Wellington fails to state a plausible claim for relief under the Section 1692i. Therefore, allowing Ms. Wellington leave to amend as to her first cause of action is futile.

C. Second, Fourth , Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, Twelfth, and

Thirteenth Causes of Action 15 U.S.C. § 1692e Ms. Wellington also alleges that MTGLQ, Weinstein & Riley, and Ms. Friedenstein ing representation[s] or means in

s Complaint, see (Doc. 1-1) at 8-44, are false, deceptive or

misleading. See (Doc. 81-1) at 5-10, ¶¶ 15-19, 24-32, 37-48 (second, fourth, sixth, eighth causes of action). Ms. Wellington fails to allege what about the Note and Mortgage documents are false, deceptive, or misleading. At most, Ms. Wellington alleges that swirl markings on the Note, id. at 5, ¶ 16, or blacked-out areas on the Mortgage, id. at 10, ¶ 46, suggest they are fabrications. However, the Court has already found these documents to not be fabrications or inauthentic, see (Doc. 71) at 9-10, and without allegations or evidence to suggest otherwise, the Court finds that Ms. Wellington fails to state a plausible claim for relief as to her second, fourth, sixth, and eighth causes of action. Therefore, because allowing amendment as to these claims is

futile, Ms. Wellington is instructed to omit them from her proposed Second Amended Counterclaim. 1

In her fifth cause of action, Ms. Wellington alleges that Weinstein & Riley, and Ms. Friedenstein made a false and knowing misrepresentation about MTGLQ notifying her of her default status and demanding payment. (Doc. 81-1) at 8, ¶ 34. Ms. Wellington alleges that Id. These allegations are inconsistent with other , on behalf of MTGLQ, contacted Ms. Wellington about her default and loss mitigation options. Id. at 15-16, ¶¶ 76- state a plausible claim for relief. Therefore, allowing amendment as to her fifth cause of action is futile.

In her ninth cause of action, Ms. Wellington alleges that Weinstein & Riley and Ms.

there was an erroneous release and erroneous assignment of the Mortgage. (Doc. 81-1) at 11, ¶¶ 50- Complaint, indicates that Profolio had no interest in the property to assign, contrary to MTGLQ statements in its Complaint. Id. at 11-12, ¶¶ 53, 56. She also alleges that MTGLQ is barred

from bringing a claim in New Mexico because it received its assignment from the Mortgage poration and not registered with the New Mexico Secretary of State. Id. at 11-12, ¶¶ 54-55. Ms. Wellington

1 Ms. Wellington also alleges violations of the FDCPA that double as arguments raised in her misrepresentation for MTGLQ to allege in its Complaint that it placed its Mortgage in the hands of Weinstein & Riley and Ms. Friedenstein for collection. Ms. Wellington does not support this allegation and the Court finds that it fails to plausibly show a violation of Section 1692e.

asserts that MERS, and, consequently, MTGLQ violated NMSA 1978, § 53-17-20 (Cum. Supp. 2015), which prohibits foreign corporations from transacting business in this state without a certificate of authority with the Secretary of State. Viewing these allegations in the light most favorable to Ms. Wellington, she fails to allege facts demonstrating a plausible claim for relief, specifically why the all assignment are misrepresentations or are false. Regarding Profolio Home Mortgage Corporation bu

-17-1(H) (Repl. Pamp. 2001). Therefore, the Court finds that

In her tenth cause of action, Ms. Wellington alleges that Weinstein & Riley and Ms.

s and the Complaint. (Doc. 81-1) at 12, ¶ 60-62. These allegations fail to state a claim for relief because Ms. Wellington lacks standing to bring a claim on behalf of a spouse. See, e.g., Trustees of the llegrini, 2005 WL 1586565, at *1 (D. pro se party may respond to claims against her, but she may not file motions or

of action is futile.

derogatory statements about Wellington to be issued to credit reporting agencies regarding the (Doc. 81-1) at 13, ¶ 66. According to Ms. Wellington, some of these statements were based on the action filed by Weinstein & Riley

and Ms. Friedenstein. Id. The credit reporting agencies then recorded and published these statements to their subscribers. Id. Ms. Wellington alleges that these credit reports resulted in her credit score dropping. Id. at 14, ¶ 67. Ms. Wellington alleges, in a conclusory fashion, that the action filed by Weinstein & Riley and Ms. Friedenstein, on behalf of MTGLQ, is baseless. Id. at 14, ¶ 68.

Viewing these allegations in the light most favorable to Ms. Wellington, the Court finds that she fails to state a plausible claim for relief under the FDCPA. Ms. Wellington s of credit information which it knew or should have known were false. This assertion simply reiterates the language of 15 U.S.C. § 1692e(8), and fails to allege facts plausibly suggesting that Rushmore communicated or threatened to communicate credit information it knew to be false or should be known to be false.

Friedenstein, on behalf of MTGLQ, is baseless is a conclusory allegation and not supported by any other facual allegations. Therefore, the Court finds that allowing amendment to Ms.

In her twelfth cause of action, Ms. Wellington alleges that Weinstein & Riley and Ms. Friedenstein made a false and misleading representation by filing a Notice of Lis Pendens in the county records. (Doc. 81-1) at 14, ¶ 72. Ms. Wellington supports this allegation by alleging that

of leg Id. at 14-15, ¶ 73. As the Court has demonstrated in its Memorandum Opinion and Order filed April 27, 2018, (Doc. 71), MTGLQ has standing to bring its claim, and, thus, as a matter of law, MTGLQ has a claim against Ms. Wellington regarding the property at issue in this case. Ms. Wellington fails to provide other factual allegations plausibly showing the filing of the Notice of Lis Pendens was

false and misleading. Therefore, the Court finds th twelfth cause of action is futile.

In her thirteenth cause of action, Ms. Wellington alleges that Rushmore, on behalf of MTGLQ, contacted her through letters since January 2016, attempting to collect the alleged debt owed on her Note. (Doc. 81-1) at 15, ¶¶ 76-78. Ms. Wellington alleges, in a conclusory fashion, that these letters were misrepresentations and false claims that she owed Rushmore in violation of 15 U.S.C. § 1692e. Id. at 16, ¶ 79. Viewing Ms. Well most favorable to her, she fails to state a claim for relief based only on the fact that Rushmore

thirteenth cause of action is futile.

D. Third Cause of Action 15 U.S.C. § 1692f(1) Ms. Wellington also alleges a violation of 15 U.S.C. § 1692f(1) in her third cause of interest, fee, charge, or expense incidental to the principal obligation) unless such amount is

Id. Ms. as

rate. (Doc. 81-1) at 6, ¶ 21. Although the futility analysis at this point is performed by applying

the Note is in the record before it. The Note explicitly provides that the interest rate before and after default is 5.750%, and Wellington] to pay immediately the full amount of Principal which has not been paid and all the

-1) at 8-9. Furthermore, the Note provides that the Note Holder has required me [Ms. Wellington] to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in Id. at 9. Ms. Wellington fails to allege facts showing that the Note is false

expressly authorized by the Note. Therefore, the Court finds that allowing amendment to Ms. use of action is futile.

E. Seventh Cause of Action 15 U.S.C. § 1692g(b) Finally, in her seventh cause of action, Ms. Wellington alleges a violation of 15 U.S.C. § 1692g(b) and § 1692e by Weinstein & Riley and Ms. Friedenstein. Section 1692g(b) governs disputed debts, providing that

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Ms. Wellington alleges that Weinstein & Riley and Ms. Friedenstein attached a document Complaint. (Doc. 81-1) at 9, ¶ 42. Ms. Wellington also alleges that the document states

she has thirty (30) days to dispute the validity of the debt claim, but, nevertheless, the debt collector may pursue debt collection immediately. Id. While these allegations appear to state an inconsistency, the Court finds that these allegations fail to state a claim for relief under Section 1692g(b). Ms. Wellington does not allege that she attempted to obtain verification of the debt or that Weinstein & Riley or Ms. Friedenstein failed to

provide verification of the debt or cease collection of the debt until verification was provided. Ms. Wellington also fails to allege sufficient facts to plausibly suggest that this Notice and the statements therein are misrepresentations or false, thus, failing to state a claim for relief under Section 1692e.

Moreover, the Court has reviewed this document and finds that there is no material inconsistency. The document informs Ms. Wellington that she has an opportunity to dispute the validity of the debt, and upon disputing the debt in writing Weinstein & Riley and Ms. Friedenstein would obtain verification of the debt. (Doc. 1-1) at 7. The document also notes that Weinstein & Riley and Ms. Friedenstein may pursue collection efforts immediately, not that they would continue to pursue collection after a dispute was made by Ms. Wellington. Thus, without any factual allegations that Ms. Wellington disputed the debt or that Weinstein & Riley and Ms. Friedenstein failed to obtain verification of the debt, Ms. Wellington fails to state a plausible claim for relief under Section 1692g(b). Therefore, the Court finds that allowing amendment to Ms.

V. Conclusion

proposed Second Amended Counterclaim carefully. Ms. Wellington fails to state a plausible claim for relief as to her thirteen causes of actions. Accordingly, the Court denies Ms. as her proposed Second Amended Counterclaim is futile.

denied.

_________________________________ UNITED STATES DISTRICT JUDGE