United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CASE NO. 4:15-CV-36
	§	Judge Mazzant
	§	
COMMERCIAL RECOVERY SYSTEMS, INC., TIMOTHY L. FORD, individually and as an officer of COMMERCIAL RECOVERY SYSTEMS, INC., and DAVID J. DEVANY, individually and as a former officer of COMMERCIAL RECOVERY SYSTEMS, INC.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff's Motion for Summary Judgment (Dkt. #30). The Court, having considered the relevant pleadings, finds that Plaintiff's motion should be granted as to Defendants Commercial Recovery Systems, Inc. ("CRS") and Timothy Ford ("Ford").[1]

BACKGROUND

On March 13, 2013, in response to numerous consumer complaints about CRS's debt collection practices, the Federal Trade Commission ("FTC") issued a Civil Investigative Demand ("CID") to CRS to review its debt collection practices. CRS's responses to the CID and FTC's interviews with former employees corroborated the numerous consumers' complaints. Based upon the evidence, Plaintiff the United States of America filed this suit, seeking both injunctive relief and civil penalties.

Defendant CRS is a Texas corporation that has been in business since 1994. Until 2013, its

[1] The Court defers ruling on Plaintiff's motion for summary judgment against Defendant David Devany.

main office was in Dallas, with a secondary office in Plano, Texas. CRS is a third-party debt collector that primarily collects consumer debt that was "primarily for personal, family, or household purposes," including auto loans and credit card debts, on behalf of the original creditors, and conducts business in numerous states. In November 2013, CRS sought bankruptcy protection under Chapter 11. Defendant Tim Ford, CRS's President, Director, and majority shareholder, testified in CRS's bankruptcy proceedings that the company's insolvency resulted, in large part, from a number of Fair Debt Collection Practices Act ("FDCPA") lawsuits brought by private litigants.

Defendant Ford has been CRS's Director and President since its incorporation. Until recently, he was also its sole shareholder. Ford drew a salary of up to $200,000 per month from the company until its bankruptcy. Ford spoke daily with the company's Vice President, David Devany, and received regular updates about the company including updates about litigation, FDCPA issues, and consumer complaints. Ford also actively helped manage the company by authorizing the termination and discipline of employees and assisting with planning and providing incentive contests to award to top collectors. Ford approved settlements of lawsuits filed against the company including lawsuits alleging FDCPA violations. Ford signed a February 2013 Stipulation and

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earned commissions for amounts collected above quota. In addition to their base salary and commissions, top collectors received a variety of rewards such as access to CRS's luxury suite at AT&T Stadium to watch Dallas Cowboys' games or a lunch or dinner at an upscale local restaurant.

According to former employees, FDCPA compliance training at CRS was virtually nonexistent, and some collection groups were more FDCPA compliant than others. In written CID interrogatory responses, CRS noted that it administered an FDCPA compliance test to all new employees. However, some former employees do not remember any FDCPA training for new hires. According to them, newly hired employees were on the floor collecting the day they were hired.

CRS stated in its 2013 CID interrogatory responses that it had a full-time employee who monitored its collection calls for FDCPA compliance, noted all violations, and wrote up offending employees. But former employees contradict CRS's claims, describing that no formal disciplinary system for FDCPA violations existed at the company and that employees were rarely terminated for FDCPA violations. These former-employee allegations are supported by the number of violations identified in call recordings. Some former employees stated the only employees fired for FDCPA violations were those whose collection tactics resulted in complaints from the creditor-client or a lawsuit.

CRS's collection practices generated a p collector u ö6 Â

result in the seizure, garnishment, or attachment of a person's property or wages. Consumers continued to file numerous complaints even after CRS received the FTC's CID in March 2013.

Part of CRS's response to the FTC's CID was the production of a hard drive containing audio recordings of thousands of calls made by CRS collectors between November 1, 2012, and March 21, 2013. Given the volume of recordings, FTC listened to a random sampling of 300 calls to determine whether the database contained any FDCPA violations. The best evidence of CRS's repeated abusive and deceptive collection tactics, discussed in detail below, is contained in those recordings.

The most common misrepresentation employed by CRS collectors is impersonating attorneys, attorneys' staff, or judicial employees. Of the 300 random calls analyzed, 77 included such impersonations. In these call recordings, collectors described themselves as attorneys or calling on behalf of attorneys or a law firm, such as by claiming that they were calling from "the Law Offices of CRS and Associates." Collectors implied that attorneys were involved in the collection efforts, by stating they were calling from "the legal department," or were calling regarding "a legal matter pending" that they "represented" CRS, or that they "represented the legal interests" of a creditor. Collectors told consumers that "there is a case against you" and offered to resolve it "out of court."

Collectors also claimed to be judicial employees, mediators, or other court personnel. One collector stated that he was a mediator working for a state judge, going so far as to put the consumer on hold while he pretended to speak with the judge regarding the consumer's case. Another stated that she was "with the county," calling regarding an "affidavit of complaint." In another call, a collector referred to himself as a "senior mediator for CRS and associates," which he proclaimed to be a "firm hired by Bank of America" to sue the consumer.

Former employees confirmed that such tactics were commonplace and were intended to pressure consumers into paying their accounts. One former employee stated that some collection groups ran a police scanner as background noise to make the collectors' threats, that a constable was on his way to serve the consumer with a lawsuit, sound real.

The audio recordings also demonstrate that CRS collectors frequently threatened consumers with litigation despite having no authority to sue on behalf of its creditor-clients. Collectors led consumers to believe that an action was already filed against the consumer and would continue unless the consumer paid the debt. These threats were patently false because, as CRS admitted, the company did not file lawsuits against a

againstdebtors. Audio recordings produced by CRS featured collectors stating they were calling regarding

opposing the motion for summary judgment. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The substantive law identifies which facts are material. *Anderson*, 477 U.S. at 248.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* at 247. If the movant bears the burden of proof on a claim or defense on which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). But if the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex*, 477 U.S. at 325; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000). Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers*, 209 F.3d at 424 (citing *Anderson*, 477 U.S. at 248-49). The nonmovant must adduce affirmative evidence. *Anderson*, 477 U.S. at 257.

ANALYSIS

Plaintiff moves for summary judgment asserting that Defendants violated the FDCPA and the FTC Act.

The purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The FDCPA restricts debt collectors from making false or misleading representations or using unfair collection methods. *Id.*; 15 U.S.C.

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synonymous" with express claims to language that few consumers would interpret as making a particular representation. *In the Matter of Kraft, Inc.*, 114 F

under the law. Defendants CRS and Ford have admitted that the company is a debt collector for purposes of the FDCPA.

Violations of FDCPA and FTC Act

Plaintiff next asserts that Defendants have engaged in acts prohibited by the FDCPA and the FTC Act. Section 807 of the FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. In addition to this general prohibition, the Act identifies specific conduct that is barred by the statute. Among other prohibitions, debt collectors may not: (1) falsely represent the character, amount, or legal status of any debt; (2) falsely represent or imply that an individual is an attorney or that any communication is from an attorney; (3) represent or imply that nonq (@ Ö–× Ç• (@ Ö–× Ç•

is not intended to be taken. 15 U.S.C. § 1692e(5). It includes threats to file a suit when there is no intention to sue. *See id.* The summary judgment evidence establishes

Section 807(2) by falsely representing the legal status of the debt. Because the misrepresentations as to the character of consumers' debts were express, they are presumptively material; because the representations were false, they were deceptive, in violation of Section 807(2) of the FDCPA.

The uncontested summary judgment records established that CRS debt collectors repeatedly and routinely violated the FDCPA; and thus the FTC Act, in multiple ways, by making blatantly false representations for the

injunctive relief. Permanent injunctive relief remains available even when illegal conduct has ceased if there is a possibility that it might reoccur. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Although CRS has declared bankruptcy the government does not seek civil penalties from the company since CRS still maintains its corporate identity; therefore, regardless of any bankruptcy proceedings, CRS remains in a position to engage in abusive debt collection practices at any time. There remains a cognizable danger of recurrent violation, and injunctive relief remains appropriate.

Individual Liability

Plaintiff also moves for summary judgment against Ford for injunctive relief. To obtain an injunction against an individual, the government must show that the individual (1) directly participated in the violative acts, (2) played a role in controlling, directing or formulating the policies and practices that resulted in violative acts, or (3) had the authority to control the unlawful activities or participated directly in them. *In re Nat'l Credit Mgmt. Grp., LLC*, 21 F. Supp. 2d at 461; *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999). Courts have held that merely assuming the duties of a corporate officer is probative of an individual's authority to control. *Amy Travel*, 875 F.2d at 573; *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 538 (S.D.N.Y. 2000). This is especially true when the corporate defendants are small, closely held corporations. *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd* 312 F.3d 259 (7th Cir. 2002); *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973).

Based upon the summary judgment evidence, the Court finds that Ford, as

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violative acts, but in fact actually set the policies of his company. As the President, he had the authority to fire or otherwise discipline his employees for employing deceptive debt collection tactics. Because he failed to respond to Plaintiff's First Set of Discovery Requests to Defendant Ford, pursuant to Federal Rule Civil. Procedure 36(a)(3), he has now deemed to have admitted them. Thus, Ford has admitted that