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United States District Court,
N.D. Georgia, Atlanta Division.

Jeffery CORDTZ, Plaintiff,
v.
JOHNSON LEGAL OFFICES, LLC;
and Larry W. Johnson, Defendants.

CIVIL ACTION FILE NO.
1:21-cv-02003-MHC-LTW
|
Signed September 30, 2022

Attorneys and Law Firms

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Larry W. Johnson, Johnson Legal Offices, L.L.C., Atlanta, GA, for Defendants.

FINAL REPORT AND RECOMMENDATION

LINDA T. WALKER, UNITED STATES MAGISTRATE JUDGE

***1** This matter appears before the Court on a Motion for Summary Judgment ([Doc. 93]) filed by Defendants Larry W. Johnson ("Johnson") and Johnson Legal Offices, LLC ("JLO"). For the following reasons, the undersigned **RECOMMENDS** that the Motion be **GRANTED in part** and **DENIED in part**, as explained below.

PRELIMINARY MATTERS

The below factual background is drawn from the parties' statements of material facts to the extent such facts are undisputed. When a fact is disputed and both parties have cited to evidence in the record, the Court has reviewed the evidence and has viewed all evidence and made all factual inferences in the light most favorable to Plaintiff. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Two preliminary matters merit further discussion.

First, Plaintiff filed a statement of additional facts in accordance with Local Rule 56.1(B)(2)(b). [Doc. 100-1]. The party moving for summary judgment "shall file a response to each of the respondent's facts," but Defendants did not file such a response. See N.D. Ga. Loc. R. 56.1(B)(3). "The Court interprets the Defendants' silence as a concession that the Plaintiff's material facts are true, so long as those facts are supported by evidentiary citations and are not contradicted in the Defendants' Statement of Material Facts." Chastain v. Physicians Hair Transplant Ctr., Inc., No. 1:20-CV-1315-TWT, 2022 WL 19388, at *1 (N.D. Ga. Jan. 3, 2022). Further, while Plaintiff's statement of additional facts is undisputed, it must still "meet the requirements set out in [Local Rule 56.1(B)(1)]." N.D. Ga. Loc. R. 56.1(B)(3).

Second, the Scheduling Order provides, "The statement of material facts to which the movant contends there is no genuine issue to be tried shall not exceed fifteen (15) double-spaced pages." [Doc. 39 at 10] (emphasis in original). Without requesting an extension of the page limit, Defendants filed a statement of material facts that is over 25 pages long. [Doc. 96]. The Court will not, as Plaintiff suggests, sanction Defendants by ignoring any "statement of material facts from page 16 onwards," but Defendants are **WARNED** that any failure to comply with the Court's orders in the future may be met with sanctions. See [Doc. 100 at 6]; see also N.D. Ga. Loc. R. 16.5 ("Failure to comply with the court's pretrial instructions may result in the imposition of sanctions....").

FACTUAL BACKGROUND

The present suit alleges Defendants violated the Fair Debt Collection Practices Act ("FDCPA"). [Doc. 66 ¶¶102–22]. In moving for summary judgment, Defendants argue they are not "debt collectors" within the meaning of the FDCPA provisions at issue. [Doc. 94 at 2–10]. Thus, the facts material to the present motion are not so much the acts that allegedly violated the FDCPA, but rather the facts bearing on whether Defendants are "debt collectors." Nevertheless, for context, the Court briefly recounts the facts underlying the present suit.

In 2006, Plaintiff took out $200,000 via a Home Equity Line of Credit ("HELOC"). [Doc. 101 ¶1]. Plaintiff used the money to pay personal, family, and household expenses. [Doc. 100-1 ¶29]. Plaintiff defaulted on the loan a full decade ago and has not made a payment since. [Doc. 100 ¶¶7–8]. The HELOC was secured by a security deed on Plaintiff's property, which was assigned to Aspen Properties Group, LLC ("Aspen") in 2018. [Id. ¶¶2–5].

***2** Plaintiff sued Aspen in 2019, the court granted default judgment, and the court refused to set aside the default in September 2020. [Docs 53-1, 53-2, 53-3]. Thereafter, Defendants were hired to represent Aspen. [Doc. 101 ¶12]. Defendants attempted to file a motion on behalf of Aspen, but the filing was rejected because the case was "closed." [Id. ¶13]. Thus, Defendants filed a new suit on behalf of Aspen against Plaintiff on January 21, 2021. [Id. ¶14]. But a week prior, the security deed had been assigned from Aspen to "Wilmington Savings Fund Society, F.S.B., not in its individual capacity but solely as Owner Trustee of Aspen Holdings." [Id. ¶6]. The original case was reopened to substitute this new party, and Defendants voluntarily dismissed their case less than two months after filing it. See [id. ¶¶17–19]. The original suit is still pending. Through March 24, 2022, Defendants were paid $23,720.56 for their work in these case(s) involving Plaintiff. See [Doc. 100-21 at 94:23–95:11]. Plaintiff alleges

Defendants actions in these cases—and a letter they sent in connection therewith—violate the FDCPA in various ways. [Doc. 66 ¶¶102–22].

In addition to the suit they filed against Plaintiff, Defendants were also involved in a case filed against Selwyn Johnson, obtaining a judgment against him for unpaid medical bills. [Doc. 100-21 at 7:9–23]. Defendants became involved in the Selwyn Johnson case after the debtor filed a counterclaim and obtained an initial judgment against Defendants' client. [Doc. 100 ¶¶36, 39]. Defendants state they were hired "specifically because of [the client's] concern regarding the Counterclaim and the defense thereof." [Id. ¶42].[1] Defendants were paid a total of $23,721.44 for their services in the Selwyn Johnson case. [Doc. 100-21 at 6:4–7:8].

1 Plaintiff asserts that the client's motivations are "the province of the jury." [Doc. 100 ¶42]. But Plaintiff does not cite *any* evidence creating a factual dispute for a jury to decide. [Id.]. Instead, Plaintiff appears to make a hearsay objection, asserting that Defendant Johnson "may not testify as to what [the client's] in-house counsel explained or thought or what his motivations are." [Id.]. The statement is not hearsay to the extent it bears on *Defendants' understanding* of why they were hired. And in any event, the objected-to fact is "reducible to admissible evidence" because Defendants could call the client's representative as a witness, and thus the evidence can be considered. See Saunders v. Emory Healthcare, Inc., 360 F. App'x 110, 112–13 (11th Cir. 2010).

From 2013 through September 2015, Defendant Johnson worked for either Johnson & Freedman or RCO Legal, both debt collection law firms. [Doc. 100-1 ¶¶1–4]. Defendant Johnson started his own law firm—Defendant JLO—in 2015 where he handles "commercial litigation," "some personal injury," and nonjudicial foreclosure cases. [Doc. 100-3 at 11:17–12:11]. Consumer debt collection activity is not Defendants' principal purpose. [Doc 101 ¶57]. Defendants do not advertise themselves as being in the business of, or having any specialty in, consumer debt collection. [Id. ¶59]. Defendants do not have any staff who handle the collection of consumer debts. [Id. ¶61]. The cases involving Plaintiff and Selwyn Johnson "came from non-collection business clients" and were "incidental to, and not relied upon or anticipated in [Defendants'] practice of law." [Id. ¶62].[2] Defendants' gross income for legal services each of the last five years has been over $250,000. [Id. ¶54].[3]

2 Plaintiff purports to deny this fact, but his denial is not "supported by specific citations to evidence

(including page or paragraph number)" and as such the fact is deemed admitted. [Doc. 101 ¶62]; see also N.D. Ga. Loc. R. 56.1(B)(2)(a)(2)(i). In any event, Plaintiff's "dispute" does not raise a genuine issue of material fact —the fact that Defendant Johnson "does litigation" does not conflict with his undisputed testimony that the "consumer debt collection" cases were incidental to his ordinary practice of law. See [Doc. 101 ¶62].

3 In support of this fact, Defendants cite Defendant Johnson's affidavit. [Doc. 101 ¶54]. Plaintiff asserts the fact is "not based on any evidence of documents" and "is instead based on opinions." [Id.]. Defendants are entitled to support their position with an affidavit "made on personal knowledge." Fed. R. Civ. P. 56(c)(4). Defendant Johnson obviously has personal knowledge of his income. He is "not required to further substantiate [his] affidavit." See James v. Wadas, 724 F.3d 1312, 1319 (10th Cir. 2013). Instead, Plaintiff must refute the fact with evidence. N.D. Ga. Loc. R. 56.1(B)(2)(a)(2)(i). The evidence Plaintiff cites only further *supports* Defendant Johnson's assertion that he earned "over $250,000 a year for each year" in question. [Doc. 100-21 at 78:1–16, 84:18–85:6].

***3** Defendants do not represent any traditional consumer debt collection agencies, but they do have a relationship with two entities that give Defendants nonjudicial foreclosures and some related litigation. See [Doc. 101 ¶60]. Since 2016, Defendants have had a continuous relationship with State Home Mortgage. [Doc. 100-1 ¶10]. Over a three-year period, Defendants earned $105,455.31 from work performed for State Home Mortgage. [Id. ¶12]. State Home Mortgage "refers foreclosure files to [Defendants]." [Doc. 100-3 at 12:10–17]. Defendant Johnson also has an of-counsel relationship with another law firm —Jauregui & Lindsey, LLC ("J & L"). [Doc. 100-19]. The work Defendants have performed for J & L consists of "non-judicial foreclosures, related evictions where no rent was sought and related bankruptcy matters." [Doc. 100-11 ¶3]. Defendants were paid $39,459.46 for non-judicial foreclosure work performed with J & L over a three-year period. [Doc. 100-1 ¶16].

In connection with one matter, J & L sent a debtor a letter stating, "This firm, along with Johnson Legal Offices, LLC, represents Park Tree Investments 20, LLC." [Doc. 100-23 at 1]. The letter directs the debtor to "contact our office" or to "notify us in writing of a dispute" regarding the alleged debt and provides contact information (a phone number and address) for only J & L. [Id. at 1–2]. Defendant Johnson

testified that JLO's name appeared on "more than 20" such letters, but not "anywhere close to 100." [Doc. 100-3 at 37:15–38:6]. In the matter in question, Defendants represented the client in a suit brought by the debtor attempting to obtain an injunction to stop a nonjudicial foreclosure. [Doc. 101 ¶¶32–33]. Defendants did not file a claim or counterclaim seeking to collect on the debt. [Id. ¶32].

LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant can discharge this burden by merely " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After the movant has carried her burden, the non-moving party is required to "go beyond the pleadings" and present competent evidence designating specific facts showing a genuine disputed issue for trial. Id. at 324.

While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A fact is material when it is identified as such by the controlling substantive law. Id. at 248. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Id. at 249-50. To the extent one party's version of events "is blatantly contradicted by the record," the "court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 379–81 (2007).

LEGAL ANALYSIS

As noted above, Defendants argue they cannot, as a matter of law, be liable under the FDCPA provisions at issue because they are not "debt collectors." [Doc. 94 at 2–10]. The first issue, in both order and importance, is whether the Court can "count" Defendants' nonjudicial foreclosure activities, as Plaintiff argues. See [Doc. 100 at 8]. Once that issue is decided, the undersigned addresses whether Defendants "regularly" collect debts within the meaning of the FDCPA's primary definition. Last, the undersigned turns to Defendants' argument that they are entitled to attorney's fees. [Doc. 94 at 10–12].

A. Defendants' nonjudicial foreclosure activities

***4** The FDCPA has a "primary definition" of the term "debt collector" and a "limited-purpose definition." Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1035–36 (2019). The primary definition is: Any person "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." 15 U.S.C. § 1692a(6). Looking only at this definition, "a business engaged in nonjudicial foreclosure proceedings would qualify as a debt collector for all purposes." Obduskey, 139 S. Ct. at 1036. But the FDCPA provision defining a "debt collector" goes on to say, "For the purpose of section 1692f(6) of this title, such term also includes any person ... in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6). The Supreme Court called this the "limited-purpose definition." Obduskey, 139 S. Ct. at 1036.

As the unanimous Obduskey Court explained, "the limited-purpose definition narrows the primary definition, so that the debt-collector-related prohibitions of the FDCPA (with the exception of § 1692f(6)) *do not* apply to those ... engaged in no more than security-interest enforcement." 139 S. Ct. at 1037 (emphasis in original). Defendants undoubtedly fall within the "limited-purpose definition," but § 1692f(6) is not at issue in this case. See [Doc. 66 ¶¶102–22]. The question is whether Defendants fall within the "primary definition" of a "debt collector." As noted above, the primary definition includes any person whose business has "the principal purpose" of collecting debts or who "regularly" collects debts. 15 U.S.C. § 1692a(6). Plaintiff concedes that consumer debt collection is not Defendants' "principal purpose." [Doc. 101 ¶57]. To defeat summary judgment then, Plaintiff must show there is a genuine issue of material fact as to whether Defendants "regularly" collect debts within the meaning of the FDCPA's primary definition. That issue is discussed in Section B below, but first the Court needs to determine what evidence is material to the question at hand.

Plaintiff argues "nonjudicial foreclosure activities count towards establishing that [Defendants] regularly collect[ ] debts" based on certain language in Obduskey.[4] [Doc. 100 at 7–8]. As Plaintiff notes, the Supreme Court said "pursuing nonjudicial foreclosures *would*" fall within the primary definition of debt collection and that nonjudicial foreclosures "*would be* an indirect attempt to collect a debt." Obduskey, 139 S. Ct. at 1036–37 (emphasis added). But Plaintiff ignores the next paragraph, "The [FDCPA] does not, however, contain only the primary definition. And the limited-purpose definition poses a serious, indeed an insurmountable, obstacle to subjecting [Defendants] to the main coverage of the [FDCPA]." Id. at 1037. The limited-purpose definition makes it so "that, but for § 1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of

the [FDCPA].” Obduskey, 139 S. Ct. at 1037–38.

4 Plaintiff also points to two out-of-Circuit, pre-Obduskey decisions. [Doc. 100 at 7–9]. Only Obduskey is binding, and that decision abrogates any lower court decision that conflicts with it.

Plaintiff's argument that nonjudicial foreclosure activities “count” in deciding if a person falls within the primary definition flies in the face of Obduskey’s holding. See [Doc. 100 at 8]. Suppose, for example, that 100% of a business's activities are nonjudicial foreclosure proceedings. If Plaintiff were right, that business would meet the primary definition of a debt collector because those “nonjudicial foreclosure activities count towards establishing that [they] regularly collects debts.” See [id.]. If 100% of the business's activities are nonjudicial foreclosure proceedings and those activities “count,” then the business “regularly” engages in debt collection and thus is subject to the entire FDCPA. The Supreme Court held the exact opposite: “[People] who engage in only nonjudicial foreclosure proceedings *are not* debt collectors within the meaning of the [FDCPA's primary definition].” Obduskey, 139 S. Ct. at 1038 (emphasis added). Thus, nonjudicial foreclosure activities cannot “count” in deciding if Defendants are “debt collectors within the meaning of the [FDCPA's primary definition].” See id.

***5** Saying that nonjudicial foreclosure activities do not “count” for present purposes does not mean Defendants can act with impunity. The Obduskey Court noted that “enforcing a security interest does not grant an actor blanket immunity from the [FDCPA].” Obduskey, 139 S. Ct. at 1039–40. It is possible for “*other* conduct (related to, but not required for, enforcement of a security interest) [to] transform a security-interest enforcer into a debt collector subject to the main coverage of the [FDCPA].” Id. at 1040 (emphasis in original). Plaintiff does not cite to or rely on this language from Obduskey, but he does make two arguments that merit further discussion.

First, Plaintiff asserts Defendants “do[ ] not merely do security enforcement” and instead “frequently collect[ ] money” as part of their foreclosure activities. [Doc. 100 at 10]. This “fact” is nowhere in Plaintiff's statement of material facts and thus need not be considered by the Court. See [Doc. 100-1]; see also N.D. Ga. Loc. R. 56.1(B)(1) (providing that the Court will not consider a fact “set out only in the brief” and not in a statement of facts). But even if the Court were to consider it, the record does not support Plaintiff's assertion. Defendant Johnson testified that a homeowner could stop a foreclosure by “pay[ing] the debt that's due.” [Doc. 100-21 at 13:15–14:9]. He did not say that has ever happened, or that he “frequently collects money,” as Plaintiff asserts.

Second, Plaintiff argues Defendant JLO and another law firm—J & L—have "written a specific debt collection letter claiming that they were collecting a consumer debt" on "dozens of occasions." [Doc. 100 at 11]. Again, Plaintiff's argument misrepresents the evidence. The letter in question (the "Ohai Letter") was *written by J & L.* [Doc. 100-23]. There is no evidence Defendants had any involvement in drafting or sending the letter or any similar letter. Plaintiff imputes the letter to Defendant JLO based solely on the fact that, in the first sentence, the letter says both law firms represent the same client. [Id. at 1]. That sentence does not say JLO is "collecting a consumer debt," as Plaintiff claims, and it is the only part of the letter that even mentions JLO. [Id.].

The Ohai letter cannot be read in isolation, as Plaintiff would have it. Defendants' work in the Ohai matter involved a situation where the borrower "attempted to obtain an injunction to stop [a nonjudicial] foreclosure." [Doc. 53 ¶¶55–56]. Filing a lawsuit "to enjoin [a] foreclosure" is one of the "ways for a borrower to stop a foreclosure." [Doc. 100-21 at 13:15–14:9]. Because defeating a claim for injunctive relief is necessary for the foreclosure to take place, such purely defensive activities fall within the penumbra of nonjudicial foreclosure activities that do not "count." See Obduskey, 139 S. Ct. at 1039 ("And because he who wills the ends must will the necessary means, we think the Act's (partial) exclusion of 'the enforcement of security interests' must also exclude the legal means required to do so."). Crucially, Defendants did not file any claim against Ohai seeking to collect the debt. [Doc. 53 ¶55].

Contrary to Plaintiff's assertion, Defendant Johnson's of-counsel agreement with J & L does not say he is responsible "for providing consumer debt collection services." See [Doc. 100 at 11]. Instead, the agreement says Defendant Johnson is responsible for "handling foreclosures, bankruptcies, evictions and litigation matters." [Doc. 100-19 ¶3]. That language is vague but again the evidence cannot be taken in isolation. As J & L explained, the work Defendants have performed consists entirely of "non-judicial foreclosures, related evictions where no rent was sought and related bankruptcy matters." [Doc. 100-11 ¶3].

***6** As discussed above, nonjudicial foreclosures alone do not count. Evictions where no rent is sought are not debt collection—they are necessary for the foreclosing party to gain possession of the property. Cf. Amin v. Del Plata Inv. Grp., LLC, No. 20-CV-80697, 2020 WL 3256862, at *4 (S.D. Fla. June 15, 2020) (denying a motion to dismiss an FDCPA claim because there was a dispute as to "whether [a suit] was *only* for eviction of Tenants, or whether it sought to collect back rent" (emphasis in original)). And a bankruptcy is another one of the "ways for a borrower to stop a foreclosure." [Doc. 100-21 at 13:15–14:9]. As discussed above,

the (partial) exclusion of nonjudicial foreclosure activities "must also exclude the legal means required to do so," such as requesting relief from the automatic bankruptcy stay to conduct a foreclosure sale. See Obduskey, 139 S. Ct. at 1039. In short, there is no evidence Defendants engaged in "other conduct" that transformed their nonjudicial foreclosure activities into "debt collect[ion]" within the meaning of "the main coverage of the [FDCPA]." See id. at 1040 (emphasis omitted).

B. Whether Defendants "regularly" collect consumer debts

That still leaves the question of whether Defendants "regularly" attempt to collect debts within the meaning of the FDCPA's primary definition. Unfortunately, the parties do not cite any binding authority on the issue. [Docs. 94, 400, 102]. Such authority is admittedly sparse, but the Court found one case: Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211 (11th Cir. 2012).

An allegation that a law firm sent "more than 500" debt collection letters "in the year before the complaint was filed" is "enough to constitute regular debt collection." Reese, 678 F.3d at 1218. Although not explicit, Reese also suggests that showing "the defendant is a 'debt collector' " requires more than simply showing "that the challenged conduct [in this case] is related to debt collection." Id. at 1216. So, one instance of debt collection is not enough to show someone "regularly" collects debts, as many courts in this Circuit have held. See Shallenburg v. PNC Bank, N.A., No. 8:18-CV-2225-T-36TGW, 2020 WL 555447, at *8 (M.D. Fla. Feb. 4, 2020) (holding that a law firm was not a "debt collector" where the only debt collection alleged were the activities "in the instant action"); Zahedi v. McCalla Raymer, LLC, No. 1:15-CV-525-WSD, 2016 WL 1064554, at *4 (N.D. Ga. Mar. 15, 2016) (same); Beckles v. Aldridge & Connors, LLP, No. 1:12-CV-03377-JEC, 2013 WL 5355481, at *5 (N.D. Ga. Feb. 27, 2013) (same), *report and recommendation adopted*, 2013 WL 5354240 (N.D. Ga. Sept. 24, 2013); Barber v. Rubin Lublin, LLC, No. 1:13-CV-975-TWT, 2013 WL 6795158, at *9 (N.D. Ga. Dec. 20, 2013) (same).

For more guidance, the Court looks to persuasive authority from other circuits. The Second Circuit provides the most detailed discussion "of factors bearing on the issue of regularity." Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62 (2d Cir. 2004). The Goldstein Court held:

> Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related

> litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice.

***7** Id. at 62–63.

The Tenth Circuit adopted the Goldstein standard, stating it was "not an exhaustive list" but simply factors "courts must consider." James v. Wadas, 724 F.3d 1312, 1317–18 (10th Cir. 2013). Drawing on the FDCPA's legislative history, the Sixth Circuit held "that for a court to find that an attorney or law firm 'regularly' collects debts for purposes of the FDCPA, a plaintiff must show that the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice." Schroyer v. Frankel, 197 F.3d 1170, 1176 (6th Cir. 1999). The Fifth Circuit's interpretation appears to differ slightly, holding that even if debt collection "services only amount to a small fraction of [a person's] total business activity," he can be a debt collector "if the

volume of [the] services is great enough." Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997).

Putting principles in practice, the Sixth Circuit held that a defendant did not "regularly" collect debts where he had 29 debt collection cases in a year, constituting 7.4% of his business. Schroyer, 197 F.3d at 1176. The Schroyer Court noted that the defendants did not have "an ongoing relationship with a major creditor or business client with substantial debts for collection" and that their "debt collection activities were incidental to, and not relied upon or anticipated in, their practice of law." Id. at 1176–77. The Fifth Circuit held a defendant was a debt collector even though such services "constituted less than 0.5 percent of his entire practice" because he attempted to collect debts from "639 different individuals" in a 9-month period. Garrett, 110 F.3d at 318. The Second Circuit held an issue of fact existed as to whether a defendant was a debt collector where it issued 145 debt collection notices in a year, had an ongoing relationship with entities for which it sent those notices, "assigned a paralegal to review them for consistency with the information provided by the landlord's managing agent, and sent the notices to a process server for delivery." Goldstein, 374 F.3d at 63. Last, the Tenth Circuit held a defendant was not a debt collector even though she had "an ongoing relationship" with a debt collector because the defendant "engaged in only six to eight debt collection cases" in a ten-year span. James, 724 F.3d at 1319.

As for the evidence in this case, Plaintiff points out that Defendant Johnson used to work for two "debt collection law firm[s]." [Doc. 100 at 9]. As demonstrated above, there is no set period of time that is relevant to deciding whether someone is a debt collector. But the ultimate inquiry is whether Defendants were debt collectors at the time they engaged in the challenged conduct. Thus, the Court concludes that looking at a decade long timeframe—like the Court in James did—would be inappropriate in this case. Plaintiff points to work Defendant Johnson used to perform for *different law firms*. [Doc. 100 at 9]. But Defendant Johnson started his own law firm in 2015 where he handles "commercial litigation," "some personal injury," and nonjudicial foreclosure cases. [Doc. 100-3 at 11:17–12:11]. That is the conduct relevant to determining whether Defendants were debt collectors in 2021. Plaintiff also points to Defendants' "ongoing ... relationship" with two entities. [Doc. 100 at 10–11]. But as discussed above, Defendants do nonjudicial foreclosure work for those entities. That leaves two cases: Since December 2018, Defendants have been paid a total of less than $50,000 "to collect a medical consumer debt from Selwyn Johnson" and to collect Plaintiff's debt. [Id. at 12]. [5]

5 Defendants assert that "the majority of [the] fees earned" in these cases were for work

"on opposing claims brought by the debtors." [Doc. 94 at 8]. Construing the facts in the light most favorable to Plaintiff, the undersigned assumes that all the fees in these cases are at least "indirectly" related to the collection of consumer debts. See 15 U.S.C. § 1692a(6).

***8** Plaintiff asserts that there "is a genuine issue of material fact as to whether [being paid] $23,720.56" to handle a single debt collection case makes Defendants "debt collectors." [Id. at 12–13]. But there is no authority to support such a proposition, and as noted above, Plaintiff cannot show Defendants "regularly" collect debts by simply showing "that the challenged conduct [in this case] is related to debt collection." See Reese, 678 F.3d at 1216; see also Shallenburg, 2020 WL 555447, at *8; Zahedi, 2016 WL 1064554, at *4; Beckles, 2013 WL 5355481, at *5; Barber, 2013 WL 6795158, at *9. Thus, Plaintiff's heavy reliance on Defendants' efforts to collect his debt is misplaced. See [Doc. 100 at 12–19]. The only other instance in the last five years that Plaintiff points to is the Selwyn Johnson case.

Applying law to facts, Defendants do not "regularly" engage in debt collection within the meaning of the FDCPA's primary definition of a "debt collector." Defendants' gross[6] income for each of the last five years has been at least $250,000. [Doc. 53 ¶45]. As discussed above, the fees Defendants received for the cases at issue—over the course of more than three years[7]—is less than $50,000. [Doc. 100 at 12]. Comparing that figure ($50,000) to Defendants' minimum revenue over the course of three years ($750,000), means that, at the absolute most, the fees from debt-collection cases constitute less than 7% of Defendants' revenue, supporting their position that they do not "regularly" collect debts. See Schroyer, 197 F.3d at 1176 (holding that a defendant did not "regularly" collect debts where such cases made up 7.4% of his overall practice).

6 Plaintiff notes that Defendants' *net* income in 2020 was less than $100,000. [Doc. 100 at 9]. But the relevant comparison is between the revenue from debt collection and Defendants' *gross* income, not their *net* income.

7 The fees are from "the 3 years prior to the filing of this case"—*i.e.* May 2018—through "March 24, 2022," a period of nearly four years. [Doc. 100 at 12].

More importantly, the absolute number of debt collection litigation matters—two in five years—weighs in favor of Defendants. See James, 724 F.3d at 1319 (holding that "six to eight debt collection cases" in ten years were insufficient); Schroyer, 197 F.3d at 1176 (holding that 29 debt collection cases in a year were insufficient). The record demonstrates that these "debt collection activities were incidental to, and not relied upon or anticipated in, [Defendants']

practice of law." See Schroyer, 197 F.3d at 1176–77; [Doc. 101 ¶62]. The cases at issue "came from [Defendants'] non-collection business clients." [Doc. 53 ¶53]. Defendants do not have "personnel specifically assigned to work on debt collection activity," they do not have "systems or contractors in place to facilitate such activity," and they do not market themselves as "having debt collection expertise." See Goldstein, 374 F.3d at 62–63; see also [Doc. 53 ¶¶50–52]. As discussed above, Defendants' "ongoing ... relationships" with other entities do not entail "the collection of outstanding consumer debt obligations." See Goldstein, 374 F.3d at 63. But even if this factor weighed in favor of Plaintiff, it is not enough on its own to make Defendants "debt collectors." See James, 724 F.3d at 1319 (affirming summary judgment in favor of a defendant who had "an ongoing relationship" with a debt collector).

In short, Defendants have presented "prima facie evidence showing that [they do] not regularly engage in debt collection." See id. The burden thus shifts to Plaintiff to point to evidence showing a genuine disputed issue for trial. Celotex, 477 U.S. at 325. As discussed above, Plaintiff's evidence amounts to two cases in five years where Defendants engaged in debt collection within the meaning of the FDCPA's primary definition of a "debt collector." Considering all the relevant factors, that is not enough to defeat summary judgment. Defendants do not "regularly" collect consumer debts within the meaning of the FDCPA's primary definition, and as such "the debt-collector-related prohibitions of the FDCPA (with the exception of § 1692f(6)) *do not* apply" to them. See Obduskey,139 S. Ct. at 1037 (emphasis in original). Accordingly, Defendants' Motion for Summary Judgment should be **GRANTED** to the extent they seek judgment as a matter of law as to Plaintiff's FDCPA claims.

C. Defendants' request for attorney's fees

***9** Last, Defendants argue they are entitled to attorney's fees under 15 U.S.C. § 1692k(a)(3). [Doc. 94 at 10–12]. Plaintiff failed to respond to Defendants' argument on this point. [Doc. 100]. But even when a party fails to respond, the Court "must consider the merits of the motion" for summary judgment. United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla., 363 F.3d 1099, 1101 (11th Cir. 2004). Doing so here, Defendants have not shown they are entitled to relief under 15 U.S.C. § 1692k(a)(3).

"The standard for obtaining attorney's fees under [§ 1692k(a)(3)] is necessarily high because [the FDCPA] is a consumer protection statute." Valenzuela v. Medicredit, Inc., No. 6:20-CV-124-RBD-GJK, 2021 WL 1733308, at *2 (M.D. Fla. May 3, 2021). Defendants conflate the actions of "Plaintiff and his counsel," but only *Plaintiff's* conduct is relevant. Sub-section 1692k(a)(3) "provides that *plaintiffs* who bring an

action in bad faith and for the purpose of harassment may be liable for the defendant's fees and costs." Marx v. Gen. Revenue Corp., 568 U.S. 371, 383 (2013) (emphasis added). The only case Defendants cite emphasizes this exact point. In Diaz v. First Marblehead Corp., 643 F. App'x 916 (11th Cir. 2016), a panel of the Eleventh Circuit held that "the district court erred in assessing attorney's fees" under § 1692k(a)(3) based on the conduct of a plaintiff's *attorney*, even though the attorney's conduct warranted sanctions. 643 F. App'x at 924–25; see also Conner v. BCC Fin. Mgmt. Servs., Inc., 597 F. Supp. 2d 1299, 1309 (S.D. Fla. 2008) (collecting cases holding that "for a court to award fees and costs to defendant under 15 U.S.C. § 1692k, defendant must provide evidence to impart the criteria to plaintiff him/herself").

Looking to *Plaintiff's* conduct, the undersigned finds that this action was not "brought in bad faith and for the purpose of harassment." See 15 U.S.C. § 1692k(a)(3). The only evidence Defendants point to is Plaintiff's testimony that he did not personally investigate whether Defendants fall within the FDCPA's definition of a "debt collector" and that he does not recall if there was "any other investigation that occurred in that regard." [Doc. 54 at 65:19–66:3]. Defendants point to no authority, and this Court has found none, indicating that a represented plaintiff has a personal duty to "investigate[ ] whether [defendants] were 'debt collectors' under the FDCPA." See [Doc. 94 at 10–12]; see also [Doc. 102 at 11–14]. Even if such a duty existed, Plaintiff had enough evidence to form a good faith belief that Defendants were "debt collectors." Plaintiff was aware of at least one instance of Defendants engaging in debt collection: Defendants sued Plaintiff seeking to collect on a consumer debt. Notably, none of the courts that dismissed FDCPA claims based on a single instance of debt collection sanctioned the plaintiff under § 1692k(a)(3). See Shallenburg, 2020 WL 555447, at *8; Zahedi, 2016 WL 1064554, at *4; Beckles, 2013 WL 5355481, at *5; Barber, 2013 WL 6795158, at *9.

Defendants would have the Court require plaintiffs to conduct "pre-suit" investigations—*i.e.* "investigations" without the benefit of any discovery—or else be subject to sanctions. Even more unavailing, Defendants want the Court to personally sanction Plaintiff for not knowing the difference between the FDCPA's "primary definition" of the term "debt collector" and the "limited-purpose definition." The Court does not expect lay individuals to infallibly parse complex statutory language like § 1692a(6), nor does it expect lay individuals to keep up with and fully understand recent Supreme Court decisions about esoteric issues. There is no basis for finding that Plaintiff brought this action "in bad faith and for the purpose of harassment," and Defendants' Motion for Summary Judgment should be **DENIED** to the extent they seek sanctions under § 1692k(a)(3).

CONCLUSION

***10** For the foregoing reasons, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment ([Doc. 93]) be **GRANTED in part** and **DENIED in part**. Specifically, the undersigned **RECOMMENDS** that the Motion be **GRANTED** to the extent Defendants seek summary judgment on Plaintiff's FDCPA claims and **DENIED** to the extent they seek sanctions under 15 U.S.C. § 1692k(a)(3). As this is a final Report and Recommendation and there are no other matters pending before the Court, the Clerk is directed to terminate the reference to the undersigned.

SO REPORTED AND RECOMMENDED, this 30th day of September, 2022.

All Citations

Not Reported in Fed. Supp., 2022 WL 17908679