IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HSIAO YIP, Plaintiff, v. DYNAMIC RECOVERY SOLUTIONS, LLC, *et al.*, Defendants.	CIVIL ACTION FILE NO. 1:18-CV-2586-WMR

ORDER

This Matter is before the Court on the Magistrate Judge's Report and Recommendation ("R&R") [Doc. 42], which recommends that Defendants' Motion to Dismiss [Doc. 20] and Motion for Judgment on the Pleadings [Doc. 26] be GRANTED and that all of Plaintiff's claims be DISMISSED for failure to state a claim for relief. Plaintiff has filed objections to the R&R [Doc. 45].

Under 28 U.S.C. § 636(b)(1), the Court reviews the R&R for clear error if no objections are field by either party within 14 days after service. If a party does file objections, the Court must determine de novo any part of the Magistrate Judge's disposition that is the subject of a proper objection. *Id.*; Fed. R. Civ. P. 72(b).

I. BACKGROUND

In her Complaint, Plaintiff alleges that Defendants contacted her through letters regarding her outstanding debt, for which the relevant statute of limitations had expired. [Doc. 43 at ¶¶ 40-64]. Defendants, who are debt collection agencies, had purchased discharged debt owed by Plaintiff and sought to collect the delinquent debt from her. Plaintiff asserts that Defendants' letter communications with her were false, misleading, and deceptive, and that they were attempting to collect "post-charge-off interest," which is interest that has accrued after the creditor has ceased actively attempting to collect upon a debt. [Doc. 43 at ¶¶ 40-74]. Based upon these allegations, Plaintiff asserts claims under the Fair Debt Collection Practices Act ("FDCPA") – 15 U.S.C. § 1692e and § 1692f, and under the Georgia's Fair Business Practices Act ("FBPA") – O.C.G.A. § 10-1-390 *et seq.* [Doc. 43 at ¶¶ 81-107].

Plaintiff raises five objections to the R&R that hinge on the central arguments that the Magistrate Judge misapplied the standard of review for evaluating her Complaint on a Rule 12(b)(6) motion to dismiss by drawing inferences in favor of the Defendants and wrongly interpreting applicable state and federal authority regarding the recovery of interest. [Doc. 45]. In evaluating the Plaintiff's objections, the Court has reviewed the Magistrate Judge's findings and conclusions on a de novo basis.

II. ANALYSIS

A. Plaintiff's Claim Regarding the "Resurgent Verification Letter" under 15 U.S.C. § 1692e and §1692f

In Count 1 of the Complaint, Plaintiff asserts that the "Resurgent Verification Letter" she received from the Defendants violated § 1692e and §1692f of the FDCPA because the letter did not disclose that a partial payment of the alleged debt might restart the statute of limitation on the expired debt. [Doc. 43 at ¶¶ 81-86]. The Court notes that, in the R&R, the Magistrate Judge recommends that Plaintiff's FDCPA claims set forth in Count 1 of the Amended Complaint be dismissed for failure to state a claim. [Doc. 42, at pp. 25-37]. Plaintiff has not specifically objected to this portion of the R&R. [See Doc. 45]. After review, the Court finds no clear error on this issue.

B. Plaintiff's Claim that Defendants Violated the FDCPA and FBPA by Attempting to Collect Post-Charge-Off Interest on the Debt

"To prevail on a FDCPA claim a plaintiff must establish that: (1) [he or] she has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a debt collector under the [FDCPA]; and (3) the defendant has engaged in a prohibited act or has failed to

perform a requirement imposed by the FDCPA." *Frazier v. Absolute Collection Servs., Inc.*, 767 F. Supp. 2d 1354, 1363 (N.D. Ga. 2011).

In Count 2 of the Amended Complaint, Plaintiff alleges that Defendants attempted to collect a debt which improperly included post-charge-off interest. [Doc. 43 at ¶ 87]. The basis for her allegation is that the original creditor has a policy of waiving contractual interest on charged-off debts [*Id.* at ¶¶ 69-70], and that the attempt by the Defendants to collect post-charge-off interest is a prohibited act under the FDCPA [*Id.* at ¶¶ 92-95] because Defendants did not send Plaintiff periodic statements on the account as required by 12 C.F.R. § 226.5(b)(2)(i).[1] [*Id.* at ¶74].

In Count 3 of the Amended Complaint, Plaintiff alleges that violation of the FDCPA as set forth in Count 2 also constitutes a violation of the FBPA.

Most of Plaintiff's objections to the R&R concerning Counts 2 and 3 may be condensed to the central argument that the Magistrate Judge improperly drew

[1] As the R&R and Defendants correctly point out, 12 C.F.R. § 226.5(b)(2)(i) is a regulation promulgated under the Truth in Lending Act ("TILA"). [Doc. 42 at pp. 48-49; Doc. 47 at pp. 5-6, n.3]. This Court agrees with the Magistrate Judge's findings that this regulation applies only to "creditors" under TILA, and that Plaintiff has failed to cite to any authority showing that Defendants, who are debt collectors, could be considered "creditors" under TILA, such that the regulation would even apply to them. [Doc. 42, at p. 48]. The Court notes that Plaintiff does not state a claim under TILA in her Amended Complaint. [*See* Doc. 43, generally].

inferences in favor of the Defendants. The pivotal issue is whether the Defendants have a statutory right to collect pre-judgment interest on a debt that was charged off by the original creditor.

Georgia's pre-judgment interest statute applies "where the rate percent is not established by written contract." O.C.G.A. § 7-4-2(a)(1)(A). In the Amended Complaint, Plaintiff does not allege that her contract with the original creditor provided for a different interest rate than that which is being sought by Defendants. Rather, Plaintiff alleges that the original creditor waived contractual interest when it charged off the debt. Assuming that this allegation is true, then it logically follows that whatever interest rate had applied to her initial contract with the creditor was no longer in effect when the Defendants purchased the debt. When there is no applicable contractual interest rate, O.C.G.A. § 7-4-2(a)(1)(A) provides a statutory rate for pre-judgment interest.

Although the issue does not appear to have been previously decided with respect to Georgia's statute, courts interpreting similar statutes in other states have held that pre-judgment statutory interest may be added to debts that have been charged off. For example, the Eighth Circuit concluded "Missouri statutory prejudgment interest remains available following the charge-off of a credit-card debt." *Haney v. Portfolio Recovery Assocs., LLC*, 895 F.3d 974, 983 (8th Cir. 2016).

The Missouri statute in question states "[c]reditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon[.]" Mo. Rev. Stat. § 408.020. Likewise, the Western District of Oklahoma held that Oklahoma's statute, which states: "The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest," permitted the subsequent owner of a debt to charge statutory interest when the original creditor waived its right to charge contractual interest. *Walkabout v. Midland Funding LLC*, 2016 WL 1169540, at *4 (W.D. Okla. Mar. 22, 2016) (quoting Okla. Stat. tit. 15, § 266). Additionally, the District of Kansas concluded "that simply because the original creditors charged off the accounts and stopped sending month[ly] statements does not preclude the assignee of the accounts from seeking to collect interest. *Bunce v. Portfolio Recovery Assocs., LLC*, 2014 WL 5849252, at *3 (D. Kan. Nov. 12, 2014). The Kansas statute at issue says "[c]reditors shall be allowed to receive interest at the rate of ten percent per annum, when no other rate of interest is agreed upon[.]" K.S.A. 16-201.

These statutes are very similar to Georgia's statute, and the Magistrate Judge correctly found the decisions interpreting those statutes to be persuasive. Plaintiff now contends this well-reasoned decision was in error by contending that the Magistrate Judge failed to make "reasonable" inferences in her favor. However, the

inferences she desires be made are either unsupported conclusions of law, which the Court is not obligated to accept as true, or are dependent upon facts which were not alleged in the Amended Complaint. In short, Plaintiff has failed to show that the Magistrate Judge's thorough and well-reasoned analysis and recommendation in regard to Counts 2 and 3 are incorrect in any way.

C. Plaintiff's Claim for Injunctive Relief under the FBPA

In Count 4 of the Complaint, Plaintiff also seeks injunctive relief under O.C.G.A. § 10-1-399(a) to prohibit the Defendants from sending her collection letters or continuing to call her in an attempt to collect the debt. [Doc. 43 at ¶ 106]. In light of the recommendation that Count 3 be dismissed, the Magistrate Judge further recommends in the R&R that Plaintiff's claims set forth in Count 4 of the Amended Complaint be dismissed for failure to state a claim. [Doc. 42, at pp. 58-59]. Plaintiff has not specifically objected to this portion of the R&R. [See Doc. 45]. After review, the Court finds no clear error on this issue.

III. CONCLUSION

After considering the Final Report and Recommendation [Doc. 42], the Plaintiff's objections to the R&R [Doc. 45], and the Defendants' replies to the Plaintiffs objections [Doc. 47; Doc. 48], the Court receives the R&R with approval

and adopts its findings and legal conclusions as the opinion of this Court. Accordingly, Defendants' Motion to Dismiss [Doc. 20] and Motion for Judgment on the Pleadings [Doc. 26] are **GRANTED**, and all of Plaintiff's claims are **DISMISSED** for failure to state a claim. The Clerk of Court is directed to close this case.

IT IS SO ORDERED, this 26th day of September, 2019.

William M. Ray II

WILLIAM M. RAY, II
United States District Court Judge
Northern District of Georgia