

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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**TODD C. BANK,**

**Plaintiff,**

**-against-**

**COOPER, PAROFF, COOPER & COOK;  
IRA G. COOPER; PHILLIP S, PAROFF;  
ADAM P. COOPER; and SHARON E. COOK,**

**Defendants.**

-----X  
**JACK B. WEINSTEIN, Senior District Judge:**

**MEMORANDUM,  
ORDER &  
JUDGMENT**

**08-CV-3936 (JBW)**

**I. Introduction**

Plaintiff, an attorney proceeding *pro se*, moves to vacate the magistrate judges's orders of January 15, 2009 and February 4, 2009 and for resolution of his motion for an extension of time to serve a motion to dismiss defendants' counterclaim. Defendants move for summary judgment on all claims. A hearing was held on May 13, 2009.

**II. Facts**

The complaint alleges five violations of the Federal Fair Debt Collection Practices Act ("FDCPA") by the defendant law firm in relation to its notice of past-due rent. Damages of \$1,000 and attorney's fees are sought, in part for a ten dollar mistake by defendant in the amount of a bad check fee. Defendants represent plaintiff's landlord. The parties engaged in separate landlord-tenant litigation in state court, where plaintiff apparently lost and a legal fee issue is currently on appeal.

Two letters sent to plaintiff by defendants are at issue: a "thirty-day debt validation letter," *see* Appendix A, and a "five-day demand notice," *see* Appendix B. Both are dated January 14, 2008. The plaintiff's claims are all directed toward the five-day demand notice.

Alleged are violations of sections 1692e (“False or misleading representations”) and 1692f (“Unfair practices”) of Title Fifteen of the United States Code. In essence, plaintiff argues that the five-day demand notice violated the FDCPA because it: 1) overstated the amount owed for a bad check fee by ten dollars; 2) suggested plaintiff could be forced to surrender possession of the premises for failure to pay late fees and a bad check fee; and 3) failed to disclose that it was a communication from a debt collector.

### **III. Motion to Vacate the Magistrate Judge’s Orders and for Resolution of Motion for Extension of Time to Serve a Motion to Dismiss Defendants’ Counterclaim**

Plaintiff challenges the constitutionality of senior judges and magistrate judges deciding cases. He sought reassignment to an active district judge. That request was referred to Chief Judge Dearie, who denied the motion for reassignment. *See* Order, Mar. 31, 2009, Docket Entry No. 39.

The remaining portion of plaintiff’s motion relates to the counterclaim asserted in defendants’ answer to the complaint seeking costs, disbursements, attorney’s fees, and dismissal of the action on the ground that it was brought in bad faith and for the purpose of harassment. Much of plaintiff’s highly contentious papers are concerned with largely frivolous arguments about the Federal Rules and practice. He claims the magistrate judge had no power to deny his request for an extension of time to serve his motion to dismiss defendants’ counterclaim because he had not yet made a formal motion. He claims that he was prejudiced by the fact that once he did make a formal motion for an extension, the magistrate judge treated it as a motion for reconsideration. Plaintiff’s arguments about the minutiae of Federal Rule of Civil Procedure 6(b)(1)(B) (“When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.”) fail to recognize that a court has broad discretion on whether to

grant an extension under that rule. Rule 6(b)(1)(B), if it limits the court's discretion at all, controls it in the context of *granting* such a motion, not in *denying* it. The magistrate judge acted well within her discretionary powers in refusing the request for an extension.

Plaintiff's procedural contentions lack merit. For reasons clarified below, his motion is in any case moot.

#### **IV. Defendants' Motion for Summary Judgment**

##### **A. Summary Judgment Standard**

Summary judgment is appropriate only if "there is no genuine issue as to any material fact . . . [in which case] the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Mitchell v. Washingtonville Central School District*, 190 F.3d 1, 5 (2d Cir. 1999). It is warranted when after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *see Anderson*, 477 U.S. at 247-50, 255; *Sledge v. Kooi*, 556 F.3d 137, 140 (2d Cir. 2009).

The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If the moving party appears to meet this burden, the opposing party must produce evidence that raises a material question of fact to defeat the motion. *See Fed. R. Civ. P. 56(e)*. This evidence may not consist of "mere conclusory allegations, speculation or conjecture." *Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir. 1996); *see also Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) ("Conclusory allegations will not suffice to create a genuine issue.").

##### **B. Fair Debt Collection Practices Act**

“[T]he FDCPA generally forbids collectors from engaging in unfair, deceptive, or harassing behavior.” *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002). The Act applies to lawyers engaged in litigation over unpaid debts, *see Heintz v. Jenkins*, 514 U.S. 291 (1995), including attorneys who send rent demand notices to tenants. *See Romea v. Heiberger & Associates*, 163 F.3d 111, 119 (2d Cir. 1998). “[T]he question of whether a communication complies with the FDCPA is determined from the perspective of the ‘least sophisticated consumer.’” *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). “Because the [FDCPA] imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages.” *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33-34 (2d Cir. 1996). But a debt collector may avoid liability for a violation upon establishing both: 1) that it was unintentional; and 2) that it “resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c).

Upon a finding of liability, a debt collector is liable for: 1) actual damages; 2) “such additional damages as the court may allow, but not exceeding \$1,000;” and 3) costs and “a reasonable attorney’s fee as determined by the court.” 15 U.S.C. § 1692k(a). In determining the amount of liability, the court is to consider “the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional.” 15 U.S.C. § 1692k(b).

### C. Application of Law to Facts

#### 1. Counts One, Two and Three

Count one alleges a violation of section 1692e(2)(A) (“The false representation of . . . the character, amount, or legal status of any debt.”). Count two alleges a violation of section 1692e(5) (“The threat to take any action that cannot legally be taken or that is not intended to be

taken.”). Count three alleges a violation of section 1692e(10) (“The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.”).

Plaintiff attempts to make out violations of sections 1692e(2)(A), 1692e(5) and 1692e(10) by arguing that the inclusion of a “late fee” and a “bad check fee” in the five-day rent demand notice constituted a false representation and a threat to take illegal action because he could not legally be forced to surrender possession of the premises for failure to pay such fees under various provisions of New York state and city law.

The defendants’ inclusion of the two fees in the total figure for “rent” in the five-day demand notice was supported by the terms of the lease (which deemed such fees “added rent”) and by defendants’ interpretation of New York housing law. *See Brusco v. Miller*, 639 N.Y.S.2d 246 (N.Y. Sup. Ct. App. Term 1995). In addition, plaintiff had ample opportunity to challenge under state and city law the form and contents of the five-day demand notice in the state landlord-tenant litigation.

Courts should avoid finding a FDCPA violation on grounds that may be inextricably intertwined with the merits of a state court proceeding. *See Kropelnicki v. Siegel*, 290 F.3d 118, 128 -129 (2d Cir. 2002) (concluding *Rooker-Feldman* doctrine applied to bar the federal Court of Appeals from reviewing claim of “violation of the FDCPA on the basis of the defendant's alleged misrepresentation” because it was “inextricably intertwined with the state court default judgment and the motion to vacate it”). While there may be dispute between the parties as to the legality of the five-day demand notice under applicable housing law, reliance on the terms of the FDCPA is not the appropriate method for the resolution of that dispute. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 295-96 (1995) (“we do not see how the fact that a lawsuit turns out ultimately to be

unsuccessful could, by itself, make the bringing of it an ‘action that cannot legally be taken’” under § 1692e(5)).

The five-day demand notice itemized the various components of the debt claimed in a clear way understandable to a layperson. There was no deception in the defendants’ indication in the five-day demand notice of intent to commence summary proceedings. Such proceedings appear to have in fact been promptly commenced. The state landlord-tenant litigation resulted in a judgment for the defendants on the full amount of debt sought, including the fees. The parties report that the full amount has been paid by plaintiff.

These claims are without merit.

## 2. *Count Four*

Count four alleges a violation of 1692e(11) (“The failure to disclose in the initial written communication with the consumer . . . that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.”).

The five-day demand notice and the thirty-day debt validation letter were prepared on the same day. Plaintiff likely did not receive the two documents at the same time, because one was mailed and one was served by a process server. *See* Hr’g Tr. 9. Neither party has offered evidence as to which of the two letters was the “initial” communication, but the plaintiff makes no claim of a violation related to the initial communication. Rather, he claims that the five-day demand notice failed to disclose that the communication was from a debt collector.

The thirty-day debt validation letter contained the required disclosures that a debt collector was attempting to collect a debt and that any information obtained would be used for

that purpose. *See* 15 U.S.C. § 1692e(11). The five-day demand notice lacks the language used in the thirty-day debt validation letter, but it is obvious from the face of the letter that the communication is from a “debt collector.” *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 26 (2d Cir. 1989) (“We reject at the outset [plaintiff’s] contention that the Notice violated the statute because it failed to state in so many words that the Bureau was attempting to collect a debt.”); *Emanuel v. American Credit Exchange*, 870 F.2d 805, 808 (2d Cir. 1989) (“the letter disclosed clearly that it was a communication to collect a debt . . . there simply is no requirement that the letter quote verbatim the language of the statute”).

The least sophisticated consumer would understand the five-day demand notice to have been from a debt collector. Alternatively, the five-day demand notice must be read together with the thirty-day debt validation letter – as any consumer would – since they bear the same date. All required disclosures were provided to plaintiff in the initial communication consisting of those two documents. “[T]here is nothing wrong with demanding payment of the debt at the same time the validation notice is given.” *Day v. Allied Interstate, Inc.*, No. 09-495, 2009 WL 1139474, at \*2 (E.D.N.Y. Apr. 27, 2009) (citing *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 n.4 (2d Cir. 2008)).

This claim is without merit.

### 3. *Count Five*

Count five alleges a violation of section 1692f(1) (“A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt . . . the following conduct is a violation of this section: The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.”).

Plaintiff contends that defendants violated section 1692f(1) because the five-day demand notice included an amount due for a bad check fee that exceeded the amount permitted under plaintiff's lease by ten dollars. Defendants concede that the "bad check fee" listed on the five-day demand notice should have been twenty-five rather than thirty-five dollars. They raise the defense of bona fide error under section 1692k(c) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."). They contend that the incorrect fee amount was conveyed to their office by the landlord, despite their procedure of accepting such information only in writing rather than over the phone in order to prevent clerical errors.

Defendants have the burden of proving by a preponderance of the evidence both: 1) that the violation was unintentional and; 2) that it resulted from a bona fide error notwithstanding procedures reasonably adapted to avoid any such error. Whether the ten dollar overstatement "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c), is an issue of fact. At the summary judgment hearing, the plaintiff declined the court's offer to take sworn testimony of the attorney who supervised the issuance of the complained-of notice. *See Hr'g Tr.* 10-17. Given plaintiff's waiving his right to admissible evidence on this point, defendants' submission (made by a practicing attorney) is credited. The issue is *de minimis*. It does not warrant burdening this court and the parties with discovery. Nevertheless, the issue is decided in favor of the defendant. A reasonable jury could only conclude that this discrepancy was the result of a bona fide error.

Plaintiff conceded as much at oral argument. *See id.* at 25 (“I’m not suggesting, by the way, that it was anything more than a clerical error”).

Plaintiff’s contention has no merit.

**V. Costs, Disbursements and Attorney’s Fees**

The defendants seek costs, disbursements, attorney’s fees, and dismissal of the action on the ground that it was brought in bad faith and for the purpose of harassment. *See* 15 U.S.C. § 1692k(a)(3) (If the court finds that an action under the FDCPA “was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.”). The court finds that no costs, disbursements or attorney’s fees should be awarded. The action was not brought in bad faith or for the purpose of harassment.

**VI. Conclusion**

The motion by defendants for summary judgment is granted. Defendants’ counterclaim is dismissed. Plaintiff’s motion to dismiss defendants’ counterclaim is now moot. The case is dismissed.

SO ORDERED.

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Jack B. Weinstein  
Senior United States District Judge

Dated: May 27, 2009  
Brooklyn, New York