United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

Will this opinion be published? Yes

Bankruptcy Caption: In re Lamar Chapman, III

Bankruptcy No. 00 B 05538

Adversary Caption: In re Lamar Chapman, III v. Diane C. Fischer, et al.

Adversary No. **00 A 00885**

Date of Issuance: April 30, 2001

Judge: Jack B. Schmetterer

Appearance of Counsel:

Attorney for Movant or Plaintiff: Lamar Chapman, III Pro Se

Attorney for Respondent or Defendant: Michael A. Kraft, Esq. (Kane & Fischer, Ltd.)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	
	)	
LAMAR CHAPMAN, III	)	
	)	Bankruptcy No. 00 B 05538
Debtor.	)	
	)	
LAMAR CHAPMAN, III	)	
	)	
v.	)	Adversary No. 00 A 00885
	)	
DIANE C. FISCHER, RONALD P. KANE, MICHAEL A. KRAFT, AND KANE & FISCHER, LTD.	)	

MEMORANDUM OPINION

Lamar Chapman ("Debtor" or "Plaintiff") has filed a seven count adversary complaint against Diane C. Fischer, Ronald P. Kane, Michael A. Kraft, and Kane & Fischer, Ltd. ("Defendants"). The complaint alleges various claims asserted to lie under the Fair Debt Collection Practices Act, the Illinois Uniform Deceptive Trade Practices Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, 42 U.S.C. § 1983, and includes a common law claim of fraud in the inducement. This matter is before the Court on the Defendants' Motion to Dismiss. Pursuant to order of November 3, 2000, the motion to dismiss is treated as one for summary judgment under Fed.R.Bankr.P. 7056.

Chapman represents himself, but he certainly is not a typical pro se litigant. He has considerable experience litigating in both state and federal courts. Chapman has been described as a "prolific pro se litigator in this district". Chapman v. Ontra, Inc., 1997 WL

321681(N.D. Ill. June 6, 1997). One opinion observed that Chapman "has cut a wide swath through the federal court system." Chapman v. Village of Homewood, 960 F. Supp. 127 (N.D. Ill. 1997) His cases in this District and Circuit have included: Chapman v. Village of Matteson, 165 F.3d 31 (7th Cir. 1998); Chapman v. Krop, 1997 WL 598126 (N.D. Ill. Sept. 19, 1997); Chapman v. Illinois, No. 96-1254, 1996 WL 590554 (7th Cir. Oct.10, 1996); Chapman v. Currie Motors, Inc., 65 F.3d 78 (7th Cir.1995); Chapman v. Burton Berger & Assocs., 154 B.R. 258 (Bankr. N.D. Ill.), aff'd, 159 B.R. 812 (N.D. Ill.1993), aff'd, No. 93-3525, 1995 WL 21519 (7th Cir. Jan.18, 1995), cert. denied, 516 U.S. 853, 116 S.Ct. 153, 133 L.Ed.2d 97 (1995); Chapman v. Illinois, No. 92 C 0120, 1992 WL 6710 (N.D. Ill. Jan.13, 1992), aff'd, No. 92-1385, 1992 WL 374017 (7th Cir. Dec.18, 1992); Chapman v. Gasperec, No. 96 C 5299, 1996 WL 515186 (N.D. Ill. Sept.6, 1996); Chapman v. Citicorp Mortgage, Inc., Nos. 92 C 2862, 90 B 14910, 1992 WL 157499 (N.D. Ill. Jun. 23, 1992); and Chapman v. Citicorp Mortgage Inc., No. 91 C 7990, 1992 WL 59289 (N.D. Ill. March 20, 1992).

In this case, Chapman has sought to convert routine litigation communications received by him in an earlier case into causes of action. For reasons stated below, Summary Judgment will be entered for Defendants on all counts.

UNDISPUTED FACTS

The following undisputed facts are based on statements and affidavits filed by the parties under Rule 7056 Fed.R.Bankr.P. and Local Bankruptcy Rules 402M and 402N:

On February 24, 2000, Chapman filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code, Title 11 U.S.C. On April 6, 2000 he filed an earlier fourteen count Adversary Complaint against Charles Schwab & Co., Inc., Steven Murphy and Craig Louie ("Schwab Defendants"), 00-A-00358 claiming inter alia violation of the Fair Debt Collection Practices Act and the Illinois Consumer Fraud and Deceptive Practices Act.

The Schwab Defendants were originally represented in the earlier case by the law firm of Sonnenschein Nath & Rosenthal. On June 27, 2000, Kane & Fischer filed a Motion for Leave to Substitute Counsel on behalf of the Schwab Defendants. The Motion was granted on July 25, 2000.

During and as part of proceedings in that earlier case, Defendants here who appeared there as counsel attempted to contact Chapman by phone and through written correspondence on several occasions. Chapman has filed this current Adversary Complaint based in part on these communications. Such communications between Chapman and attorneys of Kane & Fischer are alleged by Chapman to have been attempts by Defendants to collect a debt. Chapman contends that Defendants in the earlier case failed to comply with various statutes in their attempt to collect a debt assertedly due to them. Chapman also disputes that any debt is owed to Charles Schwab & Co., Ltd. outside of this litigation.

Kane & Fischer respond that all of the conversations in issue related directly to the earlier case then pending between Chapman and the Schwab Defendants and were not attempts to collect a debt.

The communications in issue are described below in chronological order. With the exception of a conversation that Chapman alleges took place on July 31, 2000, Defendants do not dispute that the communications occurred.

On July 21, 2000, in the earlier case, the Schwab Defendants filed a Motion for Order that Depositions be taken by telephone. Prior to filing of that Motion, on July 20, 2000, the Schwab Defendants forwarded Chapman a letter, signed by their attorney Michael A. Kraft, seeking Chapman's agreement to take five depositions by telephone (Exhibit A to this Adversary Complaint).

The July 26, 2000 correspondence referenced in paragraphs 25-27 of Chapman's Adversary Complaint was a Notice of Filing in the earlier Schwab Case regarding the Appearances filed by the Defendants on behalf of the Schwab Defendants.

The July 28, 2000 correspondence referenced in paragraphs 28 through 30 of the Adversary Complaint related to a draft deposition scheduling order, and a draft proposed order relating to the Schwab Defendants' Motion to Strike Class Allegations.

In the alleged (but disputed) July 31, 2000, conversation, Chapman asserts that Defendants verbally requested that Chapman write a check for $ 77,860 and deliver it to Defendants to settle the then pending litigation.

The August 25, 2000, correspondence referenced in paragraphs 35 through 37 of the Adversary Complaint herein was a Notice of Filing sent to Chapman by Kane & Fischer along with a copy of the Proof of Claim filed by Charles Schwab & Co. (Exhibit B to this Adversary Complaint).

The August 30, 2000 correspondence referenced in paragraphs 38 and 39 of the Adversary Complaint was a Notice of Filing sent to Chapman by Kane & Fischer along with a copy of the Objections of Charles Schwab & Co. to confirmation of Debtor's Chapter 13 Plan.

The September 12, 2000 correspondence referenced in paragraphs 40 and 41 of the Adversary Complaint, sought confirmation that Chapman intended to proceed with depositions in the Schwab Case on September 15, 2000.

The September 13, 2000 letter reference in paragraphs 42 and 43 of the Adversary Complaint related to Chapman's asserted failure to honor certain of the Schwab Defendants' discovery requests.

The foregoing written communications related to various discovery disputes, filing of proofs of claims, objections to confirmation and other litigation proceedings. They did not mention collecting a debt from Chapman. The disputed conversation was on its face an effort to settle litigation.

For the following reasons, Defendants' motion for summary judgment is granted.

STANDARDS FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to Adversary proceedings by Rule 7056 Fed.R.Bankr.P., provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." See also Russo v. Health, Welfare & Pension Fund, Local 705, 984 F.2d 762 (7th Cir. 1993).

Initially the moving party bears the burden of demonstrating absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). Once the moving party has met that burden, the non-moving party must go beyond the pleadings and bring forth specific facts to establish that there is a genuine issue for trial. Becker v. Tenenbaum-Hill Assoc., Inc., 914 F.2d 107, 110 (7th Cir. 1990). See also Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). The nonmoving party is required to do more than show mere existence of some metaphysical doubt as to the material facts or some alleged factual dispute between the parties in order to defeat the motion, unless the disputed fact is determinative of the outcome under applicable law. Id. at 586, 106 S.Ct. at 1356; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8, 106 S.Ct. 2505, 2509-10 (1986). The nonmoving party may not rest on its pleadings or on conclusory allegations in affidavits. Waldridge v. American Hoechst Corp., 24 F.3d 918, 920-1 (7th Cir. 1994); Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992).

In determining whether a genuine issue of material fact exists the Court must "construe all facts in the light most favorable to the non moving party and draw all reasonable and justifiable inferences in that party's favor." Popovits v. Circuit City Stores, Inc., 185 F.3d 726, 731 (7th Cir. 1999); See also Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. However, not every conceivable inference must be drawn in favor of the nonmoving

party, only those inferences that are reasonable and present a sufficient disagreement between the parties. Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 251 (7th Cir. 1995); See also Anderson, 477 U.S. at 251-2, 106 S.Ct. at 2512.

DISCUSSION

COUNT I
ILLINOIS UNIFORM DECEPTIVE TRADE PRACTICES ACT
815 ILCS 510/2(12)

Section 510/2(12) provides in part that: "A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation he: . . . (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding. In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding."

Section 510/2(12) does not provide a cause of action for damages. Smith v. Prime Cable of Chicago, 276 Ill.App.3d 843, 213 Ill.Dec. 304, 658 N.E.2d 1325 (1st Dist. 1995). It does, however, permit private suits for injunctive relief and has generally been held to apply to situations where one competitor is harmed or may be harmed by the unfair trade practices of another. Disc Jockey Referral Network, Ltd. v. Ameritech Pub. of Illinois, 230 Ill.App.3d 908, 172 Ill.Dec. 725, 596 N.E.2d 4 (1st Dist. 1992) . Although the Act was intended to protect business people, a consumer action is permissible if the consumer can allege facts which would indicate he is "likely to be damaged" in the future. Greenberg v. United Airlines, 206 Ill.App.3d 40, 46, 150 Ill. Dec. 904, 909, 563 N.E.2d 1031,1036 (1st Dist. 1990).

Chapman's allegations do not even come close, let alone fit within the framework of this provision. He alleges communications in prior litigation, not trade practices. Also he requests monetary damages and punitive damages which are not available, rather than injunctive relief. Further, he has failed to plead or show that Defendants' litigation communications to him created a likelihood of confusion or of misunderstanding or that he is likely to be damaged by those communications in the future.

Finally, even if a cause of action were pleaded and facts supporting it were established, a debtor's state law fraud claim based on filing of alleged fraudulent proof of claim - including a claim based on the Illinois Consumer Fraud and Deceptive Practices Act - is pre-empted by the Bankruptcy Code. Pereira v. First North American Nat'l Bank, 223 B.R. 28, 31-32 (N.D. Ga. 1998) (the expansive nature of the Bankruptcy Code pre-empts virtually all claims related to alleged misconduct in the bankruptcy courts).

COUNT II
ASSERTED DEPRIVATION OF DUE PROCESS
UNDER 42 U.S.C. § 1983

To establish a claim under section 1983, a plaintiff must allege and prove that the defendant deprived him of a right secured by the Constitution or laws of the United States and that the defendant acted under color of law. Brokaw v. Mercer County, 235 F.3d 1000 (7th Cir. 2000). Since section 1983 actions lie only against persons who act "under color" of law, a private attorney who represents a client in court action "is not within the scope of potential section 1983 defendants as to the lawyer's conduct in that respect." Chapman v. Burton Berger & Assocs., Ltd., 159 B.R. 812 (Bankr. N.D. Ill. 1993).

Kane & Fischer are and were pleaded to have been private lawyers representing the interest of their clients in the earlier referenced adversary proceeding in this court. The asserted conduct by Kane & Fischer attorneys in communicating with Chapman about his lawsuit was not conduct covered by § 1983, because it was by private attorneys representing their client, therefore not under color of law.

COUNTS III, V, VI and VII
FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. § 1692

Chapman alleges that Defendants violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 based upon communications between Chapman and Kane & Fischer arising out of their representation of Charles Schwab & Co., Inc. and two of its employees, in connection with the earlier Adversary No. 00 A 00358, and also through their filing of a proof of claim on behalf of Charles Schwab & Co., Inc. in the underlying bankruptcy proceeding.

To establish a violation of the FDCPA, three requirements must be pleaded and established: The plaintiff who has been the target of collection activity must show (1) that he is a "consumer" as defined under § 1692(a)(3); (2) that the defendant collecting the debt was a "debt collector" as defined in § 1692(a)(6); and (3) the defendant violated some part of the FDCPA by act or omission. Talbott v. GC Svcs. Ltd. Partnership, 53 F. Supp.2d 846 (W.D. Va.1999).

Chapman attaches various documents to his Adversary Complaint for support of his allegations that Defendants violated the FDCPA. The second document attached is a copy

of the bankruptcy proof of claim that Defendants filed on behalf of Charles Schwab. The FDCPA does not apply to proofs of claim in bankruptcy proceedings. Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 1999 WL 284788, *4 (N.D. Ill.) (Chapter 13 debtor's Fair Debt Collection Practices Act claim regarding law firm's filing of proof of claim dismissed based on the exclusivity of the Bankruptcy Code). Thus, Chapman cannot show that Defendants were attempting by filing a claim in bankruptcy to collect a debt in violation of the FDCPA.

In Counts III, V, VI, Chapman alleged that communications referenced in paragraphs 21 through 34, and 38 through 43 were communications to collect a debt which failed to comply with requisite notice provisions under the FDCPA. Chapman's contention is unsupported by the record. None of the written communications referenced in the adversary complaint constituted debt collection activities. Nowhere in the correspondence is there any mention or demand of payment for a debt. The letters appear merely to be communications in furtherance of Kane & Fischer's representation of its clients in the Schwab Case, and concerned matters such as resolving discovery disputes, objections to confirmation of the Chapter 13 bankruptcy plan, and related matters.

Further the term "communication" is defined by the statute as . . . "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692(a)(2). The communications with Chapman were not regarding a debt but were regarding issues such as discovery in the earlier litigation.

Chapman further alleges that there was a verbal statement by Defendants requesting that he pay the $77,860 to resolve the matter. That statement is disputed. Even accepting Plaintiff's version of it, however, that conversation was a mere offer to settle the litigation. Offers to settle litigation are not actionable because they are not "communications" as the term is defined by the FDCPA. Jackson-Spells v. Francis, 45 F. Supp. 2d 496 (D. Md. 1999) (offers to settle litigation by creditor which consumer had initiated were not "communications" which convey information about a debt.)

COUNT IV
FRAUD IN THE INDUCEMENT

Fraud in the inducement requires proof of a statement of material fact known to be false by the maker and made with the purpose of inducing another party to act. Kolson v. Vembu, 869 F.Supp. 1315, 1321 (N.D. Ill. 1994). In addition, the party claiming fraudulent inducement must reasonably believe and rely upon the statement to his detriment. Id.

In his fraud count, Chapman alleges that Defendants requested payment in the amount of $77,860. That request is alleged to constitute an attempt to collect a debt that Chapman says is neither due nor owing, so he calls it a claim based on the false and fraudulent representations of Defendants. However, Chapman has not shown that he reasonably believed or relied upon the statement alleged to have been made by Defendants. In fact, he obviously did not and does not believe that he owes $77,860 or any amount to Defendants. Nor did he plead that he made any payments to the Defendants based upon the claim for $77,860 allegedly owed.

Chapman contends that he would not have entered into a custodial Asset Management Agreement with Charles Schwab & Co., Inc. if it had not been for Defendants' assertedly false representations and fraudulent conduct. Chapman entered into the Asset Management Agreement with Charles Schwab & Co., Ltd. in March of 1999, yet the first correspondence from Defendants that Chapman complains of was dated July 20, 2000. There was a 16-month lapse between the time that Chapman entered into an agreement with Charles Schwab & Co., Ltd and the first communication with Kane & Fischer attorneys complained of in this case. Chapman has not alleged any conduct fraudulent or otherwise that occurred prior to 1999 that induced him to enter into an Asset Management agreement with Charles Schwab & Co., Ltd.

Accordingly, Chapman cannot satisfy the necessary element requiring proof that he reasonably believed and relied upon any misstatements to his detriment.

COUNT VIII
CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT
815 ILCS 5O5/1 et seq.

To establish a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFDBPA"), 815 ILCS 510/2, Chapman must prove: (1) a deceptive act or practice; (2) intent by defendants that plaintiff relied on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce. Lynch Ford, Inc. v. Ford Motor Co., Inc., 957 F.Supp. 142, 147 (N.D. Ill. 1997). Those elements are not alleged, nor do the asserted communications demonstrate those elements.

PRIVILEGE

Under Illinois law there exists an absolute privilege upon anything said or written in the course of judicial proceedings, if those statements are relevant to the underlying controversy. Starnes v. Capital Cities Media, Inc. 39 F.3d 1394 (7th Cir. 1994); Scheidler v. National Org. of Women, Inc., 739 F.Supp. 1210 (N.D. Ill. 1990) (Under Illinois Fair Comment Rule, statement made by party at press conference and in news releases regarding legal proceeding were protected by absolute privilege.) The privilege is not limited to formal pleadings and court communications. Weiler v. Stern, 67 Ill.App.3d 179, 384 N.E.2d 762, 23 Ill.Dec. 855 (1st Dist. 1978); Libco Corp. v. Adams, 100 Ill.App.3d 314, 426 N.E.2d 1130, 55 Ill.Dec. 805 (1st Dist. 1981). To the extent that Chapman asserts claims under Illinois law, Illinois' law on privilege applies.

The correspondence upon which Chapman's claims in this Adversary is based was written and sent to him in the course of the earlier adversary proceeding. Accordingly, Chapman cannot use those privileged communications as the basis for his non-federal claims in this Adversary.

CONCLUSION

There are no dispositive fact issues and Defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment is therefore granted. Judgment will separately enter in favor of Defendants on all counts.

ENTER:

_____

Jack B. Schmetterer
United States Bankruptcy Judge

Entered this 30th day of April 2001.