DEBT COLLECTION

TEXAS DEBT COLLECTION ACT CLAIM BARRED BY STATUTE OF FRAUDS

Ebrahimi v. Caliber Home Loans, Inc., ___S.W.3d___ (Tex. App. 2019).
https://law.justia.com/cases/texas/fifth-court-of-appeals/2019/05-18-00456-cv.html

FACTS: Plaintiff-Appellant Farrokh Ebrahimi executed a $268,000 note payable to America's Wholesale Lender and a deed of trust ("the loan") that was ultimately assigned to DefendantAppellee U.S. Bank, N.A, which granted a security interest in Ebrahimi's Texas property. Ebrahimi defaulted on the loan by failing to make installment payments and her property was referred to foreclosure. A notice of acceleration was sent to Ebrahimi by the loan servicer, Defendant-Appellee Caliber Home Loans, Inc. ("Caliber"), along with an accompanying notice of substitute trustee sale.

Ebrahimi filed an initial lawsuit against Caliber in order to stop the foreclosure sale, but Ebrahimi and Caliber subsequently filed an agreed stipulation of dismissal. After Ebrahimi again failed to make installment payments towards the loan, Defendant-Appellee U.S. Bank attempted to proceed with another foreclosure sale. Ebrahimi alleged that Defendants made an oral promise to delay foreclosure until a proper accounting of what she owed was provided to her.

Ebrahimi subsequently brought the underlying suit against Caliber and U.S. Bank to stop the foreclosure sale under the Texas Debt Collection Act (TDCA) and the DTPA. Defendants filed for summary judgement, which the trial court granted on all grounds.

HOLDING: Affirmed.

REASONING: Ebrahimi argued that she was entitled to relief under §392.304(a)(8) of the TDCA because she provided testimony that she would not have dismissed her first lawsuit but for Defendants' alleged representations that they would: (1) send an accurate accounting and a payoff amount to Ebrahimi, and (2) not proceed with any foreclosure actions until Ebrahimi had an opportunity to pay whatever amount was actually owed.

The Texas statute of frauds bars the enforcement of loan agreements that exceed $50,000 in value unless the agreement is in writing and signed by the party to be bound.

The court rejected this argument, holding that these oral promises were governed by the statue of frauds, Texas Business and Commerce Code §26.02(b), and were thus barred. The court noted that the Texas statute of frauds bars the enforcement of loan agreements that exceed $50,000 in value unless the agreement is in writing and signed by the party to be bound. Further, the definition of "loan agreement" includes an agreement to delay repayment of money or to otherwise extend credit or make a financial accommodation. Oral modifications of a written contract are also subject to the statute of frauds if they materially alter the obligations imposed by the original contract. Therefore, agreements to modify an existing loan agreement, including to forgo or delay foreclosure, are subject to the statute of frauds.

Because the original note was for an amount greater than $50,000, it was subject to the statute of frauds. Thus, any oral agreement to delay foreclosure would fall under §26.02(b) and be included under the definition of "loan agreement" in §26.02(a)(2). Accordingly, the court held that any claim under the TDCA based on Defendants' alleged oral promise that they would delay foreclosure in order to give Ebrahimi an opportunity to cure default was barred by the statute of frauds.

THIRD-PARTY COUNTERCLAIM DEFENDANTS CANNOT REMOVE CLASSACTION COUNTERCLAIMS TO FEDERAL COURT

Home Depot U.S.A., Inc. v. Jackson, ___U.S.___ (2019).
https://www.supremecourt.gov/opinions/18pdf/17-1471_e2p3.pdf

FACTS: Citibank, N.A., filed a debt-collection action against George Jackson in North Carolina state court, alleging that Jackson was liable for charges incurred on a Home Depot credit card. Jackson answered and filed an individual counterclaim against Citibank and third-party class-action claims against Home Depot U.S.A., Inc, and Carolina Water Systems, Inc. Jackson alleged that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices, in violation of North Carolina law. Home Depot filed a notice of removal and Jackson subsequently filed a motion to remand.

The district court granted Jackson's motion and the Fourth Circuit affirmed. Home Depot appealed.

HOLDING: Affirmed.

REASONING: Home Depot argued that removal to federal court was proper, as they qualified as "defendants" to a "claim" under 28 U.S.C. §1441.

The Court rejected this argument, holding that §1441 refers to "civil actions," not "claims." The Court explained that the action as defined by Jackson's complaint was the "civil action . . . of which the district court" must have "original jurisdiction." The "defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. The Court further noted that: (1) the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants; (2) Congress has clearly extended removal authority to parties other than the original defendant in §§1462(a) and (b), but has not done so in §1441; and (3) the Court has previously held in *Shamrock Oil & Gas Co. v. Sheets* that a counterclaim defendant who was the original plaintiff was not one of the "defendants." Therefore, there was no textual reason to reach a different conclusion for a counterclaim defendant who was not part of the initial lawsuit in the instant case.

Alternatively, Home Depot argued that even if §1441(a) did not allow removal, 28 U.S.C. §1453(b) did, as it permitted removal by "any defendant" to a "class action." The Court disagreed, holding that the two clauses in §1453(b) that employ the term "any defendant" clarify that certain limitations on removal that might otherwise apply do not limit removal under that provision. Neither clause alters §1441(a)'s limitation on who can remove, suggesting that Congress intended to maintain the limitation. In addition, §§1453(b) and 1441(a) both rely on the procedures for removal in §1446, which also employs the term "defendant." Interpreting that term to have different meanings in different sections would render the removal provisions incoherent.

FDCPA ATTORNEY'S FEES AWARD SLASHED

Paz v. Portfolio Recovery Associates, LLC., ___F.3d___ (7th Cir. 2019).
https://law.justia.com/cases/federal/appellate-courts/ca7/17-3259/17-3259-2019-05-15.html

FACTS: Plaintiff Isaac Paz defaulted on a credit card debt, which was purchased by Defendant Portfolio Recovery Associates ("PRA"). In PRA's attempt to collect the debt, PRA violated the FDCPA by failing to report to credit reporting agencies that Paz disputed the debt. Paz filed suit against PRA, but ultimately accepted a settlement offer from PRA to eliminate the debt and pay Paz reasonable attorney's fees, per Federal Rule of Civil Procedure 68. The settlement offer provided that the "offer of judgment is made solely for the purposes specified in Rule 68 and is not to be construed as an admission that Defendant is liable in this action, that Plaintiff has suffered any damage, or for any other reason." Despite the settlement, PRA continued to violate the FDCPA in the same manner. Paz filed a second suit alleging violation of the FDCPA.

PRA again provided a series of settlement offers to resolve all claims and cover Paz's attorney's fees. Paz did not respond and proceeded to trial. The district court found for Paz, but limited Paz's attorney's fees award to those incurred before PRA's final Rule 68 offer. Paz appealed.
HOLDING: Affirmed.
REASONING: Paz argued that he was entitled to all attorney's fees incurred, including those incurred after the final settlement offer because he did not understand PRA's settlement offers, due to ambiguity and unfair terms, thus rendering the offers worthless. Therefore, PRA's offers to settle were not substantial and should have been disregarded by the district court in determining the fee award.

The court rejected Paz's arguments, stating that a settlement offer made pursuant to Rule 68 limits a plaintiff's ability to recover costs and attorney's fees incurred after the date of the offer. Paz's decision to proceed to trial, despite PRA's settlement offers, was a consideration that warranted a substantial reduction in Paz's attorneys' fees. Additionally, the court cited Paz's previous experience accepting offers with identical terms.

Paz also argued that the district court abused its discretion in finding that Paz achieved only limited success on the merits of his claims. Paz asserted that agreeing to PRA's settlement offer, which expressly disclaimed PRA's liability, would have prevented Paz from claiming prevailing party status and receiving attorney's fees. The court also rejected this argument, holding that, by operation of Rule 68, Paz's acceptance of the offer would have resulted in a judgment being entered against PRA, and attorney's fees would not be precluded.

COURT DENIES DEFAULT JUDGMENT BASED ON WRONGFUL DEBT COLLECTION

Alvarado v. Eltman Law, P.C., ___Fed. Appx.___ (N.D. Tex. 2019).
https://www.courtlistener.com/recap/gov.uscourts.txnd.307353/gov.uscourts.txnd.307353.13.0_1.pdf

FACTS: Defendant Eltman Law, P.C., was representing Conn's Electronics ("Conn's") in Conn's lawsuit against Plaintiff Alex Alvarado. Eltman Law obtained a default judgment in state court after representing to the court that Alvarado was properly served in the lawsuit, which concerned debt owed to Conn's. Alvarado claimed that service had been improper, as he had been served notice to his prior address and not at the address he resided at the time of service. Alvarado filed suit against Eltman Law alleging violation of the FDCPA.

Alvarado did not seek to reverse or modify the state court judgment. Rather, Alvarado attempted to separately recover for the injury of Eltman Law failing to serve him at his proper address. Alvarado moved for default judgement on his claim of improper service.
HOLDING: Denied.
REASONING: Alvarado argued that service was improper because the service was attempted at his old address and he was never served.

The court rejected Alvarado's argument, holding that Alvarado had only pled a legal conclusion of improper service, alleged insufficient detail, and had provided no evidence in support of his claim of improper service. The court explained that Alvarado had not successfully prosecuted his case because he cited no case law to support his legal conclusion of improper service, nor did he provide sufficient notice as to how the alleged improper service would fall as a violation within the statutes. Because Alvarado failed to show any actionable violation under any statute, the court concluded that default judgment for damages and attorney's fees was inappropriate.

"ASSIGNEE" DOES NOT IDENTIFY CREDITOR AS REQUIRED BY FDCPA

Gross v. Lyons Doughty & Veldhuis, P.C., ___F.3d___ (3rd Cir. 2019).
https://www.leagle.com/decision/infco20190710072

FACTS: Defendant-Appellee, Lyons Doughty & Veldhuis, P.C. ("LDV"), was a debt collector that sent a letter to Plaintiff-Appellant Glenn Gross, attempting to collect on a debt. The letter stated that LDV represented Capital One Bank, an assignee of three other parties, but did not explicitly identify the creditor to whom Gross's debt was owed. The letter added that Gross's account was in default and that Gross could contact LDV to pay the outstanding balance. Gross filed suit against LDV for failing to identify the name of the creditor to whom the debt was owed.

The trial court dismissed Gross's complaint, holding that LDV's letter sufficiently identified Capital One Bank as the creditor by its reference to Capital One Bank as an assignee. Gross appealed.

HOLDING: Reversed and remanded.
REASONING: Gross argued that LDV's letter violated the FDCPA's requirement that debt collectors identify the name of the creditor to whom the debt is owed. Gross pointed out that, although at least four entities were connected to the debt, the letter did not explicitly identify the creditor to whom the debt was owed.

The court accepted this argument, holding that, under the least-sophisticated-debtor standard, LDV's letter did not effectively disclose the creditor's identity. The court explained that the word "assignee" is a legal term that the least sophisticated consumer might not understand. The court reasoned that, although the letter stated that LDV was a debt collector and listed the parties that it represented, the least sophisticated debtor could think that any one of the listed entities was owed the debt. Because even a sophisticated consumer could interpret LDV's letter in different ways, the letter's use of "assignee" language together with list of entities muddled the creditor's identity and failed to disclose Capital One Bank as the creditor to whom the debt was owed, as required by the FDCPA.

SEVENTH CIRCUIT HOLDS DEBT COLLECTOR'S FEE COUNTS AS AN AUTHORIZED COST UNDER DEBTOR'S CONTRACT

Bernal v. NRA Grp., LLC, ___F.3d___ (7th Cir 2019).
https://www.courtlistener.com/opinion/4641362/joseph-bernal-v-nra-group-llc/

FACTS: Plaintiff Joseph Bernal bought a monthly pass to Six Flags amusement parks. The contract between Bernal and Six Flags stated that if Bernal fell behind on his payments, he would "be billed for any amounts that are due and owing plus any costs (including reasonable attorney's fees) incurred by [Six Flags] in attempting to collect amounts due." After Bernal missed several monthly payments, Six Flags hired AR Assist, a debt collector, to recover the balance from Bernal. AR Assist was permitted to charge Six Flags a five percent management fee, plus an additional amount based on the number of days the debt was delinquent. AR Assist hired NRA Group, LLC, as a sub-contractor. NRA sent Bernal a collection letter for the amount owed, plus the percentage-based costs. Bernal filed a class-action lawsuit under the FDCPA, alleging that the percentage-based collection fee was not expressly authorized by the contract.

The court then noted that Black's Law Dictionary specifically stated that costs of collection were "[e]xpenses incurred in receiving payment of a note; esp., attorney's fees incurred in the effort to collect a note."

The district court held that the percentage-based collection fee was expressly authorized in the language of the contract between Plaintiff and Six Flags which stated that "[Y]ou will be billed for any amounts due and owing plus any costs . . . incurred by us in attempting to collect amounts due . . ." Bernal appealed.
HOLDING: Affirmed.
REASONING: Bernal first argued that the contract authorized only "actual costs," which he said included things like letterhead and postage but not collection fees. Alternatively, Bernal argued that the collection fee was not authorized because it had not yet been "incurred."

The court rejected both arguments. First, the court noted that the contract explicitly allowed for "any costs." The court then noted that Black's Law Dictionary specifically stated that costs of collection were "[e]xpenses incurred in receiving payment of a note; esp., attorney's fees incurred in the effort to collect a note." Because the court found that the fee would unquestionably be a "cost" within the meaning of the contract had Six Flags paid its attorneys the exact same amount to send the exact same collection letter, the court held the fee was also a "cost" within the meaning of the contract when it paid AR Assist to send the collection letter.

Next, the court explained that Six Flags had incurred a liability contingent on both if Plaintiff paid and when Plaintiff paid. Although the contract's language used the past tense form of the word "incur," the court found that the past participle is flexible and can relate to future events. Therefore, the standard collection fee fell within the contract's language and was not violative of the FDCPA.