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Docket: 1684CV03611-BLS2

Date: June 15, 2018

Parties: MATTHEW PERLOW, Individually and on behalf of Other Persons Similarly Situated V. ABC FINANCIAL SERVICES, INC. and SEAS & ASSOCIATES, LLC

Judge: Kenneth W. Salinger Justice of the Superior Court

MEMORANDUM AND ORDER ALLOWING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Matthew Perlow claims that ABC Financial Services, Inc., and Seas & Associates violated G.L. c. 93A while trying to collect a debt. He claims that ABC violated a regulation requiring creditors to inform the debtor of the amount of the debt within five business days after the creditor's first communication to the debtor about the debt. Perlow claims that Seas violated state law by acting as a debt collector without first obtaining a debt collection license from the Commissioner of Banks. The Court concludes that Defendants are entitled to summary judgment in their favor because Perlow has mustered no evidence that he suffered any injury that was separate and distinct from ABC's and Seas' unfair or deceptive acts. It must deny class certification for the same reason.

1. Legal Background

1.1. The "Validation of Debt" Regulation. The Massachusetts Attorney General's Office has promulgated a regulation requiring creditors that seek to collect on a debt to provide the debtor with information regarding the amount of the debt and how the debtor may challenge the validity of some or all of the alleged debt. See 940 C.M.R. § 7.08. The relevant portion of this regulation provides as follows:

(1) It shall constitute an unfair or deceptive act or practice for a creditor to fail to provide to a debtor or an attorney for a debtor the following within five business days after the initial communication with a debtor in connection with the collection of a debt, unless the following information is contained in the initial communication or the debtor has paid the debt:

- (a) The amount of the debt;
- (b) The name of the creditor to whom the debt is owed;

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(c) A statement that unless the debtor, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the creditor; and

(d) A statement that if the debtor notifies the creditor in writing within 30 days after receipt of this notice that the debt, or any portion thereof is disputed, the creditor will obtain verification of the debt and provide the debtor, or an attorney for the debtor, additional materials described in 940 CMR 7.08(2).

Id.

1.2. The Debt Collection Licensing Requirements. It is unlawful to engage in "the business of a debt collector" in Massachusetts "without first obtaining" a debt collector's license from the Commissioner of Banks. G.L. c. 93, § 24. By statute, any violation of this statute "shall constitute an unfair or deceptive act or practice" under G.L. c. 93A. See G.L. c. 93, § 28.

1.3. Separate and Distinct Injury Requirement. Where a consumer shows that a defendant violated a consumer protection regulation, and thereby committed an unfair or deceptive act or practice in the conduct of trade or commerce, the consumer cannot prevail on a claim under G.L. c. 93A unless they also prove that they suffered some injury as a result of the violation. E.g., *Bellermann v. Fitchburg Gas & Elec. Light Co.*, [475 Mass.](#)

[67](#), 73 (2016); Tyler v. Michaels Stores, Inc., [464 Mass. 492](#), 501-503 (2013); Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc., [445 Mass. 790](#), 800-802 (2006).

"[T]o meet the injury requirement under G.L. c. 93A, § 9(1) or 11, a plaintiff must have suffered a 'separate, identifiable harm arising from the [regulatory] violation' that is distinct 'from the claimed unfair or deceptive conduct itself.'" Bellermann, supra, quoting Tyler, supra. A consumer is not entitled to collect even nominal damages under c. 93A without proving that the violation caused some sort of "separate" and "distinct" injury. Tyler; Karaa v. Kuk Yim, [86 Mass. App. Ct. 714](#), 725 (2014). "[T]he Legislature ... did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery." Aspinall v. Philip Morris Cos. Inc., [442 Mass. 381](#), 401 (2004), quoting Lord v. Commercial Union Ins. Co., [60 Mass. App. Ct. 309](#), 321-322 (2004).

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"The injury requirement of G.L. c. 93A is designed 'to guard against vicarious suits by self-constituted attorneys general who see a wrong but have not actually been harmed by the wrong.'" Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., [469 Mass. 813](#), 823 (2014), quoting M.C. Gilleran, The Law of Chapter 93A § 4.18 (2d ed. 2007); accord, e.g., Roberts v. Enter. Rent-A-Car Co. of Boston, [445 Mass. 811](#), 814 (2006).

2. Factual Background. The following are undisputed facts, as demonstrated in the evidentiary materials submitted by the parties or reasonable inferences that one could draw from those facts. The Court "must ... draw all reasonable inferences" from the evidence presented "in favor of the nonmoving party," as a jury or judicial fact finder would be free to do at trial. Godfrey v. Globe Newspaper Co., Inc., [457 Mass. 113](#), 119 (2010). It has done so.

Mr. Perlow became a member of Gold's Gym in South Boston in June 2015. He signed a two-year contract, agreeing to pay the Gym \$49.99 per month over the contract term. The contract also contained a provision in which Perlow agreed that ABC could contact him, "subject to applicable law," by mail, telephone, or email.

In October 2015 Perlow told the Gym that he wanted to cancel his membership. The Gym refused. So Perlow cancelled the credit card that the Gym had been charging each month for his membership fee.

2.1. ABC Financial Services' Debt Collection Efforts. ABC made its initial contact with Perlow on Monday, November 2, 2015, through an automated telephone call. Perlow did not answer. So ABC left a pre-recorded voicemail message stating that they were calling on behalf of Gold's Gym "with an important message regarding your membership," that ABC is "the billing company" for the Gym, and that ABC was "calling regarding a problem with your fitness membership that requires your immediate attention." A reasonable fact finder could conclude that this was ABC's first communication with Perlow regarding collection of a debt. Perlow did not respond to this message.

On Friday, November 6, four business days later, ABC followed up by email. The email was in the form of ABC's "LD0" form letter. It stated that "[t]his communication is an attempt to collect a debt." ABC told Perlow that it was the billing company for Gold Gym, that ABC would assume Perlow's debt was valid unless he

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disputed the validity of the debt within thirty days, and that if Perlow disputed any portion of the debt within thirty days then ABC would obtain verification of the debt and send a copy to Perlow. However, this November 6 email did not tell Perlow the amount of the claimed debt. Perlow never

responded to this email.

ABC left another pre-recorded voicemail message for Perlow on Wednesday, November 11, 2015. The message was the same as the message left by ABC on November 2. ABC had not yet informed Perlow of the amount of the claimed debt.

On November 13, ABC sent Perlow a second email, in the form of its "LD1" form letter. This email told Perlow the amount of his alleged debt to Gold Gym, and repeated the "validation of debt" language summarized above. This was the first time that ABC told Perlow the amount of the debt he allegedly owed. Perlow never responded to this letter.

From November 16, 2015, through February 15, 2016, ABC called Perlow and left pre-recorded voicemail messages for him nineteen times. It also sent him three additional letters, in the form of its "LD2", "LD3," and "LD4" form letters. Perlow never responded to any of these communications. Mr. Perlow never spoke with an ABC representative, never contacted ABC to dispute the validity of the debt that ABC said it was trying to collect, never responded to ABC in any other way, and never paid any amount to ABC.

ABC closed its file on Perlow on February 16, 2016. It transferred Perlow's file to Seas for collection on February 26, 2016. ABC did nothing further regarding Perlow's debt. ABC never reported Perlow's debt to any credit rating agency.

2.2. Seas & Associates' Debt Collection Efforts. Seas contacted Perlow several times during 2016 in an attempt to collect his alleged debt to Gold's Gym. Seas had no license to collect debts in Massachusetts during the time it was attempting to collect a debt from Perlow.

Seas first contacted Perlow on March 4, 2016, by leaving a pre-recorded voicemail message on his cell phone. Seas also sent Perlow a letter sent on March 4, 2016. The letter asserted that Perlow owed \$1,176.77 for his Gold's Gym Southie membership. The letter also contained the "validation of debt" language required by 940 C.M.R. § 7.08.

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Seas sent Perlow a second letter on June 14, 2016. That letter also asserted that Perlow owed \$1,176.77 on his Gold's Gym account, and also included the required "validation of debt" language.

On July 14, 2016, the Massachusetts Division of Banks sent Seas a letter ordering it to cease engaging in any debt collection activities in Massachusetts until it obtains a license to operate as a debt collector in Massachusetts.

Seas made no further attempts to collect any debt from Mr. Perlow. Seas never reported Perlow's debt to any credit rating agency.

3. Analysis. ABC and Seas are entitled to summary judgment in their favor because Mr. Perlow cannot meet his burden of proving that he suffered any "separate" and "distinct" injury as a result of Defendant's violations of G.L. c. 93A. See generally *Kourouvacilis v. General Motors Corp.*, [410 Mass. 706](#), 715 (1991) ("If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." (quoting *Celotex Corp. v. Catret*, 477 U.S. 317, 328 (1986) (White, J., concurring))).

3.1. No Injury from ABC's Violation. ABC violated the Attorney General's "validation of debt" regulation because it did not tell Mr. Perlow the amount of the debt he allegedly owed by November 9, 2015, which was five business after ABC first contacted Perlow about the collection of a debt. See 940 C.M.R. § 7.08.

But ABC cured this violation four days later, on November 13, 2015, when it sent Perlow a second letter that specified the amount of the alleged debt and contained all of the other information and notices required by this regulation.

The only thing that happened between November 9 and November 13 is that ABC left one pre-recorded voicemail message telling Perlow that ABC was

"calling regarding a problem with your fitness membership that requires your immediate attention." Perlow never responded to this message.

Perlow cannot show that receiving this November 11, 2015, voicemail message caused him any injury that would support an award of nominal damages under G.L. c. 93A. ABC did not invade Perlow's privacy by calling him. To the contrary, Perlow had agreed in his contract with Gold's Gym that ABC could contact him by telephone, email, or snail mail. Though ABC had violated its obligation to tell Perlow the amount

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of the debt he allegedly owed within five business days of ABC's first contact with him, the act of leaving a second voicemail message that was apparently ignored by Perlow does not appear to have caused any kind of cognizable injury. In sum, Perlow cannot prevail on his claim against ABC because he cannot "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." *Rhodes v. AIG Domestic Claims, Inc.*, [461 Mass. 486](#), 496 (2012).

Perlow's argument that he was injured when a negative mark was placed in his credit report is unavailing, because the undisputed evidence shows that this happened in January 2017 and that neither ABC nor Seas had anything to do with it. Though Perlow invokes Mass. R. Civ. P. 56(f) and asks for time to conduct additional discovery on the issue, he has not met his burden of making a "threshold showing" that there is "some factual basis" for her allegation that ABC or Seas caused a black mark to appear on Perlow's credit report, and that specific discovery is likely to be relevant to those issues. See *E.A. Miller, Inc. v. South Shore Bank*, [405 Mass. 95](#), 100, (1989). Rule 56(f) is not a license to "'fish' for evidence on which to base their complaint 'in hopes of somehow finding something helpful to their case in the course of the discovery procedure.'" *Alphas Co. v. Kilduff*; [72 Mass. App. Ct. 104](#), 114, rev. denied, 452 Mass. 1105 (2008), quoting *E.A. Miller*; *supra*, at 102, quoting in turn *Charbonnier v. Alnico*, [367 Mass. 146](#), 153 (1975). "A court may grant summary judgment despite an opposing party's claim that discovery would yield additional facts where the opposing party has not alleged specific facts that could be developed through such discovery." *E.A. Miller*, *supra*, at 102, quoting *Taylor v. Gallagher*, 737 F.2d 134, 137 (1st Cir. 1984).

3.2. No "Separate" and "Distinct" Injury from Seas' Violation. The summary judgment request by Seas & Associates is more troubling. It is undisputed that Seas violated Massachusetts law by trying to collect a debt from Mr. Perlow without being licensed to conduct such debt collection activities, and that this constitute a per se violation of G.L. c. 93A. It is also undisputed that Perlow suffered the very injury that the statutory scheme was intended to prevent: he was repeatedly asked by Seas to pay a debt of \$1,176.77, with Seas acting as a debt collector for ABC and Gold's Gym even though it had no license to do so in Massachusetts. If a violation

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of c. 93A results in a consumer receiving unwanted communications, that is a sufficient injury to support the award of nominal damages under c. 93A. See *Tyler*, 464 Mass. at 504 & nn. 18-20.

But the Supreme Judicial Court has repeatedly held that a consumer who sues a company for violating a consumer protection statute or regulation cannot prevail under c. 93A unless they have suffered an injury that is "separate" and "distinct" from the alleged regulatory violation itself. See *Bellermann*, 475 Mass. at 73; *Tyler*, 464 Mass. at 501-503. Here the communications by Seas to Perlow are the unlicensed debt collection activities that violate c. 93A. The communications by Seas did not result from a c. 93A violation; they are the alleged violation. Under *Bellermann* and *Tyler*, Perlow cannot seek even nominal damages without proving that he

suffered some kind of injury separate and apart from Seas' c. 93A violation. The summary judgment record makes clear that Perlow cannot make such a showing, as it is undisputed that nothing ever happened as a result of Seas' attempts to collect Perlow's alleged debt.

3.3. Class Certification. Mr. Perlow cannot represent a class asserting claims against ABC and Seas when he has no viable claim of his own against these Defendants. "If an individual 'may not maintain the action on [his or her] own behalf, he or she may not seek relief on behalf of a class.' " Barbara F. v. Bristol Div. of Juvenile Court Dept., [432 Mass. 1024](#) (2000) (rescript), quoting Doe v. The Governor, [381 Mass. 702](#), 704-705 (1980).

ORDER

Defendants' motion for summary judgment is ALLOWED. Plaintiffs motion for class certification is DENIED. Final judgment shall enter dismissing Plaintiffs claims with prejudice.

Kenneth W. Salinger Justice of the Superior Court

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