IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20275
Summary Calendar

JOSE A. CAVALIERE,

Plaintiff-Appellant,

v.

MICHAEL A. BURKE, ET AL.,

Defendants,

CLAIRMONT ASSOCIATES
d/b/a The Clairmont Apartments,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-1208)

(March 13, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Jose Cavaliere brought suit against Michael A. Burke, Janice Burke, and Clairmont Associates d/b/a The Clairmont Apartments alleging, inter alia, violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t. Michael and Janice Burke were

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

dismissed from the case, and the case was tried to a jury before a magistrate judge. After the trial, the magistrate judge entered a judgment as matter of law under Federal Rule of Civil Procedure 50, finding that because the credit report at issue was procured by the Clairmont with a purely commercial purpose, Cavaliere failed to state a claim under the Fair Credit Reporting Act. Cavaliere appeals. Finding that the magistrate judge applied the incorrect legal standard, we vacate the judgment of the magistrate judge and remand this case for further proceedings not inconsistent with this opinion.

I. BACKGROUND

Underlying this suit was a conflict between Cavaliere and Jean Paul Chevriere. During the 1980s, Cavaliere was employed by a business consulting corporation, Transmar Inc., owned by Chevriere. Eventually, Transmar branched out, and Chevriere and Cavaliere formed another corporation, Transmar Affiliated Holdings, Inc. and a partnership, Transmar Enterprises, Ltd. The two men relocated to Houston, Texas, and Transmar Enterprises managed the Hidden Hollow Townhomes, a condominium and townhouse project, located in Houston. In November of 1989, Cavaliere was fired from Transmar Affiliated. Following his termination, Cavaliere filed several state and federal lawsuits against Chevriere.

Michael Burke, who was an acquaintance of Chevriere, is the general partner of Clairmont Associates ("Clairmont"), a

partnership which owns the Clairmont Apartments (also located in Houston). On several occasions during 1990 and 1991, Clairmont obtained credit information on Cavaliere through C.S.C. Credit Services Inc. ("C.S.C."). Clairmont, who was attempting to take over the management of Hidden Hollow, claimed that it obtained the creditor's reports at the behest of owners of units at Hidden Hollow.

In May of 1991, Cavaliere filed suit against Clairmont and Michael and Janice Burke (who was also a partner in Clairmont). Cavaliere alleged a variety of claims, including violations of the Fair Credit Reporting Act ("FCRA"). Several months later, the district court dismissed the Burkes from the lawsuit. After several years of procedural maneuvering, the parties agreed to have the case referred to a magistrate judge. In a supplemental joint pretrial order, the parties agreed that, "the FCRA governs this cause of action and that its provisions authorize the obtaining of consumer reports for certain `permissible purposes.'" In that same order, as one of its contentions, Clairmont stated that its "actions [were] explicitly authorized, protected, and exempted by provisions of the FCRA."

Trial began on January 10, 1994. After Cavaliere rested, Clairmont moved for a judgment as a matter of law, arguing that because it obtained the credit reports for a commercial transaction or, alternatively, because it obtained the reports for a legitimate business need, Clairmont was not liable under the FCRA. The magistrate judge denied the motion at that time.

At the conclusion of the trial, the magistrate judge recognized that "a determination of whether the [FCRA] applies is a question of law," but she agreed with the parties to submit an advisory question to the jury inquiring whether "when Clairmont Associates obtained the credit reports on Jose Cavaliere that it did so in connection with a purely commercial purpose." The jury answered yes, and, as instructed, it did not answer any further interrogatories.

The magistrate judge entered a final judgment on January 28, 1994. In her judgment, the magistrate judge noted that the jury unanimously had concluded that Clairmont obtained the credit reports in connection with a purely commercial purpose. "Based upon that finding," the magistrate judge concluded that, "Cavaliere's claims against Defendant must fail, as a matter of law, as they are outside the purview of the [FCRA]."

After Cavaliere moved for a new trial, the magistrate judge clarified her prior judgment on March 8, 1994. The magistrate judge amended her final judgment "to reflect that [Cavaliere's] claims [were] dismissed for failure to state a claim under the Act." In that same order, the magistrate judge also rejected Cavaliere's claim that Clairmont had waived its argument that the FCRA did not apply to its actions.

Cavaliere appeals, arguing the magistrate judge erred in finding that he failed to state a claim under the FCRA and in denying his motion for a new trial. According to Cavaliere, Clairmont's statements in the pretrial order waived any argument

that the FCRA did not apply. Additionally, Cavaliere complains about the jury charge. Cavaliere contends that the district court improperly submitted the question of whether Clairmont obtained the credit reports for a purely commercial purpose when "neither party had submitted a similar proposed interrogatory, and [when the interrogatory was presented to the jury] was the first time that [Cavaliere] became aware that he would have to prove that the credit reports were not obtained for a `purely commercial purpose.'" Cavaliere maintains that the magistrate judge further erred in failing to define the term "purely commercial purpose" in the jury charge. Finally, Cavaliere argues that prior to referral, the district court erred in dismissing Michael and Janice Burke from the lawsuit. Because we find that the magistrate judge improperly found that the FCRA did not apply, however, we reach only Cavaliere's first and last contentions.

II. STANDARDS OF REVIEW

We review a judgment rendered by a magistrate pursuant to 28 U.S.C. § 636(c) as we would a judgment rendered by a district judge. Thus, we review issues of law de novo and findings of fact under the clearly erroneous standard. Laker v. Vallette (In re Toyota of Jefferson, Inc.), 14 F.3d 1088, 1090 (5th Cir. 1994). In reviewing a dismissal for failure to state a claim upon which relief can be granted, we apply the same standard used by the district court. Under that standard, a claim may not be

dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Carney v. RTC, 19 F.3d 950, 954 (5th Cir. 1994).

III. DISCUSSION

A. Application of the FCRA

Cavaliere argues that the magistrate judge erred in finding that he failed to state a claim under the FCRA. Specifically, Cavaliere claims that a new trial was appropriate because he proved a prima facia claim under the FCRA.

The FCRA governs the distribution of credit reports and "was crafted to protect an individual from inaccurate or arbitrary information . . . in a consumer report and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner." St. Paul Guardian Ins. Co. v. Johnson, 884 F.2d 881, 883 (5th Cir. 1989) (internal quotations and citations omitted). To accomplish those ends, the FCRA sets forth the permissible circumstances for which a consumer credit report may be used. The Act defines a consumer report as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other

> purposes authorized under section 1681(b) of this title.

Id. at 883 (quoting 15 U.S.C. § 1681a(d)). In this circuit, we have "conclude[d] that the purpose for which the information was gathered determines whether the report is a `consumer report' under the FCRA." Id. As the Ninth Circuit noted:

> a credit report will be construed as a "consumer report" under the FCRA if the credit bureau providing the information expects the user to use the report for a purpose permissible under the FCRA, without regard to the purpose to which the report is actually put. Thus, if the user of the report led the agency preparing the credit report to believe, either through commission or omission, that the report was to be used for a consumer purpose . . . the report is a consumer report within the meaning of the FCRA.

Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1274 (9th Cir. 1990) (citations omitted); see also St. Paul Guardian, 884 F.2d at 884 (noting that a credit report was a consumer report when "the information in the report . . . was collected in whole or in part by a credit reporting agency for FCRA enumerated purposes"); Ippolito v. WNS, Inc., 864 F.2d 440, 453 (7th Cir. 1988) (stating that "even if a report is used or expected to be used for a non-consumer purpose, it may still fall within the definition of a consumer report if it contains information that was originally collected by a consumer reporting agency with the expectation that it would be used for a consumer purpose"), cert. dismissed, 490 U.S. 1061 (1989). Thus, the relevant question in determining whether a credit report is a consumer report falling within the scope of the FCRA is whether the report was prepared for an enumerated FCRA purpose.

In the instant case, the magistrate judge concluded that Clairmont obtained the reports "in connection with a commercial purpose." Yet regardless of why Clairmont obtained the reports, they still fall within the purview of the FCRA if the reports were complied with the expectation that they would be used for a FCRA consumer purpose. During the trial, Michael Burke testified that the credit reports were compiled by C.S.C. at the behest of Clairmont. Although a C.S.C. representative testified that C.S.C. did not require subscribers to inform C.S.C. of the purpose of each report requested, he did note that Clairmont's subscription agreement with C.S.C. set forth that credit reports would be furnished for the "extension of credit to or collection of an account of the consumer or for employment purposes, . . . or for insurance underwriting involving a consumer." Moreover, in the C.S.C. application for membership, when asked to "indicate the specific purpose for which credit information will be used," Clairmont marked "leasing." This indicates that the reports were consumer reports under the FCRA, for regardless of whether a credit agency knows the purpose of a report it prepares, if "the agency expected [the report] to be used for proper purposes, a transmittal of that information would be a consumer report." St. Paul Guardian, 884 F.2d at 884 n.1 (quoting Heath v. Credit Bureau of Sheridan, 618 F.2d 693, 696 (10th Cir. 1980)).[1]

[1] In Matthews v. Worthen Bank & Trust Co., 741 F.2d 217 (8th Cir. 1984), the court determined that a "particular transaction was exempt from the FCRA because the credit report was used solely for a commercial transaction." Id. at 219. That, however, is not the law in this circuit. As we noted above, in

Accordingly, the district court erred in concluding that the FCRA did not apply in this case because the reports were obtained for a purely commercial purpose.

The determination that FCRA applies in the instant case is not mitigated by § 1681b of the Act. That section sets forth the permissible purposes for which a consumer report may be furnished.[2] One purpose enumerated in that section allows a

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St. Paul Guardian, we expressly rejected the argument that "the definition of a `consumer report' under the FCRA depends on the use to which the information contained therein is put." St. Paul Guardian, 884 F.2d at 885. We recognize that some courts have focused on the use of the report in determining whether a report was a consumer report under the FCRA. See e.g., Hovater v. Equifax, Inc., 823 F.2d 413, 417-21 (11th Cir. 1987); Matthews, 741 F.2d at 217. Nevertheless, under our decision in St. Paul Guardian, a report is a consumer report and subject to the provisions of the FCRA when it is "collected, in whole or in part, by a credit reporting agency for FCRA enumerated purposes." St. Paul Guardian, 884 F.2d at 884 (internal quotation omitted).

[2] Section 1681b provides, in part:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
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> . . . .
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> (3) To a person it has reason to believe--
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> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
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> (B) intends to use the information for employment purposes; or
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> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
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> (D) intends to use the information in connection with a determination of the consumer's eligibility for

report to be furnished to a person with "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. § 1681b(3)(E). Although broadly worded, this section does not mean that every report involving a business transaction is a consumer report. See Hovater, 823 F.2d at 419 ("Section 1681b(3)(E) has not been given an expansive interpretation."). Courts have noted that giving a broad definition to business purpose in § 1681b(3)(E) would render "most of the other provisions of §§ 1681a(d) and [1681]b(3) . . . a nullity." Ippolito, 864 F.2d at 451; accord Hovater, 823 F.2d at 419; Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1149 (3d Cir. 1986). Thus, "the definition of `consumer report' has essentially been limited to information that is `used or expected to be used or collected' in connection with a `business transaction' involving one of the `consumer purposes' set out in the statute, that is, eligibility for personal credit or insurance, employment purposes, and licensing." Ippolito, 864 F.2d at 451. Although not every credit report is a consumer report, because C.S.C. prepared the reports in the instant case with the expectation that they would be used for consumer purposes, the reports were consumer reports

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> a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
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> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

15 U.S.C. § 1681(b).

and were subject to the FCRA. Given that the FCRA did apply to the reports in this case, the proper question in determining whether Clairmont was liable under the Act was whether Clairmont had a legitimate business purpose for obtaining the report.[3] The magistrate judge's inquiry into whether Clairmont obtained the reports for a purely commercial purpose merely begs this question.

B. Dismissal of Michael and Janice Burke

Cavaliere next claims that the district court improperly dismissed Michael and Janice Burke from the lawsuit. In late August of 1991, the district court (prior to referral to the magistrate judge) dismissed Michael and Janice Burke without any explanation. Since the dismissal seems to be in response to a

[3] We have not addressed the full scope of legitimate business purposes in this circuit. Some courts have determined that the legitimate business purposes of section 1681b(3)(E) includes only "the other specifically enumerated transactions in §§ 1681a(d) and [1681]b(3), i.e., credit, insurance eligibility, or licensing." See, e.g., Mone v. Dranow, 945 F.2d 306, 308 (9th Cir. 1991). Other courts, however, have read § 1681b(3)(E) more narrowly for purposes of defining a "consumer report" and more broadly for purposes of determining whether a report was disseminated for a particular purpose, noting that "the mere fact that information is collected for a consumer purpose does not prevent that information from subsequently being furnished to a person who has a legitimate business need for the information." Ippolito, 864 F.2d at 452; see also Houghton, 795 F.2d at 1152-54 (Sloviter, J., concurring) (stating that the section should be read to apply to situations "similar to those set out in subsections (A) through (D) but not limited to them"). Because there is no finding of fact as to Clairmont's business need for the report, we do not reach the question of whether that need was a "legitimate business need" under the FCRA.

12(b)(6) motion, we will review it as a dismissal for failure to state a claim on which relief may be granted.

Under the FCRA, any individual may be held liable for using false pretenses to obtain a credit report. Mone, 945 F.2d at 308 (noting that corporate officer could be personally liable for violations of the FCRA); Ippolito, 864 F.2d at 448 n.8 (stating that "[a] person may violate the FCRA by obtaining a consumer report through the use of false pretenses"); Yohay v. City of Alexandria Employees Credit Union, 827 F.2d 967, 971-72 (4th Cir. 1987) (discussing 15 U.S.C. § 1681n); Heath, 618 F.2d at 697 (intimating that an individual may be held liable for willfully obtaining credit information by false pretenses); Hansen v. Morgan, 582 F.2d 1214, 1219 (9th Cir. 1978) (holding that users of consumer information may be liable for obtaining credit reports under false pretenses).

In the instant case, Cavaliere alleged that Michael and Janice Burke used false pretenses to obtain the consumer reports in violation of the FCRA. As noted above, the reports in question were consumer reports. Additionally, Cavaliere conceivably could have proven facts under which the Burkes could be liable for violations of the Act (i.e., if the Burkes obtained the consumer information under false pretenses). Accordingly, the district court erred in dismissing Cavaliere's claims against the Burkes.

IV. CONCLUSION

For the foregoing reasons, the judgment of the magistrate judge is VACATED, the dismissal of Michael and Janice Burke by the district court is REVERSED; and this matter is REMANDED for further proceedings. Costs shall be borne by Clairmont.