IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50618

United States Court of Appeals
Fifth Circuit
FILED
March 12, 2020
Lyle W. Cayce
Clerk

MARCO SALINAS,

Plaintiff - Appellant

v.

R.A. ROGERS, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before BARKSDALE, HIGGINSON, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

R.A. Rogers, Inc., a debt collection agency, mailed a collections letter to Appellant Marco Salinas listing the total amount due on his account ($4629.96) and the interest and fees due (both $0.00). The letter also included this statement: "In the event there is interest or other charges accruing on your account, the amount due may be greater than the amount shown above after the date of this notice." In response, Salinas sued R.A. Rogers, alleging the letter was false, deceptive, and misleading in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq*., because no interest or other charges could actually accrue on his account. The district court granted summary judgment for R.A. Rogers, holding that the letter

accurately conveyed what was possible under Texas law—that interest could accrue—and was therefore not false, deceptive, or misleading. We affirm the summary judgment, but based on a more fundamental proposition. The challenged statement in the letter is not false, deceptive or misleading because it merely expresses a common-sense truism about borrowing—*if* interest is accruing on a debt, then the amount due may go up. That simple statement would have been clear even to an unsophisticated borrower thousands of years ago, just as it would be today. We therefore conclude that putting the statement in a dunning letter does not violate the FDCPA.

I.

At some unknown point in the past, Marco Salinas obtained a loan for personal, family, or household use from Security Service Federal Credit Union ("SSFCU"). Apparently, the loan agreement between Salinas and SSFCU was silent as to whether interest or other charges could accrue in the event of default. Salinas eventually did default on the loan, which led to R.A. Rogers sending Salinas an initial dunning letter on September 5, 2017. The letter lists the "Principal Balance" and "Total Amount Due" as $4629.96, and states that the "Interest" and "Fee[s]" are each $0.00. A sentence near the bottom of the letter reads: "In the event there is interest or other charges accruing on your account, the amount due may be greater than the amount shown above after the date of this notice."

On July 16, 2018, Salinas filed suit against R.A. Rogers in federal district court, alleging that the language quoted above is false, deceptive, and misleading in violation of the FDCPA, 15 U.S.C. § 1692e, because (1) R.A. Rogers does not collect interest or other charges on debts related to SSFCU and (2) the agreement between Salinas and SSFCU "does not allow" for interest to accrue or other charges to be added. Salinas characterized the language as an attempt to "induce payment . . . by scaring him." Contending

that R.A. Rogers sent "hundreds if not thousands" of similar letters, Salinas sought certification of a class of "[a]ll consumers within the State of Texas that have received collection letters from Defendant concerning debts from Security Service FCU within one year prior to filing of this complaint which falsely represent to the consumer that interest or other charges may accrue." Salinas requested $1000.00 in statutory damages for himself and each class member, plus attorneys' fees and costs.

The parties stipulated that "R.A. Rogers does not collect interest or other charges on debts referred to it for collection by the creditor, Security Service FCU" and also that "[t]he agreement between Security Service FCU and Salinas is silent as to whether interest or other charges can accrue in the event of default." R.A. Rogers moved for summary judgment, arguing that even on the stipulated facts the letter complies with the FDCPA because it "clearly and unambiguously states the amount of the debt." According to R.A. Rogers, the "plain statement" that the total amount due is $4629.96 and interest and fees are $0.00 "is not undercut by the contingent (but obviously inapplicable rather than 'applicable') language of the [challenged] sentence." R.A. Rogers added that "common sense also dictates that Salinas' claims lack merit."

In granting summary judgment, the district court *sua sponte* detoured to the Texas Finance Code, reasoning that the letter was not false, misleading, or deceptive because "Texas law stipulates that a six percent interest rate may be applied to the principal balance of the loan starting thirty days after payment is due when the obligor has not agreed on an interest rate." *Salinas v. R.A. Rogers, Inc.*, No. SA-18-CV-733-XR, 2019 WL 2465325, at *5 (W.D. Tex. June 13, 2019) (citing TEX. FIN. CODE ANN. § 302.002). The court faulted Salinas for "fail[ing] to produce the loan agreement or any statute or regulation that would absolutely prohibit interest or other charges to accrue on the account following default." *Id.* Given the possibility that SSFCU could, under Texas law, elect to

charge interest on the defaulted loan, the district court also held that the letter was "not confusing or unclear on its face" and faulted Salinas further for failing to produce any objective or subjective evidence of confusion. *Id.* Ultimately, the court concluded "[t]here is insufficient evidence in the record to create a triable issue of fact as to whether Defendant's debt collection letter is false, deceptive, or misleading." *Id.* Salinas timely appealed.

II.

We review a summary judgment *de novo*. *Mahmoud v. De Moss Owners Ass'n, Inc.*, 865 F.3d 322, 328 (5th Cir. 2017). "Summary judgment is required 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting FED. R. CIV. P. 56(a)). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "This court may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Mahmoud*, 865 F.3d at 328 (citation omitted).

III.

On appeal, Salinas argues that the district court erred in granting summary judgment because, given the stipulated facts, the conditional language in R.A. Rogers' letter is misleading, deceptive, and "utterly false," and therefore violates the FDCPA. He also contends that the district court misapplied the summary judgment standard by drawing one or more inferences in R.A. Rogers' favor. We consider each argument in turn.

A.

The FDCPA provides: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any

debt." 15 U.S.C. § 1692e.[1] Among its nonexclusive list of proscribed practices, the FDCPA prohibits "[t]he false representation of (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." *Id.* § 1692e(2). It is also a violation of the FDCPA to use "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." *Id.* § 1692(e)(10). Because Congress "intended the FDCPA to have a broad remedial scope," the FDCPA should "be construed broadly and in favor of the consumer." *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016) (internal quotation marks and citations omitted). We evaluate whether a collection letter violates § 1692e by "view[ing] the letter from the perspective of an 'unsophisticated or least sophisticated consumer.'" *Id.* (quoting *McMurray v. ProCollect, Inc.*, 687 F.3d 665, 669 (5th Cir. 2012)). "At the same time we do not consider the debtor as tied to the very last rung on the intelligence or sophistication ladder." *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004) (cleaned up).[2]

Salinas argues that the conditional language in the letter—"In the event there is interest or other charges accruing on your account, the amount due may be greater than the amount shown above after the date of this notice"—is false, deceptive, and misleading because under no set of circumstances would Salinas' debt have increased due to interest or other charges while being collected upon by R.A. Rogers. According to Salinas, the letter clearly implied

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[1] The parties agree that Salinas is a "consumer" and R.A. Rogers is a "debt collector" under the FDCPA. *See* 15 U.S.C. § 1692a(3), (6).

[2] Other circuits are split on whether to treat the application of the unsophisticated consumer standard as a question of law or question of fact. *See Gonzalez v. Kay*, 577 F.3d 600, 610 (5th Cir. 2009) (Jolly, J., dissenting). We have not formally picked sides in that debate, but generally treat the issue as a question of law, *see id.* at 609–10, as we do again here.

the false proposition that in the absence of prompt payment, interest or other charges could accrue on his account.

To the extent Salinas contends the language in the dunning letter is false, his claim is "downright frivolous." *See Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004). The language merely expresses a truism: "*In the event* there is interest or other charges accruing on your account, the amount due may be greater than the amount shown above after the date of this notice" (emphasis added). In American legal usage, "in the event" is the equivalent of "if." *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 465 (2d ed. 1995) (observing that "in the event of" and "in the event that" are "unnecessarily prolix" equivalents of "if"). Thus, the letter's statement is no more false than the statement: "If it is raining outside, the ground may be wet"—a proposition as true in Death Valley as in New Orleans. It matters not whether Salinas' agreement with SSFCU prohibited SSFCU from applying interest or other charges to the debt, because the language at issue does not state that R.A. Rogers or SSFCU would—or even could—collect interest.

A perhaps closer question is whether the language is "deceptive" or "misleading," insofar as Salinas reads it to imply the possibility that interest or other charges may accrue when in fact they cannot. To date, our court has not settled on precise definitions for the FDCPA terms "deceptive" and "misleading." We have previously held that a collection agency's form letter was deceptive and misleading because it appeared on law firm letterhead even though no attorney from the firm ever participated in debt collection efforts. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1237 (5th Cir. 1997); *accord Gonzalez*, 577 F.3d at 606–07 (allowing FDCPA claim to proceed where deceptive law firm letter contained disclaimer on back in "legalese"). We have also stated that "a collection letter that is silent as to litigation, but which offers to 'settle' a time-barred debt without acknowledging that such debt is

judicially unenforceable, can be sufficiently deceptive or misleading to violate the FDCPA." *Daugherty*, 836 F.3d at 511; *but see Mahmoud*, 865 F.3d at 334 (no FDCPA violation where "only a small portion of the debt may have been time-barred"). On the other hand, we have held non-misleading a collection letter stating—"FULL COLLECTION ACTIVITY WILL CONTINUE UNTIL THIS ACCOUNT IS PAID IN FULL . . . TO AVOID FURTHER COLLECTION ACTIVITY, YOUR STUDENT LOAN MUST BE PAID IN FULL"—because the back of the letter informed the debtor she could contest the debt within 30 days of receiving the collection letter. *Peter v. GC Servs. L.P.*, 310 F.3d 344, 349–50 (5th Cir. 2002); *see* 15 U.S.C. § 1692g(b).

While our court has not yet faced conditional language akin to that in the R.A. Rogers letter, we agree with the district court that the language at issue here is not deceptive or misleading. Reading the letter as a whole, even the least sophisticated consumer would not conclude, as Salinas urges, that absent prompt payment interest and other charges will accrue. Salinas reads the letter as if it literally says "interest and other charges may accrue" on his account, but the letter does not say that. Instead, it warns of a possible outcome—an increase in the amount due—"*in the event*" interest or other charges *are* accruing. Logically speaking, the actual text of the letter does not state or imply that interest or other charges will accrue, or even that they may accrue, on Salinas' account.[3]

An illustration shows the problem with Salinas' reading of the letter. Suppose a traveler boards a flight from El Paso, TX, to Tucson, AZ—a route traversing only desert—and is shown a safety video describing steps to take

[3] Moreover, the letter unambiguously states that Salinas owed "$0.00" in "Interest" and "$0.00" in "Fee[s]," further undermining his claim that the letter was misleading or deceptive.

"*in the event of a water landing*." Even the least sophisticated traveler would not take the video to imply the plane would be flying over water. No passenger would leap out of his seat in panic, concluding he had boarded the wrong flight. Even a traveler "tied to the very last rung on the intelligence or sophistication ladder" would interpret the video as merely acknowledging the reality that *some* flights, if not this one, fly over water. Admittedly, there might be confusion in the cabin if the captain announced, "We may be flying over water today," just as there might be confusion if the R.A. Rogers letter announced, "Interest may be accruing on your account." But that is not what the letter said. Instead, the innocuous, boilerplate language merely reiterates what unsophisticated borrowers have collectively experienced for thousands of years: that interest and other charges tend to accrue on *some* debts, and that *if* that occurs, the amount the debtor owes usually goes up.

Indeed, Salinas' argument, if adopted, would lead to absurd results. For example, by Salinas' logic, the letter would be misleading even without the offending sentence since the mere mention of "Interest" and "Fee[s]"—even though currently pegged at "$0.00"—could suggest the possibility that interest or fees may accrue in the future. What is more, the outcome Salinas proposes would force collection agencies to sift through applicable statutes and loan contracts to determine with absolute certainty, for each and every account, whether interest or other charges might possibly accrue, insofar as some debt collectors have been exposed to FDCPA liability for *omitting* statements similar to the one at issue here. *See, e.g.*, *Gill v. Credit Bureau of Carbon Cty.*, No. 14-CV-01888-KMT, 2015 WL 2128465, at *5 (D. Colo. May 5, 2015); *Dragon v. I.C. Sys., Inc.*, 483 F. Supp. 2d 198, 202–03 (D. Conn. 2007); *see also Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000) (prescribing as safe harbor language under FDCPA: "Because of interest, late charges, and other charges that may vary from day

to day, the amount due on the day you pay may be greater"); *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 74, 77 (2d Cir. 2016) (holding that "Section 1692e requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees" and adopting *Miller*'s safe harbor language).

To support his position, Salinas relies on cases from other circuits involving conditional language in collection letters. These cases are not controlling and, more importantly, not on point. Many involve language implying the possibility of some ominous event beyond the familiarity of unsophisticated consumers. *See, e.g.*, *Schultz v. Midland Credit Mgmt.*, 905 F.3d 159, 160 (3d Cir. 2018) (conditional language implying collection agency could report debt forgiveness to IRS); *Lox v. CDA, Ltd.*, 689 F.3d 818, 820 (7th Cir. 2012) (conditional language implying debtor could be charged attorneys' fees); *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1059–60 (9th Cir. 2011) (conditional language implying settlement of old debts could be reported to credit bureaus); *Ruth v. Triumph P'ships*, 577 F.3d 790, 793 (7th Cir. 2009) (conditional language implying debtor's information could be shared without consent). In contrast, the conditional language at issue here involves a basic concept familiar to even the least sophisticated debtor: that interest and other charges, in the event they are accruing, may lead to an increase in the amount due.

To be sure, some of the cases cited by Salinas do involve statements about interest or other charges. These cases are nevertheless distinguishable because the structure of the offending statements differs from the one at issue here. For example, in *Walker v. Shermeta, Adams, Von Allmen, PC*, 623 F. App'x 764 (6th Cir. 2015), the collections letter stated: "Because of interest and other charges that may accrue, the amount you owe may continue to increase daily." *Id.* at 765. The Sixth Circuit held that, "if Plaintiff can show that

interest or charges could never accrue and therefore the balance owed is truly fixed," then it was at least possible the statement was "materially misleading."[4] *Id.* at 768. But even if the Sixth Circuit had held the statement misleading—which it did not—the differences in grammar would thwart direct comparison. The complex causal sentence in *Walker* included a relative clause ("Because of interest and other charges *that may accrue*") implying that interest may accrue on the debtor's account. In contrast, the sentence at issue in the present case is best described as a "zero" conditional: it expresses a general truth without implying anything about the debtor's actual account. The same distinction applies to the dunning letter in *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362 (7th Cir. 2018), which stated: "Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater." *Id.* at 365. Unlike the letters in *Walker* and *Boucher*, the letter Salinas received does not "imply" that interest or other charges will accrue on his account; it merely communicates that Salinas' balance "may" increase "*in the event*" such charges *are* accruing.

In sum, we hold that the language at issue in this case expresses a common-sense truism about borrowing and lending, and does not imply that interest or other charges may actually accrue on the debtor's account. We therefore conclude that R.A. Rogers' dunning letter is not false, misleading, or deceptive in violation of the FDCPA.

B.

Salinas also argues that the district court applied the wrong summary judgment standard because the court drew an inference in R.A. Rogers' favor—

[4] Importantly, the Sixth Circuit did not hold the statement at issue in that case misleading or deceptive. Indeed, it recognized that the letter "tracks the FDCPA requirements for debt collection letters." *Id.* at 768.

the court inferred that R.A. Rogers *would* collect interest based on the fact that (under Texas law) the agency *could* collect interest—and, further, improperly required evidence of "subjective confusion" on the part of Salinas. Because our holding today does not depend on either point, we need not address these arguments.

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The judgment of the district court is AFFIRMED.