

Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JODY FIRNENO and CHRISTOPHER FRANKE, Plaintiffs, v. RADNER LAW GROUP, PLLC, et al., Defendants.

Case No. 2:13-cv-10135

September 28, 2016, Filed September 28, 2016, Decided

For Jody Firreno, Christopher Franke, Plaintiffs: John W Barrett, Bailey & Glasser, Charleston, WV; Julie A. Petrik, Lyngklip Assoc Consumer Law Center, Southfield, MI; Priya Bali, Lyngklip & Associates Consumer Law Center, Southfield, MI; Ian B. Lyngklip, Lyngklip Assoc Consumer Law Center, PLC, Southfield, MI.

For Radner Law Group, PLLC, 800 Zero Debt, LLC, Charity A. Olson, Olson Law Group, Ann Arbor, MI; Sheldon S. Toll, Sheldon S. Toll Assoc., Southfield, MI.

For Lasercom, L.L.C., Defendant: George A. Netschke , IV, Joseph E. Viviano, Viviano, Pagano & Howlett PLLC, Mount Clemens, MI; Joseph C. Pagano, Viviano & Viviano, PLLC, Mount Clemens, MI.

For Solomon Radner, Interested Party: Sheldon S. Toll, Sheldon S. Toll Assoc., Southfield, MI.

HONORABLE STEPHEN J. MURPHY, III, United States District Judge.

STEPHEN J. MURPHY, III

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE FIRST AMENDED COMPLAINT OR TO DISMISS (document no. 112) AND GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE EXCESS PAGES (document no. 122)

Plaintiffs Jody Firreno and Christopher Franke filed an action against Radner Law Group, PLLC ("Radner Law"), LaserCom, LLC ("LaserCom"), and 800 Zero Debt, LLC ("Zero Debt") on January 14, 2013. Plaintiffs allege that the Defendants operated a joint venture to market and sell debt consolidation services, illegally obtained private financial data, used it to identify financially distressed consumers, and solicited the plaintiffs via targeted mailers in violation of the Fair Credit Reporting Act ("FCRA"), [15 U.S.C. §§ 1681-1681x](#) . Before the Court are Defendants' Motion to Strike the First Amended Complaint or to Dismiss the Complaint, and Plaintiffs' Motion for Leave to File Excess Pages. ECF Nos. 112, 122.

BACKGROUND

On July 11, 2014, Plaintiffs moved for leave to file an amended complaint to cure any deficiencies in the pleadings,

and to add class allegations, additional parties, and facts obtained through discovery. Mot. Leave 4, ECF No. 64. They attached a proposed amended complaint to their motion ("Proposed Amended Complaint"). See ECF No. 64-2. On March 31, 2015, the Court granted the motion. Order, ECF No. 94. Radner Law and Zero Debt responded by filing Offers of Judgment pursuant to [Civil Rule 68](#), and motions to dismiss and for a protective order. ECF Nos. 96-101. On April 14, 2015, the Court held a scheduling conference and discussed with the parties the outstanding motions and offers of judgment, along with the Plaintiffs' filing of the proposed amended complaint if the case survived. 4/14/15 Tr. 6-18, ECF No. 123. The Court denied Defendants' motions on May 29, 2015, and Plaintiffs filed an amended complaint ("Amended Complaint") three days later, Am. Compl., ECF No. 108. Defendants Radner Law, Zero Debt, Solomon Radner ("Radner") and Katherine Small ("Small") now move to strike the Amended Complaint, or, in the alternative, to dismiss it for failure to state a claim.¹ After the motions had been [*2] fully briefed, the Court ordered supplemental briefing and held a hearing on August 23, 2016.

STANDARD OF REVIEW

[Civil Rule 12\(b\)\(6\)](#) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). The Court may only grant a Civil Rule 12(b)(6) motion to dismiss if the allegations are not "sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.'" *Hensley Mfg. v. ProPride, Inc.*, [579 F.3d 603](#), [609](#) (6th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, [550 U.S. 544](#), [555](#), [570](#), [127 S. Ct. 1955](#), [167 L. Ed. 2d 929](#) (2007)). In evaluating a motion, the Court presumes the truth of all well-pled factual assertions. *Bishop v. Lucent Techs.*, [520 F.3d 516](#), [519](#) (6th Cir. 2008). Moreover, the Court must draw every reasonable inference in favor of the non-moving party. *Dubay v. Wells*, [506 F.3d 422](#), [427](#) (6th Cir. 2007). But a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the element of a cause of action will not do.'" *Ashcroft v. Iqbal*, [556 U.S. 662](#), [678](#), [129 S. Ct. 1937](#), [173 L. Ed. 2d 868](#) (2009) (quoting *Twombly*, [550 U.S. at 555](#)).

DISCUSSION

I. Motion to Strike

Defendants move to strike the Amended Complaint because it includes the following additions which were not included in the Proposed Amended Complaint: (1) Small as a defendant; (2) six new classes to the class action; (3) two new counts; and (4) new allegations. Mot. Strike 2, ECF No. 112.

The issue was first raised at the scheduling conference on April 14, 2015. Plaintiffs stated that the Amended Complaint would be different than the Proposed Amended Complaint, and that they had provided Defendants with revisions for Defendants' review, input, and/or objections before filing the Amended Complaint. 4/14/15 Tr. 12-15, ECF No. 123. The Court stated that after Defendants' counsel gave Plaintiffs' counsel their position on the Amended Complaint, Plaintiffs' counsel "can either agree with you or not agree with you, but he's going to . . . file the [A]mended Complaint." *Id.* at 13. The exchange is included below in pertinent part:

MR. LYNGKLIP: Additionally, we -- we sent over to Mr. -- Mr. Toll and Mr. Pagano some revisions to the Complaint

MR. LYNGKLIP: So we have been waiting for Mr. Toll's, you know, agreement that that -- that Complaint could be filed in lieu of the one that we had attached to our original motion back in July of last year.

THE COURT: All right.

MR. LYNGKLIP: So the court can probably dispense with that today if you -- if you are amenable to doing that, but --

THE COURT: All right. I'm amenable, but let me make sure -- let me hear from Mr. Toll and Mr. Pagano. The filing -- okay. Mr. Lyngklip has a proposed amended Complaint in mind. He sent copies of it over for

you -- for you to look at. You have an ability to at least input or object to or sculpt some of the allegations, which frankly I -- I like that. That's an informal process and I -- I -- I like it. After you give Mr. Lyngklip your position on the amended Complaint, he can either agree with you or not agree with you, but he's going to -- he's going to file the amended Complaint and that will take care of the -- of the motions to dismiss such that they'll be moot. And then - and then we'll go forward with an amended Complaint on a class action[.]

4/14/15 Tr. 12:21-14:01. After counsel for Radner Group addressed the Court, the Court stated as follows:[*3]

THE COURT: All right. Well, look I think unfortunately what we're going to have to do is ask you to respond to the outstanding motions to dismiss, Mr. Lyngklip. Mr. -- Mr. Toll will have an opportunity to reply. I'll look at those and determine whether or not a hearing is necessary. My sense is that it won't be. We'll decide those motions and then you quickly thereafter file a amended Complaint.

Id at 17:09-15. Plaintiffs claim that the Amended Complaint "primarily differs from the proposed amended complaint in that the filed amended complaint contains added allegations and defendants that Ms. Firreno and Mr. Franke discovered during the eight-month interval between the filing of the motion to amend the complaint and this Court's grant of that motion." Resp. 6, ECF No. 121.

The Court finds that given the discovery that took place and the Plaintiffs' attempts to inform Defendants of the proposed revisions and receive Defendants' input, it would be unjust to strike the Amended Complaint for failing to match the Proposed Amended Complaint. Accordingly, the plaintiffs' filing of the Amended Complaint will be permitted.

II. Motion to Dismiss

Alternatively, Defendants argue that the Amended Complaint should be dismissed for failure to state a claim because (1) Plaintiffs fail to allege damages; (2) Plaintiffs do not have a right to injunctive relief; (3) there are insufficient facts to establish a claim against newly added Defendants Small and Radner; and (4) the claims against Small and Radner are barred by the statute of limitations. Mot. Strike 4-8, ECF No. 112.

A. Allegation of Damages

In their Amended Complaint, Plaintiffs allege that "[a]s a direct and proximate cause of Defendants' actions," they have suffered "actual damages," including "an unwarranted invasion of their privacy and violation of their rights under the FCRA," and "emotional distress and other actual damages." Am. Compl. ¶¶ 100, 101, 122, 129, ECF No. 108. Defendants argue that these are "not [] even the slenderest of allegations to support the conclusion that they suffered damages," and as a result, the Amended Complaint should be dismissed. Mot. Strike 4-5, ECF No. 112.

1. Standing

On August 2, 2016 the Court ordered the parties to submit briefing on the effect, if any, of the Supreme Court's recent decision in *Spokeo Inc. v. Robins*, [136 S. Ct. 1540](#), [194 L. Ed. 2d 635](#) (2016), a case that addressed a standing issue relevant to the instant matter — namely, whether Plaintiffs have clearly alleged facts to show that they have suffered a concrete "injury in fact." Order, ECF No. 147.

In their response to Defendants' motion to dismiss, Plaintiffs rely on the Sixth Circuit's decision in *Beaudry v. TeleCheck Servs., Inc.*, [579 F.3d 702](#) (6th Cir. 2009), to assert that they "need not claim any actual damages to pursue their claims for statutory and punitive damages under the FCRA." Resp. 9, ECF No. 121. In *Beaudry*, the Sixth Circuit reasoned that "Congress has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right," and thus held that the Fair Credit Reporting Act (FCRA) "permits a recovery when there are no identifiable [*4] or measurable actual damages." [579 F.3d at 705-06](#). But in *Spokeo*, the Supreme Court clarified that while

Congress may elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law . . . Congress' role in identifying and elevating intangible harms does not

mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Spokeo, [136 S. Ct. at 1549](#) (citations and internal quotation marks omitted). The fact that "[a] violation of one of the FCRA's procedural requirements may result in no harm," [id. at 1550](#), therefore means courts must determine whether plaintiffs suffered actual harm apart from the alleged statutory violation, or "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*

Plaintiffs claim that they suffered a concrete injury: an invasion of privacy when the Defendants "*actually obtained* private financial information including credit and FICO scores, the amount of debt, and addresses and the last four digits of the social security numbers of thousands of consumers." Plaintiffs' Br. 9, ECF No. 150 (emphasis in original); *see* Resp. 8-9, ECF No. 121. Defendants argue that Plaintiffs have not suffered a concrete harm, and if they have, the harm is not "fairly traceable to the challenged conduct of the defendant" since it was the Credit Reporting Agency or list provider that sold the marketing lists, making Defendants "nothing more than a messenger or conduit that made Plaintiffs aware of a possible claim." Radner Br. 8, ECF No. 149.

Numerous district courts have applied *Spokeo* and reached different conclusions after analysis of whether an alleged invasion of privacy allegation satisfies the injury-in-fact requirement. Here, the Court must determine whether Defendants' viewing and retention of Plaintiffs' private financial information is a violation of privacy that satisfies the concreteness element for Article III standing. On one hand, there is no allegation that the private information was published or made available to the public, or that the mailing led to a loss of job prospects, loss of credit, or increased risk of identity theft. *Id.* at 5. On the other, Plaintiffs persuasively argue that "the invasion of privacy caused by the unauthorized viewing and retention of their personal credit and other information" — including the last four digits of their social security number, their address, and the exact amount of debt owed to creditors — is a *de facto* injury that satisfies the injury-in-fact requirement. Plaintiffs' Brief 2-3, ECF No. 150.

The Court finds the analysis set forth in *Burke v. Fed. Nat'l Mortgage Ass'n* to **[*5]** be particularly persuasive. No. 3:16CV153-HEH, [\[2016 BL 256890\]](#), 2016 U.S. Dist. LEXIS 105103, [\[2016 BL 256890\]](#), 2016 WL 4249496 (E.D. Va. Aug. 9, 2016). In *Burke*, as here, a plaintiff alleged that her privacy was invaded when the defendant obtained her credit report without a permissible purpose in violation of [15 U.S.C. § 1681b\(f\)](#). *Id.* Judge Hudson reasoned that

[t]he FCRA was meant to protect the interest of privacy. The portion of the FCRA at issue here is clear that one's consumer report is not to be obtained except for the limited purposes specifically provided by the statute. The language and context of this provision seem to establish a statutory right to privacy based in one's consumer report. As *Spokeo* counsels, this Court must defer to history and the judgment of Congress in deciding whether the alleged harm constitutes an injury-in-fact. In some sense, the right at issue can appear procedural, as it is a mechanism intended to prevent further harms. Yet, given the purposes, framework, and structure of the FCRA, the right to privacy established by the statute appears to be more substantive than procedural . . . Plaintiff's alleged violation of privacy is a concrete harm, even if that harm does not lead to other, more tangible harms. Therefore, by claiming that the Defendant obtained her consumer report without a lawful purpose under the FCRA, *Burke* has pleaded a concrete harm.

[\[2016 BL 256890\]](#), 2016 U.S. Dist. LEXIS 105103, [WL] at *4. Like the plaintiff in *Burke*, Plaintiffs claim that Defendants unlawfully obtained their credit and FICO scores. Firreno claims that Defendants also obtained her address, the last four digits of her social security number, and her debt load. Franke claims that Defendants also obtained his "address, mortgage/debt amount, . . . and phone number." Am. Compl. ¶¶ 40, 42, ECF No. 108. Like the court in *Burke*, the Court finds that the Plaintiffs' right to privacy is "more substantive than procedural" such that the alleged violation of it is a concrete harm.

2. Damages in Plaintiffs' Amended Complaint

Defendants argue in the alternative that Plaintiffs' allegations of damages are insufficient to survive dismissal under Civil Rule 12(b)(6). In *Freedom v. CitiFinancial, LLC*, No. [15 C 10135](#), 2016 U.S. Dist. LEXIS 97533, [[2016 BL 239808](#)], 2016 WL 4060510 (N.D. Ill. July 25, 2016) — an opinion issued after *Spokeo* — the court addressed a similar issue and found that the plaintiffs' invasion of privacy allegations were sufficient to survive Rule 12(b)(6) dismissal of the claims of willful and negligent violations of the FCRA under [§§ 1681n](#) and 1681o, respectively. Specifically, the court reasoned that the claim of willful violation did not need to allege any damages, and the claim for negligent violation contained a sufficient damages allegation; namely, an "invasion of privacy, . . . loss of credit itself, the loss of time, loss of sleep, harm to his credit rating, and other emotional and mental anguish." 2016 U.S. Dist. LEXIS 97533, [WL] at *9.

Similarly here, Plaintiffs can recover actual, statutory, or punitive damages for willful FCRA violations under § 1681n(a), and the Court will deny Defendants' motion to dismiss those claims. But "[u]nlike the provision for willful noncompliance, a plaintiff alleging negligent noncompliance cannot rely on statutory damages as an alternative to actual damages," [*6] and therefore must sufficiently allege and eventually prove actual damages. *Elsady v. Rapid Glob. Bus. Sols., Inc.*, No. 09-11659, 2010 U.S. Dist. LEXIS 17266, [[2010 BL 410783](#)], 2010 WL 742852, at *5 (E.D. Mich. Feb. 26, 2010).

The Amended Complaint fails in that respect. Although their invasion of privacy allegation is sufficient to establish standing, Plaintiffs did not raise the possibility of relief above the speculative level by pairing it with specific facts to sufficiently put Defendants on notice of actual damages for the claims of negligent violation. See *Johnson v. CGR Servs., Inc.*, No. 04 C 2587, 2005 U.S. Dist. LEXIS 7889, [[2005 BL 7215](#)], 2005 WL 991770, at *2 (N.D. Ill. Apr. 7, 2005) ("The FCRA does not explicitly limit the 'actual damages' recoverable . . . and Plaintiff does not need to plead her damages with heightened particularity. However, the Complaint needs at least to give the other party some notice as to what her actual damages could possibly be."). Unlike the plaintiffs in *Freedom*, Plaintiffs did not include alongside their invasion of privacy allegation any claimed loss of credit, loss of job prospects, or increased risk of identity theft or harm to their credit rating. And although "actual damages" can include non-economic damages "to a plaintiff's name, anguish, and humiliation," Plaintiffs' complaint contains no factual allegations to support the assertion that they suffered emotional distress and other actual damages. See *Novak v. Experian Info. Sols., Inc.*, [782 F. Supp. 2d 617](#), [623](#) (N.D. Ill. 2011) (collecting cases) (dismissing plaintiff's claims of negligent violation for failing to allege facts to plausibly suggest that the plaintiff is entitled to damages, such as the denial or loss of credit, or being subject to a higher interest rate as a result of defendant's violation). Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' claims to the extent they allege negligent violations of the FCRA.

B. Plaintiffs' Right to Injunctive Relief

Next, Defendants argue that Plaintiffs are not entitled to injunctive relief under the FCRA. Mot. Strike 5-6, ECF No. 112. Plaintiffs claim that they may obtain injunctive relief because all federal remedial statutes presumptively provide for it, and since the FCRA is silent as to its availability, it is presumed to include it. Resp. 10, 14, ECF No. 121. While the parties correctly point out that the Sixth Circuit has yet to decide this issue, some district courts have looked to the text of the FCRA to dismiss claims for injunctive relief at the pleading stage. See *Holmes v. Telecheck Int'l, Inc.*, [556 F. Supp. 2d 819](#), [848](#) (M.D. Tenn. 2008) ("[I]njunctive relief is not available to private litigants under the FCRA."); *Presley v. Equifax Credit Informational Servs., Inc.*, No. CIV.A. 05-114-WOB, 2006 U.S. Dist. LEXIS 65832, [[2006 BL 90065](#)], 2006 WL 2457978, at *2 (E.D. Ky. Aug. 21, 2006) (granting motion to dismiss request for injunctive relief on FCRA claim).

Nevertheless, the Court finds that it is unnecessary to address at the present stage the availability of injunctive relief should Plaintiffs prevail on the merits of their claims. Because Plaintiffs may still be entitled to actual or statutory damages, the lack of injunctive relief is an insufficient basis on which to dismiss the entire complaint. Instead, "[r]esolution of this issue should await further [*7] procedural development of the case." *Soumano v. Equifax Credit Info Servs., Inc.*, No. 1:16-cv-313, 2016 U.S. Dist. LEXIS 96919, [[2016 BL 238548](#)], 2016 WL 4007094, at *3 (S.D. Ohio July 25, 2016).

C. Claims Against Small and Radner

In the Amended Complaint, Plaintiffs added claims against attorney Solomon Radner, who as principal of Radner Law during the relevant times directed and controlled its operations, and Katherine Small, an officer, owner, and/or manager of Zero Debt who likewise directed and controlled Zero Debt's operations. Am. Compl. ¶¶ 3, 17-18, ECF No. 108. Specifically, Plaintiffs claim that Radner and Small each authorized their company's respective debt consolidation marketing efforts in violation of the FCRA, which included the purchase of consumer reports from consumer reporting agencies. *Id.* ¶¶ 26-27. But the Amended Complaint states that Radner and Small "acting in concert with the Joint Venture [were] ultimate beneficiaries of those marketing efforts which relied on the purchase of consumer reports from consumer reporting agencies," and either "authorized the marketing of his professional services" (Radner), or "authorized the marketing efforts" (Small). *Id.* Defendants argue that these are "formulaic recitations" that do not satisfy the pleading standard, particularly because the amended complaint contains no allegations that Small or Radner personally ordered, read, or used any consumer reports on Plaintiffs. Reply 6, ECF No. 128.

In *Hahn v. Star Bank*, the Sixth Circuit held that an employee of a corporation has no personal liability for the torts of the corporation unless the individual personally participated in the challenged actions, and dismissed claims under the FCRA against individual defendants — including the CEO of the defendant bank — because the plaintiff failed to allege such personal participation. [190 F.3d 708](#), [714](#) (6th Cir.1999). Here, Plaintiffs fail to sufficiently allege that Small and Radner personally participated with the Joint Venture in the challenged actions. Accordingly, the claims against Small and Radner are dismissed.

CONCLUSION

For the reasons stated above, the Court will grant Defendants' motion to dismiss Plaintiffs' claims against Small and Radner, and the remaining allegations of negligent violation of the FCRA, and deny the motion in all other respects.

ORDER

WHEREFORE it is hereby **ORDERED** that Defendants' Motion to Strike, or, in the Alternative, to Dismiss the First Amended Complaint for Failure to State a Claim (document no. 112) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Excess Pages (document no. 122) is **GRANTED**.

SO ORDERED.

/s/ Stephen J. Murphy, III

STEPHEN J. MURPHY, III

United States District Judge

Dated: September 28, 2016

fn 1

While the instant motions remained pending, the parties have engaged in Courtordered discovery pursuant to the Special Master's report adopted by the Court on March 24, 2016. On April 20, 2016, the Court extended the Defendants' deadline to comply with that order to April 29, 2016. *See* Order, ECF No. 144.

General Information

Judge(s)	STEPHEN JOSEPH MURPHY, III
Related Docket(s)	2:13-cv-10135 (E.D. Mich.);
Topic(s)	Civil Procedure; Corporate Law; Consumer Law
Industries	Financial Services
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Parties	JODY FIRNENO and CHRISTOPHER FRANKE, Plaintiffs, v. RADNER LAW GROUP, PLLC, et al., Defendants.