NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2583-22

WARREN B. DUNCAN,

Plaintiff-Appellant,

v.

SACOR FINANCIAL, INC.,
and COLE SCHOTZ, PC,

Defendants-Respondents.

———————————————————

Argued May 14, 2024 – Decided June 3, 2024

Before Judges Mayer, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0134-22.

Philip D. Stern argued the cause for appellant (Kim Law Firm, LLC, attorneys; Philip D. Stern, on the briefs).

Arnold Paul Picinich, III, argued the cause for respondents (Cole Schotz, PC, attorneys; Anthony Paul Picinich, III, and Jeffrey M. Sauer, of counsel and on the brief).

PER CURIAM

Plaintiff Warren B. Duncan appeals from a March 17, 2023 order dismissing his complaint, with prejudice, for failure to state a claim upon which relief could be granted. We affirm.

We glean the facts from Duncan's complaint. He alleged he "once had a Circuit City Visa credit card account . . . issued by Chase Bank USA." In 2011, defendant Sacor Financial, Inc. (Sacor) became the owner of the account. Duncan described Sacor as a "debt buyer." He alleged Sacor "purchased a large number of charged-off consumer credit card accounts . . . and hired debt collectors including collection attorneys to collect from the accountholders."

Duncan alleged that in 2012, Sacor filed a collection action against him seeking payment of the outstanding amount. He asserted the parties settled that matter. Nonetheless, in 2016, "an order was entered granting Sacor's unopposed motion enforcing the settlement and entering judgment against [Duncan] for $13,165.71."

In addition, Duncan alleged that in April 2021, defendant Cole Schotz, P.C. (Cole Schotz) "filed a notice of appearance in the [c]ollection [a]ction as attorney for Sacor and mailed a letter" to Duncan. Duncan averred the April 2021 letter was Cole Schotz's "initial communication with [Duncan] in connection with the collection of the [d]ebt." The April 2021 letter stated,

"THIS IS A FORMAL DEMAND FOR PAYMENT BY A LAW FIRM INVOLVED IN DEBT COLLECTION. GOVERN YOURSELF ACCORDINGLY." Further, the April 2021 letter stated, "the balance due and owing to Sacor on March 16, 2021 is $13,890.18"; and "[u]nless you notify this office in writing within [thirty] days after receiving this notice that you dispute the validity of the debt or a portion thereof, this office will assume this debt is valid." Cole Schotz "did not mail any written communication to [Duncan] within five days after mailing the [l]etter."

Duncan alleged defendants' activities were subject to the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to -1692p. He alleged the outstanding amount was a "debt" under 15 U.S.C. § 1692a, because "it ar[o]se[] from transactions whose purpose [wa]s primar[il]y personal in nature." Duncan alleged Sacor was a debt collector within the meaning of 15 U.S.C. § 1692a, "because its principal purpose [wa]s to collect debts"; and Cole Schotz was a debt collector under the same section because "it regularly collect[ed] or attempt[ed] to collect debts." Moreover, Duncan alleged the April 2021 letter was a communication within the meaning of 15 U.S.C. § 1692a "because it convey[ed] information regarding a debt."

Duncan alleged defendants violated the FDCPA. First, he alleged Cole Schotz violated 15 U.S.C. § 1692g(a)(1), because "as a debt collector," Cole Schotz was "legally obligated to send [Duncan] a written notice contained in its initial communication or mailed within five days after its initial communication," and the "notice must [have] include[d] . . . 'the amount of the debt.'" Since the April 2021 letter "stated an amount of the [d]ebt as of March 15, 2021—[twenty-nine] days before the date of the [l]etter—and did not provide [Duncan] with the amount of the debt as of the date of the letter with per diem interest or the amount due at [a] future date," the letter "failed to provide [Duncan] with the notice required under 15 U.S.C. § 1692g(a)(1)" and "falsely represented the amount of the debt in violation of 15 U.S.C. § 1692e(2)(A)."

Second, Duncan alleged 15 U.S.C. § 1692g(a) required Cole Schotz to "send a written notice to [Duncan] either contained in its initial communication or mailed within five days after its initial written communication" which must have included "a statement that unless the consumer, within thirty days after receipt of the notice, dispute[d] the validity of the debt, or any portion thereof, the debt w[ould] be assumed to be valid by the debt collector."

Duncan alleged the April 2021 letter's requirement that his dispute of the debt "must be in writing" violated 15 U.S.C. § 1692g(a)(3) because there was no requirement that the dispute be in writing. Therefore, Duncan alleged Cole Schotz violated 15 U.S.C. § 1692g(a)(3) by not providing him with the correct notice required thereunder.

Third, Duncan alleged 15 U.S.C. § 1692k(a) provided that since "Sacor and Cole Schotz . . . [we]re each . . . debt collector[s] and the [April 2021 l]etter was sent by Cole Schotz on behalf of Sacor, they [we]re jointly and severally liable."

In lieu of an answer, defendants filed a motion to dismiss, arguing Duncan failed to state a claim upon which relief could be granted. In granting defendants' motion, the judge in part found the matter must be considered in light of the "extensive factual and procedural background and history of the prior litigation in the case."

On appeal, Duncan repeats the same arguments regarding the application of the FDCPA and defendants' violation of same. Further, he contends the judge erred by: (1) "failing to apply the least sophisticated consumer standard and limiting [his] focus to whether Duncan was misled"; and (2) "resist[ing] treating the judgment as a consumer debt."

We begin our discussion with a review of the principles governing our analysis. "Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). Thus, "we owe no deference to the trial judge's conclusions." State ex rel. Comm'r of Transp. v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015) (citing Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2014)).

In undertaking our review,

> it is essential to canvass the complaint to determine whether "a cause of action can be found within its four corners." Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 180 (App. Div.1994). In so doing, we must accept the facts asserted in the complaint as true. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995). A reviewing court must "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Accordingly, all reasonable inferences are given to plaintiff. Ibid.; Van Natta Mech. Corp., 277 N.J. Super. at 181. Courts should grant these motions with caution and in "the rarest instances." Printing

> Mart-Morristown, 116 N.J. at 772; Van Natta Mech. Corp., 277 N.J. Super. at 181.
>
> [Ballinger v. Del. River Port Auth., 311 N.J. Super. 317, 321-22 (App. Div. 1998) (alteration in original).]

"At this preliminary stage of the litigation[,] the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart-Morristown, 116 N.J. at 746 (citing Somers Constr. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961)). "The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid. "If a complaint must be dismissed after it has been accorded [the required] meticulous and indulgent examination . . . then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint." Id. at 772. In other words, only if an insufficient pleading could not be corrected by amendment, should it be dismissed with prejudice at this stage.

For purposes of this appeal only, we accept Duncan's allegations: (1) the judgment amount derived from the personal credit card was a "debt" under 15 U.S.C. § 1692a(5); (2) Cole Schotz and Sacor were debt collectors under 15

U.S.C. § 1692a(6); and (3) Sacor could be vicariously liable for Cole Schotz's actions.

Duncan's cause of action hinges on whether the April 2021 letter was an "initial communication." He argues the April 2021 letter served as the "initial communication" he received in defendants' collection of the debt. We disagree.

15 U.S.C. § 1692a(2) defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Moreover, the FDCPA, in part, provides:

> (a) Notice of debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty 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 debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt

> collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector[] . . . .
>
> [15 U.S.C. § 1692g (emphasis added).]

Duncan argues the April 2021 letter was the "initial communication" and it, or a subsequent "written notice" sent within five days of the letter, had to comply with 15 U.S.C. § 1692a(2). He further argues there was no subsequent "written notice" and the content of the April 2021 letter failed to satisfy 15 U.S.C. § 1692a(2). Consequently, Duncan argues Cole Schotz—and vicariously Sacor—violated the FDCPA. We are not persuaded.

First, the April 2021 letter was not the "initial communication." "Initial" is defined as "[t]hat which begins or stands at the beginning." Black's Law Dictionary 783 (6th ed. 1990). Duncan acknowledges "Congress required all debt collectors to provide a certain baseline of information to each consumer at the beginning of the collection process." Moreover, "communication" "is the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

In his complaint, Duncan alleged: (1) "[o]n April 2, 2012, Sacor commenced an action ('[c]ollection [a]ction') against" him; (2) he and Sacor

"settled the [c]ollection [a]ction"; and (3) he did not oppose Sacor's motion "enforcing the settlement and entering judgment against" him. Even setting aside Sacor's complaint as not being an "initial communication," and giving Duncan all reasonable inferences, it defies common sense, especially considering the expansive definition of "communication," to conclude Duncan "settled the [c]ollection [a]ction" and left "unopposed Sacor's motion enforcing the settlement and entering judgment" having never received an "initial communication."[1]

Further, under the Federal Rules of Civil Procedure, a motion is not a pleading and could be considered an "initial communication."[2] Therefore, because Duncan already received an "initial communication," the April 2021 letter could not have been an "initial communication" under the FDCPA. Thus,

---

[1] We do not consider Sacor's complaint a "first communication." "A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." 15 U.S.C. § 1692g.

[2] "Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer." Fed. R. Civ. P. 7.

the April 2021 letter did not have to comply with the requirements of 15 U.S.C. § 1692a(2).

Lastly, under these facts, we reject any suggestion that a second "initial communication" was required. Indeed, the notion of a second "initial communication" does not withstand logical scrutiny. "Legislation must be construed so as to avoid absurd results." In re Expungement Application of P.A.F., 176 N.J. 218, 222 (2003) (citing State v. Haliski, 140 N.J. 1, 9 (1995); Robson v. Rodriquez, 26 N.J. 517, 528 (1958)). Satisfied Duncan received an "initial communication" before the April 2021 letter, and that a second "initial communication" was not required, we conclude the April 2021 letter did not have to comply with 15 U.S.C. § 1692g(a).

Moreover, while Rule 4:6-2(e) motions are ordinarily granted without prejudice, this matter presents one of those rare instances where a dismissal with prejudice was appropriate. Duncan cannot save his cause of action through amendment because he cannot avoid the fact that the April 2021 letter was not an "initial communication."[3]

[3] In accord with Rule 4:6-2, we have constrained our review to the carefully constructed complaint. We do not consider "matters outside the pleading," and therefore, do not implicate the summary judgment standard.

To the extent we have not specifically addressed any of Duncan's remaining contentions, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.