UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

VENITRA DUKES,

Plaintiff,

v. Case No: 6:21-cv-1342-GAP-DAB

LVNV FUNDING, LLC,

Defendant

ORDER

This cause came on for consideration without oral argument on the parties' cross motions for summary judgment. (Docs. 23, 24) In resolving these motions, the Court has considered the parties' responses in opposition (Docs. 29, 30) and replies (Docs. 31, 32[1]).

I. Background

Venitra Dukes, aka Venitra Gainey (**"Plaintiff"**), is a natural person residing in Daytona Beach, Florida. Doc. 1, ¶ 4. LVNV Funding, LLC (**"Defendant"**) is a foreign limited liability company purportedly conducting business in the state of

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[1] Though listed within the CM/ECF Docket as a "RESPONSE," Plaintiff's papers make clear she submitted a Reply to Defendant's Response. *See* Doc. 32.

Florida. *See id.*, ¶ 5. *But see* Doc. 9, ¶ 5. Defendant maintains that it does not engage in collection acts and has no employees of its own. Doc. 30-1 at 1; Doc. 23 at 2; *see also* Doc. 23-6, at 45:16-25, 46:1-21. Instead, Defendant engages a "master servicer," non-party Resurgent Capital Services, L.P. (**"RCS"**), to manage its accounts. *See id*. On August 17, 2021, Plaintiff brought suit under the Fair Debt Collection Practices Act (**"FDCPA"**) alleging Defendant violated 15 U.S.C. § 1692e. Doc. 1, ¶22. Plaintiff seeks actual and statutory damages in addition to statutory costs and attorneys' fees. *Id.* at 6.

In 2018[2], Plaintiff opened a Credit One Bank credit card account that became delinquent; the $744 outstanding debt was ultimately acquired by Defendant. Doc. 24 at 2; Doc. 23 at 2; *see also* Doc. 23-3 at 70:18-25. Defendant sought to recover the balance through its master servicer, RCS. Doc. 23 at 2. Plaintiff and her husband subsequently began working with a credit repair organization "to try to straighten out [their] credit." Doc. 23-2 at 18:19-22, 20:1-9. Plaintiff testified that her primary goal was to obtain a mortgage, which was being frustrated by issues with her credit report. *Id.* at 53:18-57:15, 77:16-25, 78:1-6. In exchange for a fee of approximately $80 per month, this organization, or organizations, purported to provide information to

[2] Plaintiff could not recall the date she opened the account. *See above citation*. According to the letter sent to Defendant on May 28, 2021, the account was opened in May 2018. Doc. 24-5 at 1 ("…Date of Opening: May 2018…").

consumers on how to repair their credit and assisted consumers in sending letters to creditors and credit reporting bureaus. *Id.* at 20:10-25, 21:1-14, 25:14-28:7. One such letter—addressed to Transunion (a credit reporting agency) and dated March 5, 2019—detailed Plaintiff's disputes of "inaccuracies" in her credit report, noting next to a line for "LVNV FUNDING LLC" that "[t]his collection is not my account." Doc. 23-3 at 4. This letter was purportedly from, and is signed by, Plaintiff. *Id.*; *see also* Doc. 23-2 at 80:10-25.

Sometime in 2019, Plaintiff retained Credit Repair Lawyers of America (**"CRLA"**) to assist her. *Id.* at 33:25, 34:1-5. CRLA drafted and sent a letter to Defendant, dated May 28, 2021[3], that stated, in pertinent part: "Our client no longer disputes LVNV Funding LLC, Original Creditor: Credit One Bank, N.A., Balance: $744, Date of Opening: May 2018. Please remove the dispute comment from the account." Doc. 24-5; *see also* Doc. 23-2 at 99:1-25. This letter listed Plaintiff's name, address, and social security number (**"SSN"**) and was signed electronically[4] by an out-of-state attorney, Gary Hansz. *See* Doc. 24-5. Plaintiff testified that she authorized CRLA to send the letter. Doc. 23-2 at 99:1-12. As a result of several

[3] RCS received the letter on behalf of Defendant on or about June 16, 2021. *See* Doc. 24-6 at 54:9-23; *see also* Doc. 24-5.

[4] The electronic signature is indicated as "/s/ Gary Hansz." *See* Doc. 24-5 at 1.

discrepancies[5] with this letter identified in an internal review process, RCS did not remove the dispute comment from the collection item. *See* Doc. 24-6 at 56-61. Neither Plaintiff nor the attorney or law firm listed in the letter were contacted by RCS to follow-up on the review process; a representative for RCS testified it did not reach out to Plaintiff or the attorney because of the appearance of a scam. *Id.* at 64:3-23, 66:20-25. The same representative for RCS testified that had Plaintiff reached out to RCS to inform it that she was being represented by an attorney, or had included a Power of Attorney in its letter, it would have immediately removed the dispute comment. *Id.* at 64:15-22, 66:11-19.

Subsequently, Plaintiff obtained credit reports from TransUnion and Experian on July 26, 2021. *See* Docs. 24-7, 24-8. Both reports continued to list Defendant's $744 and included identical comments: "[a]ccount information disputed by consumer." *Id.* Plaintiff filed her Complaint in the instant lawsuit on August 17, 2021. *See* Doc. 1.

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[5] Defendant's witness, a paralegal for RCS, testified that the letter arrived in an envelope indicating it was sent by Michigan Consumer Lawyers, but the letterhead on the correspondence indicated it was from CRLA. Doc. 23-6 at 56:5-9. Additionally, there was no attached Power of Attorney indicating CRLA could act on Plaintiff's behalf, no wet handwritten signature, no payment for the balance of the debt, no indication of Plaintiff's account number, nor any indication that Plaintiff was copied on the letter. *Id.* at 56:5-16; *see also* Doc. 24-5. Coupled with the fact that Plaintiff had been disputing the account for several years and that the letter, purportedly sent on behalf of Plaintiff, was one of a slew of nearly identical letters received, RCS determined the communication was likely a scam. *Id.* at 56:17-25, 57:1-19.

In a deposition conducted on July 11, 2022, Plaintiff testified that she does not believe the $744 outstanding is accurate because she had made payments on the account. Doc. 23-2 at 71:13-25. When asked whether she "dispute[d] the amount of the account, but not that [she] owe[d] them something," Plaintiff responded, "[c]orrect." *Id*. at 71:17-19. Primarily, Plaintiff wanted the dispute comments removed from her credit reports for the purpose of obtaining a mortgage as she was advised that "FHA [Federal Housing Administration] would not…allow us to move forward if any sort of dispute, dispute comments or anything of that nature" were present on her credit report. *Id.* at 65:17-25, 66:1-7. Plaintiff also wanted the dispute comments removed so she could generally obtain credit. *Id*. at 66:15-18.

Notwithstanding the above testimony, Plaintiff's Motion for Summary Judgment included a Declaration of Plaintiff (Doc. 24-2) ("Affidavit") stating that Plaintiff "no longer dispute[s] the [debt owed to LVNV]." Doc. 24-2 at 1. It further states the debt was incurred for personal and household businesses and not for business or commercial purposes. *Id.*

II. Legal Standard

A party is entitled to summary judgment when the party can show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. When considering cross-motions for summary judgment, the court views the facts "in the light most favorable to the non-moving party on each motion." *See Chavez v. Mercantil Commercebank, N.A.*, 701 F.3d 896, 899 (11th Cir. 2012). The court is not, however, required to accept all of the non-movant's factual characterizations and legal arguments. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458–59 (11th Cir. 1994).

When a party moving for summary judgment points out an absence of evidence on a dispositive issue for which the non-moving party bears the burden of proof at trial, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Thereafter, summary judgment is mandated against the non-moving party who fails to make a showing sufficient to establish a genuine issue of fact for trial. *Id.* The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen.*

Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value").

III. Analysis

A. Sham Affidavit

The sham affidavit rule states that "[w]hen a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assocs. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). However, "[e]very discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986). Courts must distinguish "between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Id.* at 953.

The Plaintiff here, despite several conclusory statements to the contrary in her papers[6], testified plainly in deposition that she disputes the $744 debt. Doc. 23-2 at 71:17-19. While Plaintiff's testimony reveals her inexperience with the

[6] *See, e.g.*, Doc. 1, ¶ 8; Doc.24 at 2; Doc. 24-2, ¶ 3.

intricacies of credit and debt collection processes[7], her testimony is unequivocal in that she disputes the listed amount that she owes Defendant: "…which is why I say that the amount I don't think is correct." *Id*. at 71:24-25; *see also id*. at 71:17-19 (Q: So you—you dispute the amount of the account, but not that you owe them something? A: Correct.").

An affidavit submitted with a motion for summary judgment that "merely contradicts, without explanation, previously given testimony" cannot suffice to create an issue of credibility. *Junkins*, 736 F.2d at 657. Whether Plaintiff disputes her debt to Defendant is not a minor discrepancy worthy of disregard; it is the central question of this case. *See Tippens*, 805 F.2d at 953; *see also* Doc. 1¶ 22. Therefore, where Plaintiff has testified plainly in deposition that she disputes the amount of her debt to Defendant, she cannot manufacture a dispute of material fact by simply stating in an affidavit—without explanation—that she "no longer dispute[s] the collection item." Doc. 24-2, ¶ 3[8].

B. FDCPA Claim

The FDCPA regulates the conduct of debt-collectors, defined by the statute

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[7] *See, e.g.*, Doc. 71 at 18:10-18, 19-23, 25-26, 28:1-18, 65:1-25.

[8] The remainder of Plaintiff's affidavit contains no additional contradictory statements and has therefore been considered. Plaintiff's declaration that her debt arose from personal and household use and is consumer, rather than commercial, in nature is not contradicted by any of her deposition testimony. *See* Doc. 24-2, ¶ 4; *see also* Doc. 23-2 at 71:8-12.

as "any person…who regularly collects ... debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). "The term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." *Id.* The FDCPA provides that debt collectors may not make any "false representation of…the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). "Communicating…to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed" is likewise an express violation of the FDCPA. 15 U.S.C. § 1692e(8).

Congress provided consumers with a private right of action to enforce the FDCPA's prohibitions, holding "debt collectors who violate the Act liable for actual damages, statutory damages up to $1,000, and reasonable attorney's fees and costs." *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258 (11th Cir. 2014) (abrogated on other grounds by *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (2017) (quoting *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1270 (11th Cir.2011)).

To succeed on an FDCPA claim, a Plaintiff must prove that: (1) she was the object of collection activity arising from consumer debt; (2) Defendants are debt collectors as defined by the FDCPA; and (3) Defendants have engaged in an act or omission prohibited by the FDCPA." *Fuller v. Becker & Poliakoff, P.A.*, 192 F.Supp.2d 1361, 1366 (M.D.Fla.2002); *see also Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678

F.3d 1211, 1216 (11th Cir. 2012) ("That means in order to state a plausible FDCPA claim under § 1692e, a plaintiff must allege, among other things, (1) that the defendant is a "debt collector" and (2) that the challenged conduct is related to debt collection.").

Defendant argues in its motion for summary judgment that Plaintiff has failed to sufficiently carry her burden on any element and, even if it has, any misrepresentations were immaterial. *See* Docs. 23, 30, & 31. Plaintiff argues that Defendant has plainly violated the FDCPA and that she has dispositively shown that there is no dispute as to any material facts. *See* Docs. 24, 29, & 32. The Court's analysis is primarily focused on the question of whether Defendants have "engaged in an act or omission prohibited by the FDCPA," but addresses the other elements briefly in turn.

1. Nature of Plaintiff's Debt

Defendant disputes the "consumer" nature of Plaintiff's debt under 15 U.S.C. § 1692a(5); however, it does not assert contradictory evidence, it merely avers that Plaintiff's "conclusory affidavit" is insufficient to carry its burden. Doc. 30-1, ¶ 2. In addition to her affidavit, Plaintiff's testimony makes several passing references to the nature of her debt that substantiates her declaration. *See, e.g.*, Doc. 23-2 at 19:11-15, 20:1-9, 71:8-12; *see also* Doc. 24-6 at 13:2-13. Whether Plaintiff has asserted sufficient "specific facts" to prevail on summary judgment requires a deeper

analysis, but the Court proceeds under the assumption that they have for present purposes. *See Oppenheim v. I.C. System, Inc.*, 627 F.3d 833, 836-37 (11th Cir. 2010); *see also Celotex Corp.*, 477 U.S. at 324.

2. *Defendant is a Debt Collector*

Similarly, Defendant argues that Plaintiff failed to show that LVNV is a debt collector under 15 U.S.C. § 1692a(6). *See* Doc. 30 at 3-4; Doc. 30-1, ¶ 1. While there is precedent from other circuits holding that a debt collector can be vicariously liable under the FDCPA for acts of its affiliates, the Eleventh Circuit has not addressed the question directly. *See Rivas v. Midland Funding, LLC*, 842 F.App'x 483, 487 (11th Cir. 2021). The thin record before the court on this question reveals only that Defendant, who allegedly has no employees[9], acquired the debt and "engaged its master servicer, [RCS], to recover the outstanding balance." Doc. 23 at 2, Doc. 30-1, ¶ 1. However, past litigation involving Defendant's activities as a "debt collector" provide indicia that it lies safely within the confines of § 1692a(6). *See Crawford*, 758 F.3d at 1261 ("Our conclusion that §§ 1692e and 1692f apply to LVNV's proof of claim is consistent with the FDCPA's definition of a debt-collector as 'any person who ... regularly collects or attempts to collect, *directly or indirectly*, debts owed or due or asserted to be owed or due another.' ") (emphasis original) (quoting 15 U.S.C.

[9] Doc. 30-1 at 1; Doc. 23 at 2; *see also* Doc. 23-6, at 45:16-25, 46:1-21.

§ 1692a(6)).

3. Defendant has Violated the FDCPA

The crux of this matter is whether Defendant has violated the FDCPA by failing to remove the "dispute" comment from Plaintiff's credit account. Where the Plaintiff has admitted in sworn testimony that she continues to dispute the debt in question, surely it has not.

Plaintiff alleges that defendant violated 15 U.S.C. §§ 1692e(2)(A) and 1692e(8) by failing to remove the dispute comment from her account and communicating that allegedly false information to credit reporting agencies. *See* Doc. 1 at ¶ 22. The threshold question is whether, in failing to remove the dispute comment from Plaintiff's account in response to the May 28, 2021 letter, Defendant used a "false, deceptive, or misleading representation…in connection with the collection of any debt." 15 U.S.C. § 1692e. The Court begins its analysis with the language of the statute. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir.1998). The Eleventh Circuit employs a "least-sophisticated consumer" standard to determine whether a debt collector's communication violates § 1692e. *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010).

The question is simply answered in this case: Plaintiff's deposition testimony affirms that she continues to dispute the amount of the debt she owes Defendant. Doc. 23-2 at 71:17-19, 71:24-25. Where Plaintiff admittedly continues to dispute the

debt owed, Defendant cannot possibly have falsely represented her debt as disputed. *See id.*; 15 U.S.C. § 1692e(2)(A). On the contrary, in spite of Plaintiff's attempt to misrepresent the status of her debt, Defendant has accurately reported it. Given Plaintiff's subsequent deposition testimony, had Defendant acted in conformity with the May 28, 2021 letter it, paradoxically, would likely have found itself in violation of § 1692e(2)(A). Furthermore, Plaintiff's attempt to distinguish between disputing the *account* versus disputing the *amount* of the debt is unavailing; the account owned by Defendant is a $744 debt, if Plaintiff disputes the amount, Plaintiff disputes the account. *See* Doc. 32 at 3; *see also* Doc. 23-3. Because Defendant has not violated § 1692e(2)(A) by continuing to report Plaintiff's account as disputed, there can be no subsequent violation under § 1692e(8) for communicating said *accurate* information to credit reporting agencies.

Plaintiff does not have the right to manipulate her credit reports with false representations to improve her access to credit, and she may not weaponize the FDCPA against a debt collector for declining to participate in a scam. Defendant had reasonable, articulable justifications for not treating the letter it received on May 28, 2021 as dispositive of Plaintiff's intent to dispute the account in question. *See infra*, n. 5. Those suspicions were proven accurate by Plaintiff's deposition. *See* Doc. 23-3 at 71:17-25. Defendant has shown that there is no genuine issue of material fact from which a jury could find that it violated the FDCPA by continuing to report

Plaintiff's debt as disputed.

IV. Conclusion

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment (Doc. 23) is **GRANTED** and Plaintiff's Motion for Summary Judgment (Doc. 24) is **DENIED**.

2. The Clerk is directed to enter judgment for Defendant and close the file.

DONE and **ORDERED** in Orlando, Florida on October 27, 2022.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties