IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

Brian Forbes,

Appellant,

v.

Merrick Bank Corporation,

Appellee.
_____/

CASE NO.: 2015-CV-75-A-O
Lower Court Case No.: 2015-SC-1168-O

Appeal from the County Court,
for Orange County, Florida,
Steve Jewett, County Judge.

Jason J. Sexton, Esq., for Appellant.

Karin L. Posser, Esq., and
R. Carter Burgess, Esq., for Appellee.

Before LUBET, H. RODRIGUEZ, and S. KEST, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant Brian Forbes appeals the trial court's final judgment dismissing his case under the Florida Consumer Collection Practices Act (FCCPA). This Court has jurisdiction under Florida Rule of Appellate Procedure 9.030(c)(1)(A) and Florida Statute section 26.012(1). Because the email Merrick Bank Corporation sent to Forbes after Forbes informed it that he was represented by an attorney could be seen by the least-sophisticated consumer as sent to collect a debt, we reverse.

Forbes filed a complaint against Merrick Bank, alleging that it violated the FCCPA when it emailed him about his debt after he told Merrick Bank that he was represented by an attorney regarding the debt.

The email, attached to the Complaint as Exhibit B, is from "Merrick Bank Customer Service" and is dated October 20, 2014. (R. 15.) The subject is "Reduce Your Payment and Eliminate Fees on Your Merrick Bank Account." (R. 15.) The email states, in its entirety:

Re: Your Merrick Bank Account Ending with 8553

Dear BRIAN A FORBES SR,

We are writing to you today because as you know, your account is seriously delinquent with us. We want to help you get back on track.

You qualify for our Account Restructure Program (ARP). Through ARP, you are able to pay off your outstanding balance sooner and for less money.

As you can see in the table below, your current payment and rate would decrease significantly under ARP.

	Current	**If you accept ARP**
Monthly Payment Due Now:	$382.00	$48.00
Annual Percentage Rate (APR) for purchases	25.45% Variable Rate	6% Fixed
Annual Fee	$36	$0

To take advantage of this opportunity, you can:

- Go online to www.merrickbank.com/arp and enter the offer code [redacted]; or
- You can call 1-877-487-5596, Monday through Thursday, from 8:00 a.m. to 11:00 p.m. ET; and Saturday from 8:00 a.m. to 9:00 p.m. ET.

Don't delay. It's secure, fast, easy, and private.

Sincerely,

Merrick Bank

(R. 15-16.)

Merrick Bank moved to dismiss the Complaint, arguing that the email did not fall under the FCCPA because it was not made to collect a debt. After a hearing, the trial court granted the motion, and Forbes now appeals.

A. Standard of Review

The trial court reviews a motion to dismiss to determine whether the complaint states a cause of action upon which relief can be granted. *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1207 (Fla. 2015). Review is confined to the complaint, all inferences are drawn in the plaintiff's favor, and all well-pleaded allegations are taken as true. *Id.* The appellate court applies these same principles in reviewing the order granting the motion to dismiss, and the standard of review is de novo. *Id.*

B. Discussion

The FCCPA was enacted to regulate consumer collection agencies and curb creditors' abuses. *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010) (quoting 10A Fla. Jur. 2d Consumer and Borrower Protection § 138 (2010)). The legislature mandated that courts give "[d]ue consideration and great weight" to the federal courts' interpretations of the federal Fair Debt Collection Practices Act (FDCPA) in applying and construing civil remedies under the FCCPA. § 559.77(5), Fla. Stat. (2015). The FCCPA's goal is "to provide the consumer with the most protection possible under either the state or federal statute." *LeBlanc*, 601 F.3d at 1192.

1. Standard

In determining whether an email violates the FCCPA, the court uses a "least-sophisticated consumer standard." *LeBlanc*, 601 F.3d at 1193. Laws protecting consumers from unfair debt collection practices were enacted to protect the public, not experts. *Id.* at 1194. This is an objective standard, and the least sophisticated consumer is "'presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care.'" *Id.* (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2nd Cir. 1993)). Although the standard protects the naïve, it does not sanction bizarre or idiosyncratic interpretations. *Id.*

2. Whether the email was to collect a consumer debt

Forbes argues that the email from Merrick Bank is a communication to collect a consumer debt, and therefore it violates Florida Statute section 559.72(18), because it was emailed directly to Forbes after Merrick Bank knew that Forbes was represented by counsel regarding the debt.

Florida Statute section 559.72(18) (2014), states, "In collecting consumer debts, no person shall . . . [c]ommunicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt." Merrick Bank argues that its email to Forbes was not sent to collect a debt, and thus it did not violate section 559.72(18).

Communications that are considered attempts to collect debts typically contain at least one of the following: the amount due, consequences for not paying the debt, or terms of payment. *See Gann v. BAC Home Loans Servicing LP*, 145 So. 3d 906, 908 (Fla. 2d DCA 2014) (communications specified amount due, that foreclosure proceedings would begin or continue if the defendant did not receive that amount by a certain date, and that it was "vital" that the full amount be paid); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (communications demanded full and immediate payment, threatened adding attorney's fees unless debt was paid, and stated that it was an attempt to collect a debt); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 383 (7th Cir. 2010) (letters offered to discuss alternatives to foreclosure and asked for financial information); *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 300 (3d Cir. 2008) (letters stated amount due, a discounted rate to settle the debt, terms of payment, and payment deadline); *Beeks v. ALS Lien Servs.*, Case No. CV 12–2411 FMO (PJWx), 2014 WL 7785745, *20 (C.D. Cal. Feb. 18, 2014) (communication contained terms of payment and "asked [plaintiff] to contact defendant's office to verify the current amount prior to making her payment.").

Communications that lack terms of payment, consequences for not paying, or a demand for payment are typically found not to be made to collect a debt. *Parker v. Midland Credit Mgmt., Inc.*, 874

F. Supp. 2d 1353, 1357-58 (M.D. Fla. 2012) (communication did not contain terms of payment); *Helman v. Udren Law Offices, P.C.*, 85 F. Supp. 3d 1319, 1328 (S.D. Fla. 2014) (letter did not demand payment, "set an arbitrary deadline for a response, . . . deliver an ultimatum, [or] require Plaintiff to submit detailed financial information, and it does not require Plaintiff to provide an explanation for Plaintiff's prior default."); *Gillespie v. Chase Home Fin., LLC*, Case No. 3:09–CV–191–TS , 2009 WL 4061428, *5 (N.D. Ind. Nov. 20, 2009) (communication "did not provide terms of payment or deadlines, threaten further collection proceedings, or demand payment in any form.").

The email in this case contains the amount due and the terms of payment—two details also in most cases finding that the communications are to collect a debt. But it lacks a demand for payment or the consequences of failing to pay, which are two similarities to cases finding that the communications were informational, and not to collect a debt.

In *Gburek*, the Seventh Circuit set forth several factors to determine whether a communication is to collect a debt. 614 F.3d at 385. A demand for payment is one of those factors, but not a necessary one. *Id.* If the communication is made specifically to induce the debtor to settle the debt, then it triggers the FDCPA. *Id.* The other factors are the relationship between the plaintiff and the defendant and the purpose and context of the communications, viewed objectively. *Id.*

The plaintiff in *Gburek* alleged that the defendant violated the FDCPA by sending her letters after it knew she was represented by an attorney, among other alleged violations. *Id.* at 383. There was no explicit demand for payment, but the court still found that the letters were made in connection with attempting to collect a debt, at least at the motion to dismiss stage. *Id.* at 386. The letter offered to discuss alternatives to foreclosure and asked for financial information to start that process. *Id.* It was an offer to discuss the plaintiff's "repayment options, which qualifies as a communication in connection with an attempt to collect a debt." *Id.* The second letter also fell under

the FDCPA, as its purpose was to encourage the plaintiff to discuss how to settle the debt. *Id.* These letters "were communications made to induce the debtor to settle a debt." *Id.*

Applying the *Gburek* factors to this case, the least-sophisticated consumer could consider the email as one sent to collect a debt. The nature of the relationship between Forbes and Merrick Bank is debtor and creditor. The purpose and context of the email was to offer a way for Forbes to settle his debt with Merrick Bank. It stated that he was eligible for a program and then provided the payment terms under that program to satisfy his debt. The email discusses Forbes "getting back on track" and "paying off the outstanding balance." (R. 15.) Although there was no demand for payment, the entire content of the email is to offer Forbes a way to repay his debt.

In *Campuzano-Burgos*, 550 F.3d at 300, the Third Circuit held, without much discussion, that the letters were not dunning letters ("insistent or repeated demands for payment"), but were settlement offers that fell under the FDCPA. The letters informed the debtors of the amount due, gave them a discounted rate to settle the debt, provided the terms of payment of that discounted rate, and set a specific date when payment must be made to take advantage of the discounted rate. *Id.* at 297. The letters also contained a heading stating, "Settlement Opportunity." *Id.* at 297.

Campuzano-Burgos is almost indistinguishable from this case. Just as in *Campuzano-Burgos*, in this case the email informed Forbes of the amount due, gave him a discounted rate to settle the debt, and provided the terms of payment (monthly payment amounts and the annual percentage rate). The only difference between this case and *Campuzano-Burgos* is that the email here does not provide a deadline to take advantage of the offered program. This dissimilarity does not appear to change the email from one made to collect a debt to one that is informational. In several cases, including *Gburek*, courts have held that the communication was one to collect a debt even though it did not contain a payment deadline. *See Reese*, 678 F.3d at 1217; *Gburek*, 614 F.3d at 383; *Beeks*, Case No. CV 12–2411 FMO (PJWx), 2014 WL 7785745, at *20.

Merrick Bank relies on *Helman v. Udren Law Offices, P.C.* In *Helman*, the Southern District of Florida dismissed the plaintiff's claims under the FDCPA, finding that the communications were not debt collection activity. 85 F. Supp. 3d at 1328. The defendant sent a letter to the plaintiff stating that there may be foreclosure prevention options that she may be able to take advantage of if she provided information about her situation. *Id.* at 1324. In finding that the letter was not a collection activity, the court noted that it "does not directly seek to compel Plaintiff to take action, it does not set an arbitrary deadline for a response, it does not deliver an ultimatum, it does not require Plaintiff to submit detailed financial information, and it does not require Plaintiff to provide an explanation for Plaintiff's prior default." *Id.* at 1326. The letter also did not demand payment. *Id.* It did not "exhibit a tangible pressure upon the recipient through a combination of looming deadlines, threatened action, and demands for information and explanations[,]" which were present in the letter in *Gburek* that was held to be a collection activity. *Id.* Thus, "the instant letter was not debt collection activity as a matter of law." *Id.* at 1327.

Although the email in this case lacks the same items as the letter in *Helman*, *Helman* is distinguishable. The letter in *Helman* stated only that there may be foreclosure prevention options, without detailing those options and whether the plaintiff qualified for them. *Id.* at 1324. In our case, the email stated the monthly payments and the new annual percentage rate if Forbes chose to participate in the program. There was no indication that Forbes did not qualify for the program. The email was a specific offer to settle the debt, including specific payment terms, while the letter in *Helman* simply informed the plaintiff that there may be some way she could save her home from foreclosure and did not detail those ways or promise that she would qualify for those programs.

We cannot say as a matter of law, drawing all inferences in Forbes's favor, as we must on a motion to dismiss, that the least-sophisticated consumer would think that the email was not sent to collect a debt. The information in the email is: you owe us this money; here's how you can repay it.

The FCCPA prohibits creditors from contacting debtors to try and collect the debt when they are represented by attorneys, which is exactly what the complaint in this case alleges. The animating purpose of the email was to induce Forbes to pay. *See Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011) (to fall under the FDCPA, the communication's animating purpose must be to induce the debtor to pay). Therefore, the least-sophisticated consumer could view the email as one to collect the debt, and the motion to dismiss should have been denied.

3. Forbes's motion for appellate attorney's fees

Forbes filed a motion seeking appellate attorney's fees if he is able to subsequently prove a violation of the FCCPA. Florida Statute section 559.77(2) allows an award of reasonable attorney's fees and costs against an entity that violates the Act. Therefore, the Court grants Forbes's motion contingent upon Forbes ultimately prevailing on the FCCPA claim.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The trial court's Order Granting Defendant's Motion to Dismiss Complaint, entered on June 5, 2015, is **REVERSED** and these proceedings are **REMANDED**.

2. Forbes's motion for appellate attorney's fees, filed on October 26, 2015, is **GRANTED** contingent upon Forbes prevailing on his FCCPA claim, and the assessment of those fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 15th day of January, 2016.

/S/
MARC L. LUBET
Presiding Circuit Judge

H. RODRIGUEZ and S. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Steve Jewett, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Jason J. Sexton, Esq.**, Kaufman, Englett & Lynd, PLLC, 150 N. Orange Ave., Suite 100, Orlando, FL 32801; and **Karin L. Posser, Esq., and R. Carter Burgess, Esq.**, McGlinchey Stafford, 10407 Centurion Parkway North, Suite 200, Jacksonville, FL 32256, on this 16th day of January, 2016.

/S/
Judicial Assistant