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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ASSET ACCEPTANCE, LLC, Plaintiff and Respondent, v. LILIA HANSON, Defendant and Appellant.	2d Civil No. B208548 (Super. Ct. No. CIV241995) (Ventura County)

Lilia Hanson appeals the dismissal of her class action claims after the trial court sustained, without leave to amend, respondent's, Asset Acceptance, LLC, demurrer to a third amended cross-complaint. Appellant filed the cross-complaint after she was sued on a $1,358.80 Discover Card debt. The third amended cross-complaint alleged that respondent was fraudulently collecting time-barred debt in violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act; Civ. Code, § 1788 et seq)[1] and the California Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq). The trial court sustained the demurrer finding that there was no well-defined community of interest among the purported class members. We affirm.

[1] Unless otherwise stated, all statutory references are to the Civil Code.

Reviving a Time-Barred Debt

The gist of the cross-complaint is that respondent purchases time-barred Discovery Card debt for pennies on the dollar and tricks debtors into making payments, which has the legal effect of reviving the debt. If a debtor acknowledges a debt in writing after the statute of limitations has run, "a new obligation is created, for which the original barred debt is said to be 'consideration.' The cause of action is on the new obligation, and a new statutory period starts running as on any other written promise. [Citation.]" (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 752, p. 982; see *McCormick v. Brown* (1868) 36 Cal. 180, 184-185; *General Credit Corp. v. Pichel* (1975) 44 Cal.App.3d 844, 849.)

The Rosenthal Act makes applicable, with few exceptions, the Federal Fair Debt Collection Practices Act (FDCPA; 15 U.S.C. §§ 1692-1992o; see Civ. Code, § 1788.17) and prohibits debt collectors from using threats, physical force, obscene language, annoying telephone calls, false representations, or falsely simulating a legal action. (§§ 1788.10, 1788.11, 1788.13, 1788.16.) It provides that a debt collector may not "[o]btain[] an affirmation from a debtor who has been adjudicated a bankrupt of a consumer debt which has been discharged in such bankruptcy, without clearly and conspicuously disclosing to the debtor, in writing, at the time such affirmation is sought, the fact that the debtor is not legally obligated to make such affirmation[.]" (§ 1788.14, subd. (a).)

The Rosenthal Act is silent on whether a debt collector must give a similar warning when attempting to collect a time-barred debt that has not been discharged in bankruptcy. Although there are no published state court opinions on the issue, federal courts interpret the FDCPA differently. Citing federal district court cases from other states, a California debt collection treatise states, with a question mark ("**Collection of time-barred claims?**"), that "[i]t may be 'unconscionable' and 'unfair' to file a collection suit after the statute of limitations expires." (Ahart, Cal. Practice Guide (Rutter 2008) Enforcing Judgments and Debts, ¶2:120.2, pp. 2-73 to 2-74.) The treatise also cites a contrary federal case from Northern California: "There is also authority, however,

supporting attempts to collect a potentially time-barred debt that is otherwise valid where there is *no threatened or actual litigation*. [See *Abels v. JBC Legal Group, P.C.* (ND CA 2005) 428 F.Supp.2d 1023, 1027-1029. . .]." (*Id*., at p. 2-74.)

The third amended cross-complaint alleges that respondent, as a matter of custom and practice, failed to disclose the debts were time barred when contacting class members about payment on the Discover Card accounts. It seeks damages and injunctive relief for purported class members based on fraud, negligent misrepresentation, and violation of the Rosenthal Act (§ 1788 et seq) and the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq).

The trial court sustained the demurrer because insufficient facts were alleged to establish a well-defined community of interest among the putative class members. (See e.g., *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1102-1103; *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 244.) On review, we treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Well-Defined Community of Interest

Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code Civ. Proc., § 382.) It requires an ascertainable class and a well-defined community of interest among the class members. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) " 'Class actions will not be permitted . . . where there are diverse issues to be resolved, even though there may be many common questions of law.' [Citation.] '[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case. . . .' [Citations.]" (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 118.)

Appellant argues that a class action claim may not be decided on demurrer. Trial courts, however, routinely decide class certification on demurrer. (*Alvarez v. May*

Dept. Stores, Co. (2006) 143 Cal.App.4th 1223, 1231; *Silva v. Block* (1996) 49 Cal.App.4th 345, 349.) "When class certification is challenged by demurrer, 'the trial court must determine whether "there is a "reasonable possibility" plaintiffs can plead a prima facie community of interest among class members. . . ." [Citation.] " 'The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then, all of the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage." [Citation.]' [Citations.]" (*Newell v. State Farm General Ins. Co., supra,* 118 Cal.App.4th at p. 1101.)

Appellant complains that she was not afforded discovery or an evidentiary hearing on class certification issues. The trial court stated that it was putting "an end to this repeated" pleading. There was no abuse of discretion. "[W]here the invalidity of the class allegation is revealed on the face of the [cross-]complaint, and/or by matters subject to judicial notice, the class issue may be properly disposed of by demurrer or motion to strike. [Citations.] In such circumstances, there is no need to incur the expense of an evidentiary hearing or class-related discovery." (*Canon U.S.A. Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5.)

Unfair Debt Collection Practice

Appellant contends that a class action may be brought to challenge unfair and deceptive debt collection practices. (See e.g., *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1075 [class action alleging violation of Rosenthal Act].) But in *Fireside Bank,* the class members received a form letter stating that their repossessed vehicles would be sold. Each form letter overstated the amount due and violated the Rees-Levering Motor Vehicle Sales and Finance Act (§ 2981 et seq). (*Id.,* at pp. 1075-1076.)

Unlike *Fireside Bank*, there is no allegation that respondent mailed the same form letter to all purported class members. The third amended cross-complaint states that payments were solicited by letter and phone, but the message was not always the same.

Appellant's case is atypical. Appellant believed that her ex-husband paid off the Discover Card debt six years earlier pursuant to a marital dissolution judgment. When respondent called on January 17, 2001, appellant refused to acknowledge the debt. Respondent followed up with more phone calls. To placate respondent, appellant orally agreed to pay $10 and made payments between March 2001 and September 2002. In May 2006, respondent filed suit to collect the balance due.

The third amended cross-complaint states that respondent acted "outrageously" and contacted appellant "approximately 102 times by telephone and letter at her home and work" causing appellant to suffer "great mental and emotional distress[,] anguish, sickness, illness, shock, anxiety, nervousness, worry, shame, humiliation. embarrassment, chagrin, frustration, anger and sleeplessness." There is no allegation that other purported class members suffered similar harassment or damages. The trial court ruled that the third amended cross-complaint alleged an individual violation of the Rosenthal Act but would require proof too particularized to allow a class action.[2]

We concur. A class action based on "telephone contracts may be the most troublesome if they differed from individual to individual." (*Carabini v. Superior Court, supra,* 26 Cal.App.4th at p. 244.) No facts are alleged that respondent's collection agents memorized a script and recited it each time it solicited a payment. (See e.g., *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 812 [scripted telemarketing statement recited by rote]; *Joseph v.. J.J. Mac Intyre Companies, L.L.C.* (N.D. Cal. 2003) 281 F.Supp.2d 1156, 1158-1159 [repeated, pre-recorded voice phone calls where debt collector did not

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[2] The trial court overruled the demurrer to appellant's individual claim for violation of the Rosenthal Act (7th cause of action).

disclose his/her identity].) Where the class action requires individualized proof of misrepresentation and reliance, class certification may be denied. (See e.g., *Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773, 786.)

UCL

Appellant also contends that respondent's collection practices constitute an unlawful, unfair, or fraudulent practice in violation of the UCL. (Bus. & Prof. Code, § 17200.) Because the UCL cause of action hinges on the Rosenthal Act, it fails if no class action is stated for violation of the Rosenthal Act. (See e.g., *Renick v. Dun & Bradstreet Receivable Management* (9th Cir. 2002) 290 F.3d 1055, 1058 [UCL action hinged on invalid FDCPA claim]; *Newell v. State Farm General Ins. Co., supra*, 118 Cal.App.4th at pp. 1103-1104 [UCL action premised on improper denial of policy benefits].)[3] Nor can appellant sue for damages under the UCL which only permits equitable remedies. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) "Plaintiffs who prove they have standing and a meritorious case may seek injunctive relief on behalf of the public by using 'the streamlined provisions of the UCL' without the need to certify a class. [Citation.]" (*Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1104.)

Citing a Maryland federal district court case, *Wallace v. Capital One Bank* (D. Md. 2001) 168 F.Supp.2d 526 (*Wallace)*, appellant argues that respondent's failure to disclose that the debts were time-barred violates the FDCPA and the Rosenthal Act. In *Wallace*, the federal court concluded that a debt validation notice which failed to disclose that the debt was time-barred is not "itself violative of § 1692e [of the FDCPA]. As held in *Shorty* [*v. Capital One Bank* (D. N.M. 2000) 90 F.Supp.2d 1330] and *Aronson* [*v. Commercial Financial Services, Inc.* (W.D.PA 1999) 1997 WL 1038818], such a [collection] letter in and of itself is consistent with seeking nothing more than a voluntary

[3] The FDCPA provides that "[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.)

payment." (*Id*., at p. 528.) "[U]nless it is alleged that a debt collector has engaged in a course of conduct that tricks a debtor into waiving his legal right to assert a limitations defense, no violation of the FDCPA occurs solely because a debt validation notice silent on the time-bar issue is sent to the debtor." (*Id*., at p. 529.) In dicta, the court stated that such a debt validation notice, in combination with a misrepresentation, may violate the FDCPA where it is part of a larger scheme. (*Id*., at p. 528.)

Appellant argues that "misrepresentation" includes what was not said, i.e., the failure to disclose that a debt may be time-barred. But this type of disclosure is only required where the debt collector attempts to obtain affirmation of a debt previously discharged in bankruptcy. (See § 1788.14, subd. (a).) We reject the argument that the Rosenthal Act requires that debt collectors "*Mirandize*" debtors that certain consumer debts may be time-barred.

Although there are no published California state court cases, one federal court has held that attempts to collect on a time-barred debt do not violate the FDCPA or the Rosenthal Act. (*Abels v. JBC Legal Group, P.C.* (N.D. Cal. 2005) 428 F.Supp.2d 1023 (*Abels*).) In *Abels,* the collection letter requested payment of a time-barred debt, cited a Civil Code provision providing for a thirty day payment period, and warned that "you may under certain circumstances be subject to additional statutory penalties." (*Id*., at p. 1025.) The *Abels* court stated that "an attempt to collect on a time-barred debt *alone* is not a violation of the federal FDCPA. [Citation.] The holding in *Freyermuth* [*v. Credit Bureau Services, Inc.* (8th Cir, 2001) 248 F.3d 767] is particularly persuasive because in California, the statute of limitations is an affirmative defense waivable by not being asserted, and as such 'a cause of action is not extinguished or impaired by the mere passage of time, and the maintenance of the claim is not precluded simply by the running of the statute of limitations.' [Citation.] In fact, if a defendant does not affirmatively invoke the defense of the statute of limitations, the defense is waived or forfeited. [Citation.] Thus, since the underlying debts are not substantively affected, an attempt to collect on the time-barred debts, standing alone, is not a violation of the federal FDCPA."

(*Id*., at p. 1027; see also *Goins v. JBC & Associates, P.C.* (D. Conn. 2005) 352 F.Supp.2d 262, 272 adopting *Freyermuth*].)

The court in *Abels* looked at "the content of the collection attempt" (*id*., at p. 1028) in determining whether the debt collection letters were deceptive or threatened litigation. "The language in these Letters clearly do not threaten litigation even to the least sophisticated debtor. Words such as 'suit,' 'action,' 'case,' or 'litigation' do not appear in the Letters." (*Id*., at p. 1029.) [4]

The third amended cross-complaint states that respondent preyed on each debtor's lack of sophistication and induced debtors to make small, insignificant payments to revive the debt. If a debtor refused to make a payment, he or she was harassed with a barrage of phone calls and letters. That may be the case with appellant, but there are no allegations that the same harassment was carried out on all proposed class members. The third amended cross-complaint alleges: "While the training manual provided by Asset Acceptance to its collection agents provides instruction on how to interact with a debtor initially, the training manual is merely a starting point." It alleges that respondent's collection agents "often [expand] on the tactics contained in the training manual. Indeed, with Asset Acceptance's full knowledge, its collection agents often engage in collection practices far more aggressive than those set forth in the training manual," meaning that different tactics were used depending on the collection agent and the debtor's response.

Even if we assumed that the FDCPA imposes a duty to warn that a debt is time-barred, that does not satisfy the community of interest requirement. In *Parkis v.*

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[4] The collection of consumer charged-off debt is a billion dollar industry. (See Goldberg, Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA (2006) 79 So. Cal. Law Rev. 771, 727-728.) The Legislature, in enacting the Rosenthal Act, acknowledged the tension between consumer rights and fair debt collection practices: "The banking and credit system and grantors of credit to consumers are dependent upon the collection of just and owing debts. Unfair or deceptive collection practices undermine the public confidence which is essential to the continued functioning of the banking and credit system and sound extensions of credit to consumers." (§ 1788.1, subd. (a)(1).)

Arrow Financial Services, LLS (N.D. Ill. 2008) 2008 WL 94798 it was alleged that defendants sued on time-barred debts and purposefully omitted information from the complaint in order to conceal the statute of limitations problem. The federal court stated that there was no "common nucleus of operative fact" to establish class commonality because the date any one debt became time-barred varied with each debt. (*Id*., at p. 4.) "In order to resolve this question of fact, this court would have to look into the payment history of each putative class member to determine whether the last payment date or charge-off date was more than five years prior to the filing of the debt-collection suit. Because the payment timing and history will be different for each putative class member, [t]his would involve an individualized inquiry for each potential member. Thus, the commonality requirement is not met, and class certified is denied." (*Id*., at pp. 4-5.)

The third amended cross-complaint states that common questions predominate: "Whether Asset Acceptance's standard corporate policy of concealing from, and willfully failing to disclose to, debtors that any payment made towards a debt the enforcement of which is barred by the statute of limitations may create a new, distinct and enforceable legal obligation is a false, deceptive and misleading practice in violation of the FDCPA and CA FDCPA [i.e., the Rosenthal Act]." This poses a common legal issue but alleges no common facts about what was said, when it was said, and who made the representation to purported class members.

Class certification is inappropriate if each member of the proposed class has to individually establish violation of the Rosenthal Act and damages. (See e.g., *Bennett v. Regents of University of California* (2005) 133 Cal.App.4th 347, 358.) "The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues. [Citations.]" (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.)

The Rosenthal Act provides for fact-specific defenses that change from debtor to debtor. If a debt collector "shows by a preponderance of the evidence that the

violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adopted to avoid any such violation," the debt collector "shall have no civil liability." (§ 1788.30, subd. (e).) The Rosenthal Act also imposes debtor responsibilities (§ 1178.20 et seq) and provides: "Any intentional violation of the provisions of this title by the debtor may be raised as a defense by the debt collector, if such violation is pertinent or relevant to any claim or action brought against the debt collector by or on behalf of the debtor." (§ 1788.30, subd. (g).) Where the lead plaintiffs in a class action "are subject to unique defenses which could skew the focus of the litigation, [trial] . . . courts properly exercise their discretion in denying class certification." (*State of Alaska v. Suburban Propane Gas Corp.* (9th Cir, 1997) 123 F.3d 1317, 1321.)

Here the factual predicate for the class action is that respondent solicited payments on old credit card accounts without warning class members that the debts were time-barred. But that alone is not an unlawful debt collection practice. (*Abels, supra,* 428 F.Supp.2d at p. 1023; see *Johnson v. JP Morgan Chase Bank DBA Chase Manhatt* (E.D.Cal 2008) 536 F.Supp.2d 1207, 1212 [litigation privilege may bar Rosenthal Act claim].) "It is elementary law that the statute of limitations does not extinguish a debt, but simply operates to bar a recovery thereon." (*Carter v. Canty* (1919) 181 Cal. 749, 754; see also *Eilke v. Rice* (1955) 45 Cal.2d 66, 73.)

Fraud/Misrepresentation

Recasting the action on fraud and negligent misrepresentation theories does not establish a well-defined community interest unless the same misrepresentation was made to each purported class member. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095.) If the action is based on deceit, there must be common facts of actual reliance. (*Ibid.*)

Brown v. Regents of University of California. (1984) 151 Cal.App.3d 982 is illustrative. There, a class action was brought for fraud and battery based on the claim that surgeons failed to disclose morbidity and mortality statistics for elective heart surgery. The Court of Appeal held there were no common facts as to what was said to each class member and there were a wide variety of facts that would influence a patient's

decision to consent to surgery. (*Id*., at p. 989-990.) "If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage. In our review of the [cross-]complaint at issue, we have determined that individual issues substantially predominate over common questions." (*Id*., at p. 989.)

Appellant's remaining arguments have been considered and merit no further discussion.

The judgment (order sustaining demurrer to class action claims in third amended cross-complaint) is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frederick Bysshe, Judge

Superior Court County of Ventura

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