

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 5005	DATE	2/25/2008
CASE TITLE	Cotton vs. Asset Acceptance		

DOCKET ENTRY TEXT

The Court denies Defendant's Motion to Dismiss [27]. Defendant's Answer is due on or before March 10, 2008.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Plaintiffs Cleve Cotton III and Darryl T. Scott bring the present one-count First Amended Complaint against Defendant Asset Acceptance, LLC, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Before the Court is Asset Acceptance's Motion to Dismiss Cotton's claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the following reasons, the Court denies Asset Acceptance's motion.

BACKGROUND

In their First Amended Complaint, Plaintiffs allege that Asset Acceptance is engaged in the business of purchasing charged-off consumer debts – including telecommunications debts – and enforcing the debts against consumers. (R. 8-1, First Am. Compl. ¶ 9.) On or about February 26, 2007, Asset Acceptance filed a lawsuit against Cotton in the Circuit Court of Cook County to collect a purported debt for federally-regulated telecommunications services incurred for personal, family, or household purposes. (*Id.* ¶ 14.) The state court entered a default judgment of \$2,373 against Cotton in June 2007. (*Id.*) On or about June 18, 2007, Asset Acceptance filed a lawsuit against Scott in the Circuit Court of Cook County to collect a purported debt for federally-regulated telecommunications services incurred for personal, family, or household purposes. (*Id.* ¶ 15.) Scott's case is still pending. (*Id.*) Asset Acceptance filed these state court lawsuits as an assignee of AT&T, a telecommunications company regulated by the Federal Communications Commission. (*Id.* ¶ 16.)

Plaintiffs further allege that the charges for which recovery was sought in their lawsuits were more than two years old and that the applicable statute of limitations to an action for the recovery of charges by a telecommunications carrier regulated by the Federal Communications Commission is two years pursuant to 47 U.S.C. § 415. (*Id.* ¶¶ 17, 18.) Moreover, Plaintiffs allege that Asset Acceptance regularly files and threatens to file lawsuits on federally-regulated telecommunications debts that are more than two years old at

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the time of the filing or threat. (*Id.* ¶ 22.) Plaintiffs also allege that Asset Acceptance engages in a pattern and practice of filing lawsuits on time-barred debts of modest amounts knowing that the persons sued could not retain counsel to defend such suits except by paying an amount comparable to that sought in the lawsuits. (*Id.* ¶ 26.) Accordingly, Plaintiffs maintain that Asset Acceptance's conduct constitutes both a deceptive collection practice and an unfair collection practice in violation of 15 U.S.C. §§ 1692(e), 1692f. (*Id.* ¶ 28.)

ANALYSIS**I. Motion to Dismiss for Lack of Subject Matter Jurisdiction****A. Legal Standard**

In deciding a motion to dismiss under Rule 12(b)(1), the Court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007). If the defendant denies or controverts the truth of the jurisdictional allegations, the Court may look beyond the pleadings and view any evidence submitted to determine if subject matter jurisdiction exists. *See id.*; *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc). The party asserting jurisdiction bears the burden of proof on a Rule 12(b)(1) motion. *See United Phosphorus*, 322 F.3d at 946; *see also Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540 (7th Cir. 2006).

B. Analysis

Asset Acceptance argues that the Court does not have subject matter jurisdiction over Cotton's FDCPA claim based on the *Rooker-Feldman* doctrine because Cotton seeks review of his state court default judgment. "Under the *Rooker-Feldman* doctrine, lower federal courts lack subject-matter jurisdiction when, after state proceedings have ended, ***a losing party in state court files suit in federal court complaining of an injury caused by the state-court judgment*** and seeking review and rejection of that judgment." *Beth-El All Nations Church v. City of Chicago*, 486 F.3d 286, 292 (7th Cir. 2007) (emphasis added). In essence, when determining if a federal plaintiff is seeking to review a state court judgment, the Court must determine whether the injury alleged in the federal complaint resulted from the state court judgment. *See id.*; *O'Malley v. Litscher*, 465 F.3d 799, 802 (7th Cir. 2006). If so, the *Rooker-Feldman* doctrine bars the federal claim. *See Beth-El*, 486 F.3d at 292. "*Rooker-Feldman* also applies to bar federal claims that are 'inextricably intertwined' with a state-court judgment, except where the plaintiff lacked a reasonable opportunity to present those claims in state court." *Id.*

Here, Cotton contends that the *Rooker-Feldman* doctrine does not bar his FDCPA claim based on the Supreme Court's decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Cotton contends that under *Exxon*, the *Rooker-Feldman* doctrine only applies where someone against whom a judgment has been entered files a later federal action complaining of an injury caused by the state court judgment. *Id.* at 284. Cotton relies on the following language from the *Exxon* decision:

The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: ***cases brought by state-court losers complaining of injuries caused by state-court judgments*** rendered before the district court proceedings commenced

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and inviting district court review and rejection of those judgments.

Id. at 284 (emphasis added). Based on this language, Cotton maintains that because Asset Acceptance allegedly violated the FDCPA before and during the course of the state court litigation, his FDCPA claim does not fall under the *Rooker-Feldman* doctrine. Cotton also argues that the state court judgment did not cause his injury. Indeed, the Seventh Circuit has “recognized a distinction between a federal claim alleging injury caused by a state court judgment and a federal claim alleging a prior injury that a state court failed to remedy.” *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 555 (7th Cir. 1999) (quotations and citation omitted). As the *Long* decision instructs, in assessing whether the *Rooker-Feldman* doctrine applies, courts must determine “whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.” *Id.*

Cotton’s FDCPA claim against Asset Acceptance is distinct from the state court judgment because Cotton’s injury resulted from Asset Acceptance’s alleged conduct in bringing time-barred FDCPA claims. *See Long*, 182 F.3d at 556 (violations of FDCPA were complete before state court entered judgment); *see also Sides v. City of Champaign*, 496 F.3d 820, 825 (7th Cir. 2007) (events preceding state court judgment outside scope of *Rooker-Feldman*). Here, Cotton’s federal lawsuit does not target the state court’s decision, but instead targets Asset Acceptance’s alleged practice of filing and threatening to file lawsuits on federally-regulated telecommunications debts that are more than two years old at the time of the filing or threat. *Cf. Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2007 WL 4335293, at *4 (N.D. Ill. Dec. 5, 2007) (class action certification).

Asset Acceptance also argues that Cotton’s FDCPA claim is “inextricably intertwined” with the state court judgment because state courts have concurrent jurisdiction over FDCPA claims and Cotton could have brought his statute of limitations defense in state court. Asset Acceptance’s arguments concern the state court judgment’s preclusive effects on the FDCPA claims in the present lawsuit, which the *Exxon* Court made clear are not within the scope of *Rooker-Feldman*. *See Exxon Mobil*, 544 U.S. at 293 (“Preclusion, of course, is not a jurisdictional matter”). Accordingly, the *Rooker-Feldman* doctrine does not bar Cotton’s FDCPA claim. The Court now turns to Asset Acceptance’s claim preclusion defense.

II. Motion to Dismiss Based on Claim Preclusion

Asset Acceptance argues that even if the Court has subject matter jurisdiction, Cotton’s claim is barred by claim preclusion, also known as *res judicata*. *Res judicata* is an affirmative defense – as clearly delineated in Rule 8(c) – and thus Asset Acceptance cannot bring any such defense until a motion for judgment on the pleadings under Rule 12(c). *Forty One News, Inc. v. County of Lake*, 491 F.3d 662, 664 (7th Cir. 2007); *United States Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 626 (7th Cir. 2003) (“Complaints need not anticipate or attempt to defuse potential defenses”); *see also Exxon Mobil*, 544 U.S. at 293. Nevertheless, when it is clear from the complaint’s face – and matters of which the district court can take judicial notice – that *res judicata* does or does not apply, courts may consider this defense in a motion to dismiss brought under Rule 12(b)(6). *See Gann v. William Timblin Transit, Inc.*, 522 F.Supp.2d 1021, 1026 (N.D. Ill. 2007) (citation omitted).

A. Legal Standard

“A motion under Rule 12(b)(6) challenges the sufficiency of the complaint.” *Christensen v. County of Boone, Ill.*, 483 F.3d 454, 458 (7th Cir. 2007). Under Fed. R. Civ. P. 8(a)(2), a complaint need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.” This

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statement must “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 506, 122 S. Ct. 992, 152 L.Ed. 2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Under Rule 8(a)(2), a plaintiff’s “factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1959 (2007); *see also EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). “[W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson*, 127 S. Ct. at 2200.

B. Analysis

Because an Illinois state court entered the default judgment against Cotton, the Court applies Illinois claim preclusion law under the circumstances. *Hicks v. Midwest Transit, Inc.*, 479 F.3d 468, 471 (7th Cir. 2007); *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 955-56 (7th Cir. 1997). Under Illinois law, three requirements must be satisfied in order for res judicata to preclude a claim: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of causes of action; and (3) an identity of parties or their privies. *See Hicks*, 479 F.3d at 471; *In re Dollie’s Playhouse, Inc.*, 481 F.3d 998, 1001 (7th Cir. 2007). “Res judicata bars not only issues that were actually raised in the prior proceeding, but also issues which could have been raised in the prior proceeding.” *Hicks*, 479 F.3d at 471.

The Court turns to the second element, namely, the identify of causes of action, because it is dispositive. When determining the identity of causes of action, Illinois courts apply the transactional test, “which provides that the assertion of different kinds of theories of relief constitutes a single cause of action for purposes of res judicata if a single group of operative facts gives rise to the assertion of relief.” *In re Dollie’s Playhouse, Inc.*, 481 F.3d at 1001 (citation omitted); *see also River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 234 Ill.Dec. 783, 703 N.E.2d 883, 889 (Ill. 1998). Simply put, the “transactional approach asks whether both claims arise out of the same factual situation.” *Whitaker*, 129 F.3d at 958.

In *Whitaker*, the Seventh Circuit reasoned that although the plaintiff’s FDPCA claims arose out of her debt concerning her telephone service with Ameritech, “[d]ebt attachment and debt collection are matters separated by time and purpose.” *Id.* The *Whitaker* court explained:

This decision comports with the policy considerations that underlie res judicata. The doctrine of res judicata serves the interests of judicial economy and finality in disposition of disputes by precluding parties to a judgment and their privies from relitigating the same cause of action. While Ameritech should reasonably expect to rely on the default judgment, Ameritech should also expect that its obligation to comport with other law in its debt collection practices is not extinguished when a court determines that a debt is valid.

Id. (internal citation and quotations omitted).

Accepting Cotton’s allegations as true as the Court is required to do at this procedural posture, Cotton bases his FDCPA claim on Asset Acceptance’s alleged practice of filing and threatening to file lawsuits on federally-regulated telecommunications debts that are more than two years old. Put differently, Cotton’s FDCPA claim concerns Asset Acceptance’s allegedly deceptive and unfair debt collection practices. *See Byrd v. Homecomings Fin. Network*, 407 F.Supp.2d 937, 945 (N.D. Ill. 2005) (citing *Whitaker*, 129 F.3d at 958). Asset Acceptance’s state court lawsuit against Cotton was based on his failure to pay his telephone bills. *See id.* Under the Illinois transactional test, these sets of facts are two different transactions. *See*

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Whitaker, 129 F.3d at 958; *Byrd*, 407 F.Supp.2d at 945. On a final note, any argument that Cotton is precluded from bringing his FDCPA claim in federal court because he did not bring it in the state court action is misplaced because counterclaims in Illinois are permissive – not mandatory. See 735 ILCS 5/2-608(a); *JRC Midway Marketplace, L.P. v. Draper & Kramer, Inc.*, 372 Ill.App.3d 362, 369, 310 Ill.Dec. 118, 865 N.E.2d 442 (Ill. 2007). Accordingly, because there is not an identity of causes of action under the Illinois transactional test, the Court denies Asset Acceptance’s motion to dismiss based on claim preclusion.