

[Cite as *Midland Funding L.L.C. v. Stowe*, 2009-Ohio-7084.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MIDLAND FUNDING, LLC,)	
)	CASE NO. 08 CO 32
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
DONALD STOWE, Jr.,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas,
Court, Case No. 2008 CV 565.

JUDGMENT: Reversed and Remanded.

APPEARANCES:
For Plaintiff-Appellee: Attorney Bradley Triplett
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For Defendant-Appellant: Attorney Philip Zuzulo
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Niles, OH 44446

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 23, 2009

DeGenaro, J.

{¶1} Appellant, Donald Stowe Jr., appeals the judgment of the Columbiana County Court of Common Pleas dismissing his counterclaims against Appellee, Midland Funding, LLC, in an action on a credit card account. On appeal, Stowe contends the trial court erred by dismissing his counterclaims for lack of standing. Further, Stowe argues that the trial court erred by dismissing his Fair Debt Collection Practices Act counterclaims because he is a "consumer" as defined in that statute. Upon review, both of Stowe's assignments of error are meritorious.

{¶2} First, Stowe was served with notice of process, as the defendant in this action, at his residence, therefore making him a party-defendant in this case. Although Stowe pled as a defense in his answer that he was not obligated on the debt at issue, this neither stripped him of his status as a party-defendant, nor transformed him into an intervenor. Stowe was the real party in interest with respect to his counterclaims and thus had standing to bring them, and as a party-defendant, he properly asserted his counterclaims pursuant to Civ.R. 13. Second, Stowe had standing to bring his counterclaims under the Fair Debt Collection Practices Act, Section 1692 et seq., Title 15, U.S.Code (FDCPA). Although Stowe alleges he is not the actual debtor, the FDCPA provides relief for a consumer in Stowe's position, i.e., one who is wrongfully sued for a debt he does not owe. Under the FDCPA, "the term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." Section 1692a(3), Title 15, U.S.Code. Many of the specific FDCPA provisions under which Stowe counterclaimed need not be brought by the "consumer," but may be brought by "any person." Section 1692k, Title 15, U.S.Code. Accordingly, both of Stowe's assignments of error are meritorious, and the judgment of the trial court is reversed and this cause is remanded for further proceedings.

Facts and Procedural History

{¶3} During December 2007, Stowe received a collection letter from Midland through its agent, Javitch, Block and Rathbone. According to Stowe, the letter informed him of his rights, pursuant to the FDCPA, to dispute the debt in writing, and to receive verification of the debt if he disputed it within thirty days. Since Stowe did

not recall having the account in question, which had apparently been charged-off twelve years earlier, he sent a written dispute to Midland via certified mail, requesting verification. That letter was received by Midland on January 8, 2008.

{¶4} Midland, however, never provided Stowe with verification of the debt, and instead commenced the present suit against Stowe in the Columbiana County Municipal Court on January 14, 2008. Stowe was served a summons on the complaint, at his residence address, via certified mail, on January 16, 2008.

{¶5} In its complaint, Midland alleged it is the assignee of Stowe's Citibank USA credit card account, and that Stowe had breached his agreement with Citibank by failing to make payments on the account as required. Midland attached a copy of the Citibank credit card agreement as an exhibit. Midland demanded judgment for \$2,468.39, the amount allegedly owed on the debt, plus interest in the amount of 8%, costs of the action and other relief deemed proper by the court. Midland also attached an affidavit from Midland employee, Elizabeth Neu, attesting to the amount owed on the account by Stowe, in lieu of providing the actual account records. Midland asserted it did not attach the account records to the complaint because: (a) it is not the original creditor and does not have possession, custody or control of said records; (b) copies were sent monthly to Stowe and are or were in Stowe's possession, custody or control; and/or; (c) the account records may be voluminous.

{¶6} On March 14, 2008, Stowe filed an answer and counterclaim which alleged violations of the FDCPA, the Ohio Consumer Sales Practices Act, and common law torts of negligence and invasion of privacy. With respect to the FDCPA, Stowe alleged violations of: Section 1692d (engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt); Section 1692e (using false, deceptive, or misleading representation or means in connection with the collection of any debt); Section 1692e(2)(A) (the false representation of the character, amount, or legal status of any debt); Section 1692e(10) (the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer); Section 1692f (use of unfair or unconscionable means to collect or attempt to collect

any debt); Section 1692f(1) (the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law); and Section 1692g(b) (failure to provide verification of the debt, after such debt is disputed). Stowe requested damages in excess of \$25,000.

{¶7} On May 15, 2008, Midland filed a Civ.R. 12(B)(6) motion to dismiss Stowe's counterclaims, or alternatively, a motion for a more definite statement. Midland argued that since Stowe alleged in his counterclaims that he never had a credit card account with Citibank, this meant Stowe admitted he was not a proper party-defendant and therefore had no standing to pursue his counterclaims. Midland also argued that Stowe was not a "consumer" under the FDCPA and therefore had no standing to bring claims under that statute. Alternatively, Midland moved for a more definite statement, arguing that the collection letter that Stowe allegedly received from Midland must be produced to substantiate the counterclaims. Throughout its motion, Midland characterized Stowe as a non-party who had improperly filed pleadings on behalf of the actual debtor, a man with the same name as Stowe.

{¶8} On May 16, 2008, Stowe filed a brief in opposition, arguing that he has standing to bring his counterclaims, both under established case law and statutorily through the FDCPA. With regard to the motion for a more definite statement, Stowe asserted that his counterclaims were not based on a written instrument, like an account or contract, as contemplated by Civ.R. 10(D), but instead centered on Midland's allegedly improper collection efforts. Thus, Stowe argued that his counterclaims were subject only to regular notice-pleading requirements, and that he was therefore not required to produce the collection letter to move forward with his counterclaims.

{¶9} That same day, Stowe filed a motion to transfer the case to the Common Pleas Court, since his counterclaims exceeded the jurisdictional amount authorized for the Municipal Court and transfer was warranted under Civ.R. 13(J). This motion was subsequently granted and the case was transferred.

{¶10} Midland then filed a reply brief in support of its motion to dismiss after the

court granted it leave to do so. Midland first noted that it does not challenge Stowe's assertion that he is not obligated to Midland for the credit card debt at issue. As a result, Midland reasoned that Stowe is "not a party to the current litigation and must seek leave to intervene" pursuant to Civ.R. 24(C). Midland characterized Stowe as a non-party who has no real interest in the subject matter of Midland's claim and therefore has no standing to assert his counterclaims. Further, Midland argued that even if Stowe were allowed to assert his counterclaims, he lacks statutory standing because he is not a "consumer" under either the CSPA or the FDCPA.

{¶11} On July 16, 2008, the trial court granted Midland's motion to dismiss Stowe's counterclaim, "[f]or the reasons set forth in [Midland's] reply." The court stated further that, "[t]his does not leave Donald Stowe, Jr., without at least a potential remedy as a result of what transpired in this case."

{¶12} On July 22, 2008, Midland voluntarily dismissed its claims against Stowe, without prejudice, pursuant to Civ.R. 41(A)(1). This timely appeal followed. On October 7, 2008, Midland filed a motion to dismiss the appeal with this court, alleging that the trial court's order dismissing the counterclaim was not final and appealable. On November 5, 2008, this court overruled Midland's motion to dismiss. In his appellate brief Stowe asserts that he has abandoned his Ohio Consumer Sales Practices Act claims on appeal.

Standard of Review

{¶13} The standard of review for a Civ.R. 12(B)(6) motion to dismiss requires the appellate court to independently review the complaint or counterclaim to determine if the dismissal was appropriate. *Ferreri v. Plain Dealer Publishing Co.* (2001), 142 Ohio App.3d 629, 639, 756 N.E.2d 712. A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, the court must find beyond doubt that appellant can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true, and construes all reasonable inferences in

appellant's favor. *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128.

Real Party in Interest

{¶14} In his first of two assignments of error, Stowe asserts:

{¶15} "The trial court erred by dismissing the Appellant's counterclaim based on lack of standing and real party in interest."

{¶16} Midland counters that Stowe's admission in his answer that he does not owe the debt at issue is tantamount to Stowe admitting he is not a party-defendant. Therefore, Midland contends Stowe is actually an intervenor in the action, who should have sought leave prior to filing a counterclaim. We disagree.

{¶17} Stowe was served with a summons on the complaint in this action, by certified mail, at his residence address. Civ.R. 4(C) provides that a "defendant" includes "any party upon whom service of summons is sought." Civ.R. 4(C). Midland's assertions that Stowe "intercepted pleadings in the mail," and filed an answer *on behalf of* the actual obligor, another Donald Stowe, Jr., are misplaced. Had Stowe not answered the complaint, he could have been subject to a default judgment and garnishment actions. That Stowe pled, as a defense to the suit against him, that he was not obligated on the debt at issue, or in other words, that he was not party to any contract with Citibank, does not transform him into a non-party.

{¶18} Since Stowe was a party-defendant, we next determine whether he properly asserted his counterclaims against Midland. We first conclude that Stowe had standing to bring those claims as he is a real party in interest. Civ.R. 17(A) requires that an action be brought "in the name of a real party in interest." This means one who is "directly benefited or injured by the outcome of the case rather than merely having an interest in the action itself." *State ex rel. Sinay v. Soddors* (1997), 80 Ohio St.3d 224, 226, 685 N.E.2d 754. An injury in fact is one that is specific, traceable to the subject matter of the suit, and capable of being redressed by the court. *Fair Hous. Advocates Assn., Inc. v. Chance*, 9th Dist. No. 07CA0016, 2008-Ohio-2603, at ¶5.

{¶19} "The purpose of [the real party in interest] rule is so the defendant can avail himself of evidence and defenses that the defendant has against the real party in

interest, to assure the defendant of the finality of the judgment, and to protect the defendant against another suit brought by the real party in interest on the same matter. When an action is prosecuted in the name of the real party in interest, and that party is awarded judgment, the party against whom the judgment is awarded is protected from the possibility of multiple judgments against him" *Myers v. Evergreen Land Dev. Ltd.*, 7th Dist. No. 07MA123, 2008-Ohio-1062, at ¶13 (internal citations omitted).

{¶20} When determining whether a defendant is a real party in interest with respect to his counterclaim, the analysis should focus on the counterclaim itself, not the plaintiff's original claim against the defendant, as Midland asserts. For example, in *Capital Tool Co. v. Great Lakes Tooling Co.*, 8th Dist. No. 85774, 2005-Ohio-5141, the court found that the defendant lacked standing to assert its counterclaim where the defendant conceded he had not suffered any damages as a result of plaintiff's alleged conduct. *Id.* at ¶10-11. In other words, the court found that upon looking at the counterclaim, the defendant had suffered no "injury in fact," was not a real party in interest, and had no standing to bring the counterclaim. *Id.*

{¶21} By contrast, Stowe alleged in his counterclaims that he was injured by Midland's improper collection activities. Midland's argument that Stowe is not a real party in interest simply because Stowe alleges he is not the obligor on the account is misplaced. The real party in interest rule looks at the counterclaims that Stowe has asserted against Midland. Stowe is a real party in interest with respect to his counterclaims, and therefore had standing to bring them.

{¶22} Further, Stowe's counterclaims were properly asserted from a procedural standpoint. Midland argued in the trial court that Stowe's counterclaims were improper because they did not arise from "a common nucleus of operative facts." However, Ohio law does not limit counterclaims in this way. Rather, any claim against an opposing party, even if not arising from the same operative facts, may be raised as a counterclaim. See Civ.R. 13.

{¶23} Finally, the fact that Midland voluntarily dismissed its claims against Stowe, pursuant to Civ.R. 41(A), did not divest the trial court of continued jurisdiction to hear the counterclaims. When a party files a notice of voluntary dismissal pursuant

to Civ.R. 41(A), the trial court lacks jurisdiction to proceed in the matter. *Page v. Riley* (1999), 85 Ohio St.3d 621, 623, 710 N.E.2d 690. However, a timely and properly asserted counterclaim, which states a legally sufficient basis to confer jurisdiction on the court, survives the dismissal. *Isquick v. Dale Adams Enterprises, Inc.*, 9th Dist. No. 20839, 2002-Ohio-3988, at ¶10. Thus, a trial court retains jurisdiction over a counterclaim pending at the time of the voluntary dismissal.

{¶24} The trial court erred by dismissing Stowe's counterclaims for lack of standing as Stowe is the real party in interest with respect to his claims against Midland, and as a party-defendant in this action, properly asserted his counterclaims. Stowe's first assignment of error is meritorious.

Fair Debt Collection Practices Act

{¶25} In his second of two assignments of error, Stowe asserts:

{¶26} "The trial court erred by dismissing the Appellant's counterclaim for lack of standing as a consumer under the Fair Debt Collection Practices Act."

{¶27} When an action is brought in relation to a specific statute or constitutional provision, the plaintiff, or as here, counterclaimant, must demonstrate that the interest he or she seeks to protect falls within the "zone of interests" that are protected or regulated, in order to have standing to bring the claim. *Fair Hous. Advocates Assn., Inc.* at ¶5. In the trial court, Midland argued, and the trial court agreed, that Stowe is not a "consumer" under the FDCPA, and that he therefore had no standing to bring his FDCPA claims. Stowe maintains he fits under the definition of "consumer," and that even if he did not, he could still maintain a viable FDCPA claim against Midland.

{¶28} As a threshold matter we note that the FDCPA as a whole does not limit recovery to "consumers." Unless specified otherwise within a given subsection, the FDCPA "imposes liability where a debt collector has failed to comply with the Act with respect to 'any person.'" *Dutton v. Wolhar* (D.Del.1992), 809 F.Supp 1130, 1134, affirmed, (1993), 5 F.3d 649, quoting Section 1692k(a), Title 15, U.S.Code. Here Stowe brought counterclaims against Midland under several sections of the FDCPA, namely: 1692d, 1692e, 1692e(10), 1692f, 1692f(1) and 1692(g). Only Sections 1692e(10), and 1692g(b) specifically limit claims to those made by a "consumer."

{¶29} Under the FDCPA, "[t]he term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." Section 1692a(3), Title 15, U.S.Code. While Midland contends that a consumer means: "a cardholder or natural person to whom consumer credit is offered or extended," pursuant to Regulation Z, Section 226.2(a)(11), Title 12, C.F.R., that regulation applies to the Truth In Lending Act, which is a separate and distinct federal statute. See Section 1601 et seq., Title 15, U.S.Code; Regulation Z, Section 226.2(a)(1), Title 12, C.F.R. Midland's proposed definition is inapplicable to Stowe's FDCPA claims.

{¶30} Thus, to determine whether Stowe is a consumer under the FDCPA we must decide whether he is a "natural person obligated or allegedly obligated to pay any debt." For purposes of a Civ.R. 12(B)(6) motion, Stowe's contention in his counterclaim that Midland attempted to collect the Citibank account from him, via a dunning letter, must be taken as true. Assuming that is true, Stowe falls squarely into the definition of a consumer under the FDCPA, as one who is allegedly obligated to pay a debt.

{¶31} As the Sixth Circuit noted in *Fed. Home Loan Mtge. Corp. v. Lamar* (C.A.6, 2007), 503 F.3d 504:

{¶32} "Congress enacted the FDCPA in order 'to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.' 15 U.S.C. § 1692(e). 'Congress designed the [FDCPA] to eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.' *Id.* at 508 (internal citation omitted).

{¶33} Midland cites *Rose-Gulley v. Spitzer Akron, Inc.*, 9th Dist. No. 21778, 2004-Ohio-4063, for the proposition that Stowe is not a consumer under the FDCPA. However, *Rose-Gulley* involved a claim under the Ohio Consumer Sales Practices Act (CSPA) not the FDCPA. *Id.* at ¶9-13. The definition of consumer under the CSPA is different from that found in the FDCPA. The CSPA defines consumer as "a person who engages in a consumer transaction with a supplier." R.C. 1345.01(D).

Contrastingly, as aforementioned, a consumer under the FDCPA means "any natural person obligated or allegedly obligated to pay any debt." Section 1692a(3), U.S.Code, Title 15.

{¶34} Stowe is a consumer under the FDCPA and therefore had standing to bring his FDCPA counterclaims. Accordingly, the trial court erred by dismissing Stowe's FDCPA counterclaims for that reason. Stowe's second assignment of error is meritorious.

Conclusion

{¶35} Both of Stowe's assignments of error are meritorious. The trial court erred by dismissing Stowe's counterclaims for lack of standing. Stowe is a party-defendant in this case, and not an intervenor, because he was served with notice of process, as the defendant in this action, at his residence. Further, Stowe is a real party in interest with respect to his counterclaims and therefore had standing to bring them. Finally, Stowe had standing to counterclaim under the FDCPA as he is a "consumer" under the meaning of that statute. Accordingly, the judgment of the trial court is reversed and this cause is remanded for further proceedings.

Donofrio, J., concurs.

Waite, J., concurs.