

FILED

OCT 14 2005

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY 4 DEPUTY CLERK

MARIA MUNOZ, on Behalf of Herself and §
All Others Similarly Situated, §
Plaintiffs, §
§
v. §
§
EDWARD T. BURKE & ASSOCIATES, P.C., §
Defendant. §

No. SA-05-CA-00223-RF

ORDER GRANTING CLASS CERTIFICATION

BEFORE THE COURT is Plaintiff's Motion for class certification, filed on April 4, 2005 (Docket No. 2). The Court held a hearing in this matter on October 12, 2005 and now finds that the motion for class certification is meritorious. As a result, the Court will GRANT Plaintiffs' motion for class certification (Docket No. 2).

BACKGROUND

This action was originally filed in Texas state district court in Bexar County, Texas. Plaintiff's Original Petition sought damages against two defendants under Chapter 392 of the Texas Finance Code for alleged violations of the Texas Debt Collections Act ("TDCA") regarding a form letter sent to Plaintiff by Burke & Associates, P.C. ("Burke"). In the Court's opinion, the letter sent by Defendant Burke implied that Burke, a debt collector, intended to collect credit card debt from equity in the cardholder's homestead, action generally prohibited by the Texas Constitution. Plaintiff initially sought damages against Burke and General Electric Capital Corporation ("GE Capital").¹ Plaintiff later amended her

¹ Defendant Burke now states that Defendant G.E. Capital Corporation has settled Plaintiff's claims against it and has been dismissed from the suit.

Petition, adding federal claims under the Fair Debt Collections Practices Act ("FDCPA")² and class action allegations against Burke. After the case was removed to this Court, Plaintiff dropped all claims except those brought pursuant to the FDCPA. (See Docket No. 5). Upon removal, Plaintiff moved for class certification, which the Court now considers. Defendant objects to class certification, arguing that one or more of the Rule 23 requirements are not met.

DISCUSSION

I. *Motion for Class Certification*

A. **Standard for Class Certification**

Rule 23 allows plaintiffs to certify their cases as class actions provided certain criteria are met.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.³

These requirements are often simplified and described at (1) numerosity; (2) commonality; (3) typicality; and (4) fair and adequate representation. The party seeking certification has the burden of showing that each of these criteria are met.⁴ If one is not met, then the party

² 15 U.S.C. § 1692 *et seq.*

³ FED. R. CIV. P. 23(a).

⁴ *Robinson v. Texas Auto Dealer's Ass'n*, 387 F.3d 416, 421 (5th Cir. 2004).

seeking certification has failed to meet its burden and certification should be denied.⁵

B. Defendant's Objections to Certification

Defendant opposes class certification, arguing that the criteria provided by Rule 23 are not met. First, Defendant argues that Plaintiff fails to meet the numerosity requirement and that Plaintiff has provided no evidence of the impracticability of simply joining all the parties. Next, Defendant argues that Plaintiff has failed to show that her damages are typical of the claims asserted by the members of the putative class.

Defendant also asserts that certification would be premature, since no meaningful discovery has yet taken place. Defendant states that it has not yet deposed Plaintiff, the proposed class representative, and thus there is no evidence that Plaintiff satisfies the typicality requirement.

Defendant also argues that Plaintiff has failed to present any evidence that she has knowledge of other potential class members' contact with Burke and any potential damages they may have suffered. Thus, Defendant concludes that Plaintiff simply lacks the information required to support her assertions regarding the four criteria for certification under Rule 23(a). Defendant also protests that Plaintiff has failed to point to an identifiable class of claimants to join in her action.

The day before the hearing on this matter, October 11, 2005, Defendant filed a Supplemental Opposition to Class Certification. One new assertion is that class certification is not proper under Rule 23(b)(2) to grant injunctive relief. Plaintiffs concede and agree that

⁵ *Vizena v. Union Pacific R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004).

Defendant is correct in this regard. The other new assertion is that class certification is not proper under Rule 23(b)(3) because Defendant has a minimal net worth. Plaintiffs challenge this argument.

1. Numerosity

Rule 23 requires that the class to be certified be “so numerous that joinder of all members is impracticable.”⁶ Plaintiff cites a number of cases holding that class numbers of 25 or more have been found to be sufficient. However, the determination does not hinge merely on the number of potential class members and must take into consideration the numerosity of the class and any number of other relevant factors.⁷ Here, Plaintiff submits evidence that Defendant sent the form letter at issue to 9,022 individuals in 2003 and 1,186 in 2004.⁸ Thus, Plaintiff shows that there are over 10,000 potential plaintiffs who received the letters in the past two years. The Court finds that this number of potential plaintiffs is sufficient to support a finding that the class is too numerous to join as individual parties.

2. Commonality

Rule 23(a)(2) requires that there be a common question of law or fact and that “resolution of common questions affect all or a substantial number of class members.”⁹ “To establish commonality, it is sufficient that Plaintiff allege that all class members receive the

⁶ FED. R. CIV. P. 23(a)(1).

⁷ *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Miss.*, 637 F.2d 1014, 1015 (5th Cir. 1981).

⁸ Plf.’s Mot. at 6, Ex. 1, Bingham Aff.

⁹ *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

same collection letter.”¹⁰ This the Plaintiffs have done. Therefore, commonality is present here.

3. Typicality

Rule 23 also requires that claims or defenses of the representative parties be typical of the claims or defenses of the class.¹¹ However, this threshold requirement is not high and only require that resolution of the common questions affect all or a substantial number of the class members.¹² Defendant argues that Plaintiff has produced no evidence that her damages are typical of the class she seeks to represent, surmising that Plaintiff’s damages are probably atypical. Thus, Defendant argues that Plaintiff fails to satisfy the typicality requirement and that certification would be improper for this reason as well.

The Court notes that the grounds for all the potential plaintiffs’ claims – that they received an allegedly illegal form letter from Defendant – are identical in that they all involve the receipt of such a letter. The Court thus notes that there are common questions of law and fact present among all potential plaintiffs. The primary question of law before the Court is whether Defendant’s letter violated the FDCPA.

The FDCPA is designed “to eliminate abuse debt collection practices by debt collectors.”¹³ The statute is well-suited to Rule 23 litigation because it provides special

¹⁰ *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665, 668 (M.D. Fla. 1999), see also *D’Alauro v. GC Servs. Ltd.*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996).

¹¹ FED. R. CIV. P. 23(a)(3); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).

¹² *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993).

¹³ 15 U.S.C. § 1692(e).

damage provisions and specifically provides for class actions.¹⁴ Indeed, the FDCPA provides for statutory damages, whether or not the consumer proves actual damages.¹⁵ Thus, though individual plaintiffs' subjective damages could differ slightly, the whole potential class would share the statutory damages provided by the FDCPA. Further, the statutory damages calculation in the FDCPA is focused on the Defendant, not on the potential plaintiffs.¹⁶ Typicality is thus inherent in the class definition because each potential class member received the same or similar letter and was thus subject to the same potential violation of the FDCPA. Thus, the Court finds that Plaintiff has met the typicality criterion as well.

Defendant does argue in its most recent opposition brief that the matter of certification is premature on the issue of typicality until discovery is conducted. The Court disagrees. If later facts lead Defendant to believe that typicality does not exist, the Court will grant leave to file a motion to de-certify the class.

4. Fair and Adequate Representation

Finally, the proponent of a class action must be a fair and adequate representative of the class in order to obtain certification.¹⁷ There are two criteria for determining adequacy under this portion of the Rule. First, the named representatives must have a common interest with the unnamed members of the class and there must not be any conflict between the

¹⁴ See 15 U.S.C. § 1692k(a)(2)(B), (b)(2).

¹⁵ 15 U.S.C. § 1692k(b).

¹⁶ *Id.* (requires court to consider frequency, persistence, and nature of the violation, number of persons affected, debt collector's resources, and the extent to which the debt collector's actions were intentional).

¹⁷ FED. R. CIV. P. 23(a)(4).

interests of the named plaintiffs and the other members of the proposed class.¹⁸ Second, it must appear that the representative parties, by their attorneys, will vigorously prosecute the class claims.¹⁹ Plaintiff argues that she and the other potential class members have the common interest implicit in their claim against Defendant: that they wish to pursue their claims related to Defendant's form letter. Further, Defendant does not challenge this aspect of Plaintiff's request for class certification, although it argues that discovery should be had on the matter before the certification decision. The Court finds discovery unnecessary at this stage of the process, but would allow Defendant to file a motion to de-certify if discovery raised an issue here. On these facts, the Court finds that the Plaintiff has shown that she would be a fair and adequate representative of the class and that she thus meets the criterion set forth in Rule 23(a)(4).

5. Identifiable Class

Defendant also protests certification, stating that there is no clearly discernable number of putative class members set forth in any of the Plaintiff's pleadings. However, as noted above, Plaintiff states – based upon Defendant's discovery responses – that there are 10,208 potential plaintiffs who received the letters in 2003 and 2004. While Plaintiff does not provide their names or contact information, she is not required to do so. By setting forth this number, Plaintiff shows the Court that there is indeed a clearly discernable number of putative class members.

Defendant also protests that the members of the putative class must be identifiable.

¹⁸ *Gonzalez v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1974).

¹⁹ *Id.*

The Court finds that while Plaintiff has not identified all of the other potential plaintiffs by name, Defendant has access to that information and cannot object to class certification on the grounds that Plaintiff does not.

Defendant also states that Plaintiff's request for class certification must fail because Plaintiff has failed to define the class of claimants in objective terms. However, Defendant's argument is belied by even a cursory review of the instant motion. Plaintiff very clearly states that she seeks certification of a class "consisting of [a]ll residents of Texas to whom [Defendant] sent the form letter . . . after March 24, 2003" (Docket No. 2, at 1). Thus, Defendant's assertions that Plaintiff has failed to point to an identifiable class is completely without merit.

6. Class Certification Under 23(b)

Defendant argues that class certification under Rule 23(b)(2) is improper and Plaintiffs agree. No certification will issue under Rule 23(b)(2).

Defendant argues that class certification under Rule 23(b)(3) is improper because it has minimal assets. The Plaintiffs contest this position and notes that Defendant cites no authority for the proposition. The Court rejects the argument and is of the opinion that the matter of Defendant's assets is not an infirmity to certification under the circumstances as they exist here.

CONCLUSION

Based upon all of the foregoing, the Court finds that Defendant's objections to the class certification lack merit and that Plaintiff has adequately pleaded the requirements of Rule 23. As a result, the Court will grant Plaintiff's motion for certification under Rules

23(b)(1) and 23(b)(3).

It is therefore ORDERED that Plaintiff's Motion for Class Certification (Docket No. 2) is GRANTED under Rules 23(b)(1) and 23(b)(3).

SIGNED this 13th day of October, 2005.



ROYAL FURGESON
UNITED STATES DISTRICT JUDGE