IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Julia Crawford,)
)
Plaintiff,)
vs.)
)
Advanced Debt Recovery, Inc.,)
et. al.,)
)
Defendant.)
) Case No. 3AN-03-5859 Civil

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Julia Crawford, debtor and defendant in an underlying case, brings suit against a judgment creditor, Advanced Debt Recovery, Inc. ("ADR"), Alaska Law Offices, Inc. ("ALO"), and attorney Steven Jones for executing on funds in excess of her debt. She argues on Motion for Summary Judgment that ADR's failure to monitor the amount of money seized by process servers, and thus to prevent over levying, violates the Alaska Unfair Trade Practices and Consumer Protection Act ("UTPCPA"), AS § 45.50.471.[1] ADR, also moving for summary judgment, claims that its practices do not violate the Alaska UTPCPA both because ADR unintentionally over levied and because the surplus money was returned

[1] Memorandum in Support of Plaintiff's Second Motion for Summary Judgment, p. 11.

to Crawford. ADR also claims that "no post-satisfaction levy or execution ever took place in this case."[2]

II. FACTS AND PROCEEDINGS

On August 2, 2002, ADR obtained a judgment against Crawford for $5777.25.[3] The district court issued the writ of execution on August 16, 2002.[4] To satisfy the judgment, Nathan Walker, a process server employed by Writ Process, levied four times on Crawford's assets over an eight-month period, ultimately collecting more money than she owed.[5]

Nathan Walker served the first writ against Crawford's permanent fund dividend in August 2002; this seizure of $1,232.61 was processed on September 25, 2002.[6] Trial court accounting received this money on October 15. But it wasn't until December 16, 2002, that the court notified Writ Process that it had received Crawford's PFD of $1232.61.[7]

Nathan Walker served the second writ on Alaska USA Bank ("AKUSA") on September 3, 2002, seizing $5,822.25 on September 20.[8] It is uncontested that this was the full amount owed.

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[2] Defendant's Motion for Summary Judgment, April 4, 2005, at 1.
[3] 3AN-02-7047 Civil; the judgment amount, $5767.85 plus $9.40 interest equals $5777.25.
[4] Defendant's Attachment 12.
[5] Levies I-III: Plaintiff's Attachments 13-15. Levy IV: See Order on Motions for Summary Judgment, November 1, 2004.
[6] Defendant's Answer to Complaint, Deposition of C. Walker page 41 lines 21-25 and Defendant's Attachment 13.
[7] Defendant's Attachment 13 and Order on Motions for Summary Judgment, November 1, 2004.
[8] Defendant's Attachment 14 and Deposition of C. Walker pages 45-47.

Nathan Walker served the third levy on AKUSA on October 9, 2002,[9] almost three weeks after the second writ had been satisfied, and seized $2,705.59.[10]

On December 23, 2002, the court returned $3888.30 to Crawford, and the next day it tendered $5876.13 to Writ Process.[11]

A fourth writ, the third on AKUSA, was levied on March 11, 2003.[12] All parties agree that this levy was improper, but do not agree as to who was responsible. Crawford points to ADR; ADR in turn blames Writ Process. At Crawford's request, Judge Wanamaker held a hearing. Mr. Walker explained that the fourth levy was a mistake, and agreed to waive expenses of levy, and reimburse the debtor for any bank charges, NSF fees, or similar out-of-pocket expenses. The court so ordered, and directed the debtor to file an accounting.[13]

Crawford thereafter brought suit against ADR.

In an Order on Motions for Summary Judgment issued on November 1, 2004, this court held that ARCP 69(e) allows for the practice of multiple and simultaneous levies based on one writ of execution; to limit that privilege in the abstract based on Alaska's UTPCPA, AS §

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[9] Defendant's Attachment 15.
[10] *See* Plaintiff Crawford Memorandum in Support of Second Motion for Summary Judgment at 4.
[11] Defendant's Attachment 18.
[12] Order on Motions for Summary Judgment, November 1, 2004
[13] See Order on Motions for Summary Judgment, November 1, 2004 (*citing* Defendant's Response and Cross Motion, p. 3 n.2 ("[T]he . . . levy problem, occurred in this case because of a simple oversight by the licensed process server used in this action."); Plaintiff's Reply, p.3 ("[T]he 'oversights' by defendants' process servers were and are, in fact, 'oversights' by defendants themselves, for which they are liable"); Log notes from March 11, 2003 in 3AN-02-7047 Civil).

45.50.471, would be an impermissibly draconian interpretation.[14] That issue is not addressed further in this order.

All parties have moved for summary judgment claiming that there are no genuine issues of material fact and that each is entitled to summary judgment as a matter of law.

III. DISCUSSION

a. Standard of Review. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[15] A genuine issue of material fact exists when reasonable jurors could disagree on its resolution.[16] The moving party has the initial burden of showing that there is no genuine issue of material fact.[17] The moving party may rely on the pleadings, depositions, answers, admissions, as well as any affidavits or other admissible evidence.[18] Once the moving party has met its burden, the opposing party must set forth specific facts demonstrating that a genuine issue of material fact exists.[19] The court views all facts in the light most favorable to the non-moving party.[20] The nonmoving party may not,

[14] If a creditor over levies funds, the court will account for and return the extra to the debtor.
[15] *Lincoln v. Interior Reg'l Hous. Auth.*, 30 P.3d 582, 585 (Alaska 2001).
[16] *McGee Steel Co. v. State*, 723 P.2d 611, 614 (Alaska 1986).
[17] *Brock v. Rogers & Babler Co.*, 536 P.2d 778, 782 (Alaska 1975).
[18] *Whaley v. State*, 438 P.2d 718, 719-720 (Alaska 1968).
[19] *Howarth v. First Nat'l Bank of Anchorage*, 540 P.2d 486, 489-490 (Alaska 1975).
[20] *Braun v. Alaska Commercial Fishing & Agric. Bank*, 816 P.2d 140, 142 n.2 (Alaska 1991).

however, rely on mere assertions of fact in unverified pleadings and memoranda in its opposition to the motion for summary judgment.[21]

b. Unfair Trade Practices. The UTPCPA reads, in relevant part:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.[22]

Any requirement for damages is notably absent.[23] Because the statute does not require damages, ADR's argument that it should avoid liability because Mrs. Crawford eventually received her returned money is unfounded. Alternatively, actual damages were incurred. Aside from loss of use of the wrongfully levied money, Crawford incurred bank fees of $60.00 for these 2 levies. ADR repaid these fees over 2 ½ years from when the first bank fee was incurred.[24]

UTPCPA then enumerates a non-exclusive list of offenses which help define "'unfair methods of competition' and 'unfair deceptive acts or practices.'"[25] ADR's actions do not fall directly into any of the enumerated categories, but are still eligible to violate UTPCPA.

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[21] *Bennett v. Weimar*, 975 P.2d 691, 695 (Alaska 1999); *French v. Jadon, Inc.* 911 P.2d 20, 26 (Alaska 1996).
[22] AS 45.50.471(a).
[23] "Actual injury as a result of the deception is not required." *State v. O'Neill*, 609 P.2d 520 (Alaska 1980).
[24] *See* Attachment 2 to Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, April 12, 2005.
[25] AS 45.50.471(b).

In *State v. O'Neill,* the Supreme Court of Alaska held that debt collection agencies fall under the purview of UTPCPA.[26] The court laid out the following test:

> Two elements must be provide to establish a prima facie case of unfair or deceptive acts or practices under the Alaska Act: (1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred. ... An act or practice is deceptive or unfair if it has the capacity or tendency to deceive.[27]

The court continued to explain that "[i]ntent to deceive need not be proved. All that is required is a showing that the acts and practices were capable of being interpreted in a misleading way."[28] The court then offered a set or factors to help determine whether a specific practice is unfair:

> Unfairness will be determined by a variety of factors, including: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[29]

c. Levies I and II. This court held in a November 1, 2004 Order that multiple levies do not, of themselves, violate UTPCPA. Nathan

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[26] 609 P.2d 520, 528 (Alaska 1980).
[27] *Id.* at 534 (citing *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152 (1942)).
[28] *Id.* at 535 (citations omitted).
[29] *Id.* at 535 (citing *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972)).

Walker served Levy II on September 3, 2002, almost three weeks before the Defendants were notified of the results of the money seized by Levy 1. The first two levies were conducted pursuant to Rule 69(e) and did not violate UTPCPA.

d. Levies III and IV The parties in this case have essentially agreed that ADR did not monitor Writ Process carefully enough to prevent unnecessary over levying. Specifically, process server Nathan Walker, of Writ Process, admitted at his deposition that his company, Writ Process, was not responsible for monitoring the outstanding balance.[30] Clayton Walker of ALO explained in his deposition that his office did not supervise Nathan Walker in avoiding over levying accounts.[31]

By September 20, 2002, ADR knew that AKUSA planned to pay $5,822 in response to Levy II. Crawford's original debt was only $5777.25, approximately $45 less than the total amount promised by AKUSA, plus the process service fee. This payment was more than enough to satisfy ADR's collection needs and was logged in ALO's computer system.[32] But on October 9, 2002, Nathan Walker served Levy III. Then, on March 11, 2003, he served Levy IV.

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[30] Deposition N. Walker pp. 65-67.
[31] Deposition C. Walker pp.54-60.
[32] C. Walker Deposition p.47 ll 6-9.

Neither levy III nor levy IV should have occurred. Clayton Walker blames Levy III on poor computer programming by Nathan Walker. Clayton admits "if the systems as I had envisioned them working were in place, Levy 3 would not have happened."[33] But Clayton Walker both worked next to his brother Nathan--a former employee before forming Writ Process with Clayton Walker's wife, Kathleen Walker--and provided "99%" of Nathan's business.[34] This court finds sufficient identity between Clayton's firm, ALO, ADR, and Nathan's business, Writ Process, to discount ALO's argument that Nathan's dysfunctional computer program caused over levying that ALO could not otherwise prevent. Also, intent is not required for a UTPCPA violation. Even viewing the facts in the light most favorable to the Defendants, this Court does not find any material contested issue of fact that would support Defendants' claim of a "bona fide" error within the plain wording of 15 U.S.C.A. § 1692(k)(c).

To find a *prima facie* violation of UTPCPA, Crawford must show that the *O'Neill* test encompasses the Defendant's actions. ADR's practice satisfies the "trade or commerce" prong because ADR bought Crawford's debt and then attempted to collect it. The *O'Neill* court specifically held that debt collection is a trade practice.[35]

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[33] *Id.* at p.47 ll.22-25.
[34] N. Walker Deposition p. 7-8.
[35] 609 P.2d 520, 528 (Alaska 1980)

The second prong requires that ADR's performed unfair acts or practices. ADR did not monitor either the specific amount of money levied or Nathan's efforts to prevent over-levying Crawford's account and, in the process, twice levied money from Crawford's accounts even though it had received notification from AKUSA that Crawford's outstanding balance would be paid in full. This failure to monitor satisfies the "unfair act or practice" prong because it is "immoral, unethical, oppressive," and it is "within the penumbra of some ... established concept of unfairness," specifically that one ought not collect more than what is owed. Hence, the failure to monitor writs of execution establishes a prima facie unfair trade practice case.

In summary, there is no factual dispute that ADR and ALO did not monitor the levying process and over levied Crawford when sufficient funds had been seized to fully pay her debt. Under these facts facts, this court finds that the Defendants have violated UTPCPA, AS §45.50.471, and grants summary judgment for Crawford.

d. Remedies The court finds its authority to enjoin the Defendants under UTPCPA at AS § 45.50.535. The Defendants cite a letter from Crawford's attorney which satisfies the statutory requirement. The Defendants argue that the letter was not sufficient as it referred to "post-satisfaction" levies although the judgment had not been "satisfied" because the satisfaction of the judgment had yet to be entered on a civil

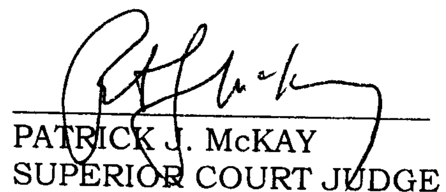
docket. The court disagrees with Defendants' interpretation of "satisfaction" and holds that the notice letter was sent in a timely manner and, under the circumstances, fully informed ADR of the prohibited practices. The closer question, and one not decided in this order, remains as to whether ADR failed to promptly remedy the unfair practice.

At a minimum, plaintiff is entitled to $500 for each act which this court finds constituted an unfair trade practice or $1,000.00 total.[36]

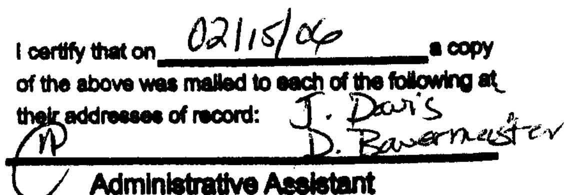
The court does not find sufficient evidence of intentional, malicious or outrageous conduct to justify an award of punitive damages as a matter of law.

A status hearing has been scheduled for 4:00 p.m. on February 28, 2006, at which time a requested hearing on damages, both compensatory and injunctive relief, will be set.

Dated at Anchorage, Alaska, this 14th day of February, 2006.



PATRICK J. McKAY
SUPERIOR COURT JUDGE



I certify that on 02/15/06 a copy of the above was mailed to each of the following at their addresses of record: J. Davis D. Bauermeister

Administrative Assistant

[36] AS 45.50.531(a).