IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 502013AP000071
L.T. NO: 502013SC003374

KENNETH DELI AND DANA DAVIES,
Appellants,

v.

RONALD R. WOLFE & ASSOCIATES,
Appellee.
_____/

Opinion filed: AUG 27 2015

Appeal from the County Court in and for Palm Beach County,
Judge Reginald R. Corlew.

For Appellant: Yechezkel Rodal, Esq.
2150 S. Andrews Ave., 2nd Floor
Ft. Lauderdale, FL 33316
chezky@floridaloanlawyers.com

For Appellee: Suzanne Barto Hill, Esq.
Kevin R. Gowen, Esq.
PO Box 1873
Orlando, FL 32802
shill@rumberger.com; kgowen@rumberger.com;
docketingorlando@rumberger.com

PER CURIAM.

Plaintiffs/Appellants, Kenneth Deli and Dana Davies ("Mortgagors"), appeal the final

judgment entered in favor of Defendant/Appellee, Ronald R. Wolfe & Associates ("Wolfe"). The trial court dismissed the Mortgagors' statement of claim brought pursuant to the Fair Debt Collection Practices Act ("FDCPA"). Mortgagors assert the lower court erred in finding that they failed to state a claim that is cognizable under the FDCPA. We agree and reverse.

Background

Wells Fargo Bank, N.A. ("Wells Fargo") retained Wolfe[1], to represent its interests in pre-suit enforcement of the Mortgagors' note and mortgage. On October 6, 2011, and again on March 14, 2012, Wolfe sent a letter to Mortgagors informing them that they were in default and that Wells Fargo had accelerated all sums due. The letter identified Wells Fargo as the mortgage servicer and the creditor to whom the debt was owed. Wolfe advised Mortgagors of the total amount due at that time, noting that additional interest would continue to accrue. The letter stated that it was "sent to comply with the Fair Debt Collection Practices Act and should not be considered a payoff letter," but it did provide information on how to reinstate or pay off the loan. In the letter, Wolfe identified itself as a debt collector and stated "this law firm is attempting to collect a debt." In the same letter, however, Wolfe also stated, "this law firm is seeking solely to foreclose the creditor's lien on real estate and this law firm will not be seeking a personal money judgment against you." *Id.*

On March 12, 2013, Mortgagors filed a Statement of Claim against Wolfe, alleging violation of the Fair Debt Collection Practices Act ("FDCPA").[2] Mortgagors claimed that the letter falsely represented Wells Fargo as the creditor, that the actual creditor of the note was

1 At the time of the cause of action, Ronald R. Wolfe & Associates was doing business as Florida Default Law Group, P.L.

2 Mortgagors also filed a claim under the Florida Consumer Collection Practices Act ("FCCPA"). That claim was also dismissed but was not raised as an issue in this appeal.

Federal National Mortgage Association ("Fannie Mae"), and that the letter "would be deceptive to the least sophisticated consumer."

Wolfe moved to dismiss the Statement of Claim, asserting that it was frivolous because Wells Fargo was in possession of the original note, endorsed in blank, making Wells Fargo the creditor to whom the debt was owed. Further, Wolfe argued, a foreclosure action does not qualify as debt collection under the FDCPA. The court granted Wolfe's motion to dismiss, and this appeal followed.

Standard of Review

A motion to dismiss for failure to state a claim is an issue of law subject to *de novo* review. *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005). "To state a cause of action a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001) (quoting *Perry v. Cosgrove*, 464 So. 2d 664, 665 (Fla. 2d DCA 1985)). In reviewing a motion to dismiss, the court is limited to the four corners of the complaint and must accept facts alleged in the complaint as true. *Id.* at 494.

The Mortgagors Stated a Claim Under the FDCPA

To state a claim under the FDCPA, Mortgagors must show: (1) they were the objects of collection activity arising from consumer debt; (2) Wolfe was a debt collector as defined by the FDCPA; and (3) Wolfe engaged in an act or omission prohibited by the FDCPA. *Sanz v. Fernandez*, 633 F.Supp. 2d 1356, 1359 (S.D. Fla. 2009). We find that the Mortgagors adequately pled each of these elements and stated a claim under the FDCPA.

1. Mortgagors adequately pled that they were the object of debt collection activity.

In general, a foreclosure action is not debt collection. *Warren v. Countryside Home*

Loans, Inc., 342 Fed. Appx. 458, 460 (11th Cir. 2009) (holding that enforcement of a security interest is not debt collection). Enforcement of a promissory note, however, does constitute debt collection activity, even if done in conjunction with the enforcement of a security interest. *See Reese v. Ellis*, 678 F.3d 1211, 1217 (11th Cir. 2012); *Birster v. Am. Home Mortg. Serv., Inc.*, 481 F. App'x. 579, 582 (11th Cir. 2012); *Battle v. Gladstone Law Group, P.A.*, 951 F.Supp. 2d 1310, 1313 (S.D. Fla. 2013). In *Reese*, the court ruled that a letter providing notice of a pending foreclosure functions to enforce both the note and security interest, and is therefore subject to the FDCPA. *Reese*, 678 F.3d at 1217 ("The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt."). Only when a firm takes action exclusively related to the enforcement of a mortgagee's security interest, and unrelated to the note itself, does its activity fall outside the scope of the FDCPA. *See Dunavant v. Sirote & Permutt, P.C.*, No. 14–13314, 2015 WL 525536, at *2 (11th Cir. Feb. 9, 2015) (publishing public foreclosure notices amounts only to enforcement of a security interest and is not subject to the FDCPA).

Like the letter in *Reese*, the letter in this case informed Mortgagors of impending foreclosure action and advised them that all sums recoverable under the note *and* mortgage were immediately due. In other words, Wolfe sought to enforce both the Note and Mortgage. In its brief, Wolfe asserts that *Reese* and *Birster* are inapplicable because the letter sent to Mortgagors made no explicit or implicit demand for payment, no mention of collection efforts, nor directions for payment. However, while the letter did not explicitly demand direct payment, the following excerpts from the letter are sufficient to state a claim that Wolfe was engaged in debt collection efforts on behalf of its client:

- "[T]he entire principle balance and all other sums recoverable under the terms of the

promissory Note and Mortgage are now due."

- "Additional interest will accrue after the date of this letter."
- "If you wish to receive figures to reinstate…or pay off your loan through a specific date, please contact this law firm at (813) 251-4766 or client.services@defaultlawfl.com."
- "This law firm is attempting to collect a debt…"

Implicit demands for payment, such as these, are sufficient to find a communication an attempt to collect debt. *See Caceres v. McCalla Raymer, LLC.*, 755 F.3d 1299 (11th Cir. 2014) (finding references to collection efforts, statements about the amount of debt owed, and instructions on how to pay off one's debt as indicators of debt collection activity).[3] Thus, we find that Mortgagors satisfied this element of their FDCPA claim.

2. The Mortgagors adequately pled that Wolfe was a debt collector as defined by the FDCPA.

"The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (2011). Thus, a party may be defined as a debt collector either for: (1) using instrumentalities of interstate commerce or the mail system for a business that principally collects debt; or (2) regularly collecting or attempting to

3 Wolfe dismisses these collection-related statements as "mini-Miranda" language that does not convert foreclosure communications into debt collection efforts. "Mini-Miranda" language is a term used to describe the mandatory disclosures that the FDCPA requires in communications with debtors. Wolfe points to a Middle District of Florida decision to support that claim. *See Diaz v. Fla. Default Law Grp., P.L.*, No. 3:09–cv–524–J–32MCR, 2011 WL 2456049 (M.D. Fla. Jan 3, 2011) (finding that an identical letter from the same defendant as in this case was not an attempt to collect debt). The Middle District, however, made that decision prior to the Eleventh Circuit's rulings in *Reese* and *Birster*. A more recent decision in the Southern District of Florida, also involving the same defendant, cited *Reese* in holding that the so-called "mini-Miranda" language employed by Wolfe is evidence of collection efforts. *See Owens v. Ronald R. Wolfe & Associates, P.L.*, No. 13–61769–CIV, 2013 WL 6085121, at *2 (S.D. Fla. June 28, 2013).

collect debts for third parties. *Reese,* 678 F.3d at 1218. Lawyers who regularly attempt to collect debt for their clients are debt collectors under the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

Wolfe identified itself as a debt collector in the letter it sent to Mortgagors, and the Statement of Claim alleges that Wolfe "regularly uses the mail and telephone in a business the principle purpose of which is to collect debt." Thus, Mortgagors have adequately pled that Wolfe is a debt collector within the meaning of the FDCPA, satisfying the second element of a FDCPA claim.

3. The allegation that Wolfe falsely represented Wells Fargo as the creditor is sufficient to state a claim that Wolfe engaged in conduct prohibited by the FDCPA.

In reviewing a motion to dismiss, the court is limited to the four corners of the complaint and must accept facts alleged in the complaint as true. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001). Here, the Mortgagors' allegation that Wells Fargo was not the creditor of their loan was sufficient to satisfy this element of the claim. The FDCPA defines a creditor as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4) (2011). Whether Wells Fargo is a creditor within the meaning of this definition is an issue of fact, which the court cannot resolve on a motion to dismiss. *Owens*, 2013 WL 6085121, at *3 ("Where a complaint alleges that an entity named in a letter to the plaintiff is not a creditor under the FDCPA, the complaint has stated a claim under 15 U.S.C. § 1692a(4)."). *See also Bourff v. Rubin Lublin, LLC.*, 674 F.3d 1238, 1241 (11th Cir. 2012); *Shoup v. McCurdy & Chandler, LLC.*, 465 F. App'x 882 (11th Cir. 2012). Thus, Mortgagors adequately pled that Wells Fargo was not the creditor of their loan, satisfying the final element of a FDCPA claim. Therefore, Mortgagors' FDCPA claim should not have been

dismissed for failure to state a claim.

Wolfe's argument that the dismissal should be alternatively affirmed based upon litigation privilege or the statute of limitations is without merit. Both of these grounds are affirmative defenses. Affirmative defenses cannot form the basis of a dismissal for failure to state a claim unless the statement of claim "affirmatively and clearly shows" the applicable defense conclusively bars the action. *Alexander Hamilton Corp. v. Leeson*, 508 So. 2d 513 (Fla. 4th DCA 1987). As to the litigation privilege, FDCPA is a federal law, and Florida's litigation privilege does not extend to violations of federal law. *Battle v. Gladstone Law Group, P.A.*, 951 F. Supp.2d 1310, 1315-16 (S.D. Fla. 2013); *Acosta v. James A. Gustino, P.A.*, No. 6:11–cv–1266–Orl–31GJK, 2014 WL 5685540, at *4 (M.D. Fla. June 6, 2014). As to the statute of limitations, the Mortgagors allege that the letter at issue was sent twice, most recently on March 14, 2012. The Statement of Claim was filed on March 12, 2013, within the one year statute of limitations. *See* 15 U.S.C. § 1692k (2011). Thus, Wolfe has not demonstrated an alternative basis for affirming the dismissal.

Because we find that the Mortgagors have adequately stated a claim under the FDCPA, we **REVERSE** the trial court's order granting Wolfe's motion to dismiss and **REMAND** the case to the trial court for further proceedings.

Wolfe's Motion for Attorney's Fees and Costs is **DENIED**. The Mortgators' Motion for Attorney's Fees and Costs is **DENIED** as to costs, as such request is premature, *see* Fla. R. App. P. 9.400(a), and **GRANTED** as to attorney's fees. The motion is remanded to the trial court to determine and award a reasonable amount of attorney's fees, contingent upon the Mortgator's successfully prosecuting their claim on remand. *See* § 15 U.S.C. § 1692k(a)(3) (2011) (providing for entitlement to fees "in the case of any successful action to enforce the foregoing

liability.")

OFTEDAL, GILLEN, AND BRUNSON, JJ. concur.