



News

Carlos Ortiz Analyzes in ARM Compliance Digest: EDNY Judge Denies MTD in FDCPA Case Over Reference to Creditor in Letter

December 16, 2020

In the December 14, 2020 edition of the *ARM Compliance Digest*, Hinshaw partner Carlos Ortiz analyzed the denial by a New York federal judge of a motion to dismiss in a FDCPA case:

In *Sali*, the plaintiff filed a putative class action under the FDCPA against the creditor and the law firm that collected on the subject account balance alleging that the collection letter sent was confusing. According to the plaintiff, one of the reasons the letter was confusing was because the law firm was under the exclusive control of the creditor and, therefore, the creditor's alter ego. The factual allegations in the Complaint included that the law firm consisted of one attorney who was also the creditor's general counsel, the creditor owned and operated the office address for the law firm, and the creditor's employees answered the law firm's office phone number. In response, both defendants moved to dismiss, and as part of their argument, supplied the court with proof of a retainer agreement between the creditor and law firm, as well as a lease showing that the creditor rents office space to the law firm. While the court acknowledged that defendants' argument may ultimately prevail, documents outside of the complaint that were not referenced in that pleading are irrelevant for purposes of a motion to dismiss. As a result, the court held that the Complaint consisted of enough factual allegations to survive a motion to dismiss.

This case exemplifies one of the many difficult issues that defendants that have been sued under the FDCPA or a similar statute face when deciding how to defend against litigation filed against them. That is, having evidence that they believe to be dispositive of the claims alleged against them, but being forced to wait until summary judgment to present it to the court. In the meantime, discovery takes place, and the litigation, in many instances, becomes cost prohibitive or requires the disclosure of sensitive information; thereby forcing settlement. In some instances, a defendant may be tempted to move for summary judgment at the outset, but many courts will still allow a plaintiff a chance to engage in discovery in order to respond. There are also instances where plaintiff's counsel may not be amenable to considering evidence that defendants voluntarily disclosure to show why litigation should not continue. Given the above, it is essential to know your judge and opposing counsel and to be careful in identifying

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when in the litigation engaging in motion practice will be the most effective.

[Read the full December 14, 2020 edition of the AccountsRecovery.net Compliance Digest.](#)