2017 IL App (2d) 160542-U
Nos. 2-16-0542 & 2-16-0874 cons.
Order filed June 22, 2017

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELIZABETH CHEZ,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff and Counterdefendant-Appellee,	)	
	)	
v.	)	No. 15-SC-703
	)	
FRED DOWNEY, JOANNA DOWNEY, and MATTHEW DOWNEY,	)	
	)	Honorable
Defendants and Counterplaintiffs-Appellants.	)	David P. Brodsky
	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting landlord summary judgment on counterclaim brought by tenants under the Fair Debt Collection Practices Act.

¶ 2 Plaintiff and counterdefendant, Elizabeth Chez, filed a small claims action to recover unpaid rent from her tenants, defendants and counterplaintiffs, Fred Downey, Joanna Downey, and their son, Matthew Downey. Defendants filed counterclaims, including one for statutory damages and attorney fees for alleged violations of the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 *et seq.* (2012)). Defendants allege that plaintiff and her boyfriend,

Richard Giese, acting as her agent, engaged in various forms of harassment to recover the amount owed.

¶ 3 The trial court entered summary judgment for plaintiff on defendants' FDCPA counterclaim on the ground that plaintiff was a creditor, not a debt collector; and because the FDCPA allows recovery only against debt collectors, the claim was barred. The trial court then entered an agreed order disposing of all the remaining claims. Defendants appeal the summary judgment entered on their FDCPA claim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On February 13, 2015, plaintiff filed a one-count small claims action for breach of a residential lease. The two-year lease ran from July 1, 2014, through June 30, 2016, with rent of $2,650 per month to be paid by defendants, the "lessees," to plaintiff, the "lessor." Defendants stopped paying rent within a few months, and plaintiff allegedly directed Giese to attempt to recover the debt. On November 12, 2014, around the time defendants moved out, plaintiff notified defendants that they owed $3,950 plus late fees.

¶ 6 On August 6, 2015, defendants filed an answer denying liability and three affirmative defenses, which are not germane to the appeal. Defendants also alleged two counterclaims: (1) plaintiff or her agent harassed and threatened defendants in violation of the FDCPA and (2) plaintiff wrongfully evicted defendants under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2014)).

¶ 7 On June 14, 2016, the trial court entered summary judgment for plaintiff on the FDCPA counterclaim. The court determined that there was no genuine issue of material fact as to whether the FDCPA renders plaintiff liable for her efforts to recover the debt. The court

concluded that all the evidence showed that plaintiff was merely a "creditor" under the FDCPA and not a "debt collector" who might be liable for statutory violations.

¶ 8 On June 17, 2016, the trial court entered an agreed order in which (1) plaintiff's breach of contract claim was voluntarily dismissed with prejudice; (2) defendants' counterclaim for wrongful eviction was dismissed with prejudice; and (3) the trial date was stricken with "the court finding that there are no pending claims or causes of action remaining to be tried, and judgment is hereby entered in this matter." The order states that the parties agreed to waive the right to refile their respective causes of action. Defendants' timely appeal followed.

¶ 9 On July 11, 2016, defendants filed a notice of appeal from (1) the June 14, 2016, order in which the court granted plaintiff summary judgment on defendants' counterclaim under the FDCPA and (2) the June 17, 2016, agreed order, to the extent that the agreed order finally disposed of the FDCPA counterclaim. This court docketed the appeal under case No. 2-16-0542.

¶ 10 On July 15, 2016, after defendants filed their notice of appeal but within 30 days of the agreed order, plaintiff filed a motion to modify the judgment under section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2014)). Plaintiff sought attorney fees under the FDCPA (15 U.S.C. § 1692k(a)(3) (2012)) and sanctions under Illinois Supreme Court Rule 137 (eff. July 1, 2013). On September 6, 2016, the trial court denied the motion.

¶ 11 Defendants filed a second notice of appeal on October 5, 2016, specifying the June 14, 2016, order, the June 17, 2016, agreed order, and the September 6, 2016, order. This court docketed the appeal under case No. 2-16-0874 and granted defendants' motion to consolidate the two appeals.

¶ 12 II. ANALYSIS

¶ 13 Initially, we note that defendants' two notices of appeal specify the June 17, 2016, agreed order. "Our law is clear that once an agreed order is entered, it is not appealable unless it was the result of fraud, coercion, or inequities between the parties." *McGath v. Price*, 342 Ill. App. 3d 19, 31 (2003). While the notices mention the agreed order, they state that it is being appealed only insofar as the order incorporated and made appealable the summary judgment entered on the FDCPA counterclaim. Defendants do not otherwise challenge any ruling in the agreed order or allege that it was the result of fraud, coercion, or inequities between the parties.

¶ 14 The second notice of appeal also mentions the September 6, 2016, order that denied plaintiff's motion to modify the judgment, but defendants' briefs do not challenge any portion of that order either. It appears defendants cited these orders in the notices as a prophylactic measure to ensure appellate jurisdiction. The sole issue in the consolidated appeals is the viability of defendants' counterclaim under the FDCPA.

¶ 15 Summary judgment is appropriate only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams*, 211 Ill. 2d at 43. If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004).

¶ 16 In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is to be encouraged to expedite the disposition of a lawsuit; however, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Springborn v. Village of Sugar Grove*, 2013 IL App (2d) 120861, ¶ 24. We review *de novo* a trial court's grant of summary judgment. *Springborn*, 2013 IL App (2d) 120861, ¶ 24.

¶ 17 A. FDCPA

¶ 18 A consumer injured by a "debt collector's" failure to comply with the provisions of the FDCPA is entitled to recover damages. 15 U.S.C. § 1692k (2012). The FDCPA generally prohibits "debt collectors" from engaging in abusive, deceptive, or unfair debt-collection practices. 15 U.S.C. § 1692 *et seq.* (2012). Among other things, the FDCPA regulates when and where a debt collector may communicate with a debtor (15 U.S.C. § 1692c (2012)); restricts whom a debt collector may contact regarding a debt (15 U.S.C. § 1692c (2012)); prohibits the use of harassing, oppressive, or abusive measures to collect a debt (15 U.S.C. § 1692d (2012)); and bans the use of false, deceptive, misleading, unfair, or unconscionable means of collecting a debt (15 U.S.C. § 1692e, f (2012)).

¶ 19 Defendants' counterclaim alleges that, while attempting to collect a debt for unpaid rent owed her, plaintiff or her agent violated the FDCPA by (1) contacting defendants via numerous telephone calls and text messages; (2) threatening defendants' physical safety and well-being if the unpaid rent was not tendered promptly in cash; (3) threatening defendants with law enforcement involvement if the unpaid rent was not tendered promptly in cash; (4) following or

stalking defendants as they moved to their new residence; (5) threatening to contact Fred Downey's employer to disclose the debt; (6) contacting Fred Downey at his place of employment; (7) demanding that defendants obtain loans to finance the debt; and (8) failing to comply with the notice requirement of section 9-209 of the Forcible Entry and Detainer Act (735 ILCS 5/9-209 (West 2014)).

¶ 20 Before considering the alleged violations of the FDCPA, we must determine whether it prescribes a cause of action against plaintiff, which is a matter of statutory interpretation. The primary objective of statutory interpretation is to give effect to the intent of the legislature, and the most reliable indicator of legislative intent is the language of the statute given its plain, ordinary, and popularly understood meaning. *Gardner v. Mullins*, 234 Ill. 2d 503, 511 (2009). The statute " 'should be read as a whole with all relevant parts considered.' " *Gardner*, 234 Ill. 2d at 511 (quoting *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990)). If the statutory language is clear, a reviewing court need not resort to extrinsic aids of construction, such as legislative history. *Northern Kane Educational Corp. v. Cambridge Lakes Education Association*, 394 Ill. App. 3d 755, 758 (2009). In such a situation, a court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are inconsistent with the express legislative intent. *Landheer v. Landheer*, 383 Ill. App. 3d 317, 321 (2008). Nonetheless, when reviewing a statute, we also consider the subject it addresses and the legislature's apparent objective in enacting the statute, while presuming that the legislature did not intend to create absurd, inconvenient, or unjust results. *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006). The construction of a statute presents a question of law, which we review *de novo*. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 510-11 (2007).

¶ 21 For conduct to be actionable under the FDCPA, the defendant must qualify as a "debt collector," which the FDCPA defines as 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) (2012); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 384 (7th Cir. 2010). Section 1692k provides in part that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person." 15 U.S.C. § 1692k (2012). The FDCPA imposes liability only on debt collectors: "[a]n entity that tries to collect money owed to itself is outside the FDCPA." *Carter v. AMC, LLC*, 645 F.3d 840, 842 (7th Cir. 2011); 15 U.S.C. § 1692k (2012).

¶ 22 Plaintiff argues, and the trial court agreed, that plaintiff is a "creditor," which the FDCPA generally defines as "any person who offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4) (2012). Defendants' counterclaim does not even allege that plaintiff is a "debt collector" as defined by the FDCPA. In fact, the counterclaim specifically alleges that plaintiff is a "creditor" under section 1692a(4). Plaintiff contends that the allegation constitutes a judicial admission that bars the counterclaim. We agree.

¶ 23 A judicial admission is a formal concession in the pleadings or a stipulation by a party or its counsel that effectively withdraws a fact from issue and dispenses wholly with the need for proof of the fact. See *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 102. A party's admission in an original verified pleading is a judicial admission. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). Defendants' allegation of plaintiff's status as a creditor was verified by Fred Downey's affidavit that was filed in support of the counterclaim. The allegation settled the

factual issue that, under the FDCPA, plaintiff acted as a creditor of defendants, and therefore cannot be liable for possible statutory violations committed while collecting money owed her. See *Carter*, 645 F.3d at 842 (7th Cir. 2011); 15 U.S.C. § 1692k (2012).

¶ 24 Assuming *arguendo* that the allegation is not a judicial admission, there is no genuine issue of material fact that plaintiff was a creditor and not a debt collector under the FDCPA. Plaintiff's unrebutted affidavit shows that her principal business is not debt collection for others. Plaintiff leases the residential property at issue in this case and collects unpaid rent owed her. Defendants suggest in passing that plaintiff was acting as a debt collector for her father, who was part owner of the property. However, the lease identified plaintiff as lessor, and her alleged conduct was an attempt to collect past-due rent that was owed her. Moreover, even if, as defendants also suggest, plaintiff's counsel could be viewed as engaging in debt collection, his conduct is not attributable to plaintiff under the FDCPA.

¶ 25 Under the FDCPA, plaintiff is not a debt collector whose business has the principal purpose of collecting debts. The collection of unpaid rent owed plaintiff by tenants such as defendants is tangential to her principal business of leasing property. See *Carter*, 645 F.3d at 842 ("[a]n entity that tries to collect money owed to itself is outside the FDCPA"). There is no evidence that plaintiff regularly collects or attempts to collect debts for anyone else. See 15 U.S.C. § 1692a(6) (2012); *Gburek*, 614 F.3d at 384. In fact, defendants offer no evidence that plaintiff *has ever* attempted to collect a debt for someone else. The unambiguous language of section 1692a(6) (defining "debt collector") and section 1692k (prescribing the cause of action), demonstrates that defendants may not recover against plaintiff for alleged violations of the FDCPA because she is not a debt collector.

¶ 26 B. Illinois Claim for Abusive Rent Collection Practices

¶ 27 Defendants concede that plaintiff is a "landlord" and qualifies as a "creditor" under the FDCPA, but they nevertheless assert that she also is a "debt collector" who is statutorily liable for violating the FDCPA. Citing *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39 (2009), defendants contend that, in the context of landlords, "Illinois has dispensed with the purported status distinction" between debt collectors and creditors. We disagree for two reasons: *American Management Consultant* did no such thing and defendants may not introduce an entirely new cause of action on appeal.

¶ 28 First, we reject defendants' assertion that *American Management Consultant* created an Illinois claim under the FDCPA for abusive rent collection practices. In that case, a landlord brought an action against a tenant under section 9-209 of the Forcible Entry and Detainer Act, seeking unpaid rent, utilities, late charges, possession of the property, and attorney fees and costs. The trial court granted the landlord relief on everything but the utilities. The parties disputed whether the landlord should have paid the utilities and billed back the charges or the tenant should have paid the utility providers directly. *American Management Consultant,* 392 Ill. App. 3d at 40.

¶ 29 To collect the debt, the landlord posted demands for payment on the tenant's door. The tenant filed a harassment complaint with the police and also reported that the landlord had allowed unauthorized entry of the apartment. *American Management Consultant,* 392 Ill. App. 3d at 41-42.

¶ 30 On appeal, the tenant argued, *inter alia*, that the landlord had violated the FDCPA by failing to properly serve notice of its demands for payment. *American Management Consultant,* 392 Ill. App. 3d at 43. The Appellate Court, Third District, stated as follows:

> "[W]e agree [with the tenant] that [the landlord's] notice pursuant to section 9-209 was defective and defeats its claim against [the tenant] under section 9-209. Therefore we are not required to reach [the tenant's] FDCPA argument to resolve her appeal. We will address the issue because we feel it vital to resolve any questions surrounding [the landlord's] efforts to collect 'debts' from [the tenant] and others like her, and also because resolution of the question is of significant importance to future litigants in forcible entry and detainer proceedings." *American Management Consultant,* 392 Ill. App. 3d at 48.

¶ 31 The minority justice stated, "we hold, as a matter of first impression, that lessors are required to comply with the FDCPA in their efforts to collect past-due rent from their lessees." *American Management Consultant,* 392 Ill. App. 3d at 51. The analysis focused on the purpose of the statute but did not even mention the statutory definitions of "debt collector" and "creditor," which is critical to understanding the cause of action prescribed by section 1692k. See 15 U.S.C. § 1692e (2012) (the FDCPA was enacted by Congress "to eliminate abusive debt collection practices by debt collectors"). The other two justices, specially concurring, agreed with the dispositive ruling that the landlord was not entitled to relief on its forcible entry and detainer claim based on defective notice. *American Management Consultant,* 392 Ill. App. 3d at 65 (Wright and Schmidt, JJ., specially concurring). However, the two justices declined to join the minority's *dicta* regarding the FDCPA, emphasizing that "those issues are not determinative of the outcome of this appeal." *American Management Consultant,* 392 Ill. App. 3d at 65 (Wright and Schmidt, JJ., specially concurring); see also *Golden Rule Insurance Co. v. Schwartz,* 203 Ill. 2d 456, 469 (2003) (Illinois courts do not issue advisory opinions to guide future

litigation). We decline to interpret *American Management Consultant* as creating a new cause of action against landlords in Illinois for abusive rent practices under the FDCPA.

¶ 32 Defendants support their position in large part with an isolated statement by plaintiff's counsel during the hearing on the postjudgment motion. Counsel remarked that, when a landlord attempts to collect unpaid rent, "you have to be careful if you're a creditor and still a debt collector, you're liable."

¶ 33 Counsel made the comment in the context of distinguishing this matter from *American Management Consultant*. Taken out of context, the comment lends superficial support to defendants' position, but counsel's entire statement shows it was not a concession, as defendants claim:

> "[T]he Appellate Court goes way out on the limb and says as a matter of first impression, lessors are required to comply with the [FDCPA] in their efforts to collect past due rent from their lessees. Doesn't say it creates a cause of action under Illinois law. There is now a new Illinois common law cause of action based on [the FDCPA], and it's *dicta*.
>
> The logical extreme of this Appellate Court decision, if you were to find that it creates a cause of action under Illinois law, would render the [Forcible Entry and Detainer Act] unusable. Any landlord, every landlord, weather [*sic*] they are a creditor – actually a landlord can be a debt collector. You can be a debt collector like a law firm and a landlord. So, you have to be careful if you're a creditor and still a debt collector, you're liable."

¶ 34 Defendants disingenuously take out of context counsel's comment about the need "to be careful if you're a creditor." Plaintiff's counsel simply was pointing out a flaw in defendants' interpretation of the FDCPA as it relates to the Forcible Entry and Detainer Act.

¶ 35 Second, in claiming that *American Management Consultant* created a state claim, defendants improperly attempt to pursue an entirely new action on appeal. The counterclaim was labeled "Fair Debt Collection Practices Act" and specifically alleged violations of the federal FDCPA, without mentioning anything that could be construed as an Illinois claim for abusive rent collection practices. See 735 ILCS 5/2-603(b) (West 2014) ("each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered").

¶ 36 Under these circumstances, we conclude that the trial court did not err in granting plaintiff summary judgment on defendant's counterclaim brought under the FDCPA. Therefore, the judgment must be affirmed.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the summary judgment entered for plaintiff by the circuit court of Lake County.

¶ 39 Affirmed.