

IONA C. CLARK, Plaintiff, vs. STATEBRIDGE COMPANY, LLC, Defendants.

County Court, 6th Judicial Circuit in and for Pasco County.

Case No. 51-2014-CC-892-WS, Division U.

Frank I. Grey, Judge.

**ORDER DENYING DEFENDANT'S MOTION TO  
DISMISS PLAINTIFF'S AMENDED COMPLAINT**

THIS CAUSE coming before the Court on July 22, 2014, upon Defendant's Motion to Dismiss Plaintiff's Amended Complaint, and the Court after hearing argument from counsel, having considered the motion, and being otherwise fully advised in the premises, hereby finds as follows:

1. Plaintiff filed an Amended Complaint against Defendant alleging that Defendant violated Fla. Stat. 559.72(18) when Defendant, on or about January 23, 2014 and March 4, 2014, mailed a monthly mortgage statement directly to Plaintiff which sought to collect a mortgage debt from Plaintiff.

2. Plaintiff alleges that the monthly mortgage statements violated Fla. Stat. 559.72(18) because Plaintiff was represented by legal counsel with respect to the debt at issue and that Defendant had knowledge of the representation.

3. Defendant filed a Motion to Dismiss the Amended Complaint and as the basis for requesting dismissal stated that:

“Contrary to Plaintiff's allegations, the mailing of the monthly billing statements is not a violation of the FCCPA or 559.72(18). to the contrary, the mailing of the monthly mortgage statements is required by 12 CFR 1026.41 (Regulation Z of the Truth in Lending Act). 12 CFR 1026.41 preempts the FCCPA, and therefore, Defendant's compliance with 12 CFR 1026.41 is not a violation of the FCCPA or Fla. Stat. 1026.41 as a matter of law.”

4. This Court concludes that the language found in 15 USC 1610(a)(1) reflects a conflict preemption standard and that the proper standard to determine whether or not Fla. Stat. 559.72(18) is preempted by 12 CFR 1026.41 is whether or not “compliance with both federal and state regulations is a physical impossibility”. (See Def.'s Motion to Dismiss at p. 7 citing to *Ting v. AT&T*, 319 F.3D 1126, 1136 (9th Cir. 2003) and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

5. Defendant contends that pursuant to 12 CFR 1026.41 that Defendant is required to send monthly mortgage statements directly to the Plaintiff, irrespective of the mandate of Fla. Stat. 559.72(18) prohibiting direct debt collection communications with a debtor who is represented by counsel. Defendant declares that the requirements of 12 CFR 1026.41 reflect an impossible conflict with the prohibitions contained in Fla. Stat. 559.72(18), resulting in 12 CFR 1026.41 preempting Fla. Stat. 559.72(18). According to Defendant “if this Court were to accept Plaintiff's argument that the Defendant violated 559.72(18) of the FCCPA by sending the Monthly Statements to the Plaintiff then it would create a physical impossibility on the part of the Defendant”.

6. In opposition to Defendant's position the Plaintiff contends that it is possible to comply with both 12 CFR 1026.41 and Fla. Stat. 559.72(18) simultaneously, by sending a 12 CFR 1026.41 periodic statement

to a legal counsel for a mortgage debtor, as opposed to the debtor directly, if a mortgage debtor is represented by counsel.

7. In support of her position Plaintiff makes several supported arguments, namely:

a. That Defendant's "physical impossibility" position ignores the case law which states that notice to an attorney acting within the scope of his authority is imputed to his client. Estate of Brugh, et al. v. Freas and Craft, 306 So. 2d 599 (Fla. 2d DCA 599); Brydger, P.A. v. Wolfe, 847 So. 2d 1074, 1077 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1380a]("Generally an attorney is an agent for his client; thus notice given to the attorney is considered as notice to the client.")

b. That the case of Marcotte v. General Capital Services, Inc., 709 F. Supp. 2d 944 (S.D. Cal. 2010), aside from not being binding on this Court, is distinguishable because it interpreted a California debt collection law which, unlike Fla. Stat. 599.72(18), specifically carves out a "billing statement" exception to a prohibition against contacting persons known to be represented by legal counsel.

8. This Court concludes that Fla. Stat. 559.72(18) is not preempted by 12 CFR 1026.41 because it is possible to simultaneously comply with the requirement to send a 12 CFR communicate directly with a debtor who is represented by counsel, by sending the 12 CFR 1026.41 periodic statement to legal counsel for a debtor when a debtor is represented by legal counsel. As such, when examining the four corners of the complaint for purposes of ruling on motions to dismiss the Court finds Plaintiff has stated a cause of action for a violation of Fla. Stat. 559.72(18) with regard to the Defendant's sending of the monthly mortgage statements at issue directly to Plaintiff.

Therefore it is ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Plaintiff's Amended Complaint is DENIED. Defendant shall have twenty (20) days from the entry of this order in which to Answer the Amended Complaint.

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