IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-03074 RBJ KMT

Larry Eastman and Mary Eastman and Jason Eastman

Plaintiff,

v.

NPL Capital LLC

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS (Doc. 66)

Defendant begins its motion stating: "Sometimes declining an invitation to amend a complaint and letting go is the course of action that makes the most sense. This case provides a good example." (Motion at 1). Then Defendant goes into a sixteen-page dissertation about its view of how the Defendant's conduct was not the type of "aggressive" techniques contemplated by the FDCPA and how it was, at least in this case, involved in a non-judicial foreclosure, attempting to "end the inquiry." The word "aggressive" appears five times in the motion. Because Defendant's motion clings to language and inferences in the Tenth Circuit opinion in *Obduskey* that were clearly not adopted by the Supreme Court, based on its interpretation of the FCDPA, Defendant can be very brief here. Plaintiff alternatively suggests that sometimes declining an opportunity to put yet one more technical roadblock or one more motion in front of the plaintiff and

dealing with the merits of the case is the right thing to do[1], and this case is an example. *See*, F.R.C.P. 1.

This court wisely noted in its latest decision (Doc. 64) that the Supreme Court's *Obdusky* opinion did not adopt the "aggressive" language of the Tenth Circuit stating clearly stating:

> The Tenth Circuit in *Obduskey* excluded from its purview only "aggressive collection efforts" in pursuit a nonjudicial foreclosure, *Obduskey*, 879 F.3d at 1223 (10th Cir.), but the Supreme Court seems to contemplate a wider category of conduct, that which is "related to, but not required for, enforcement of a security interest" as conduct that could place a security-interest enforcer into the purview of the main coverage of the FDCPA, *Obduskey*, 139 S. Ct. at 1039." (Opinion 3-4).

The opinion goes on to state at 4:

> "Though the Supreme Court affirmed that a business "engaged in no more than the kind of security interest enforcement at issue here – nonjudicial foreclosure proceedings" falls outside of the purview of the FDCPA (except for the limited purpose of §1692f(6)), *Obduskey*, 139 S. Ct. at 1031, it also made clear that the fact that a defendant holds a security interest should not be the end of the inquiry, *id.* at 1039-1040."

Defendant clings to the life preserver of the "aggressive" language because it has nothing else.

Then Defendant tries to enumerate the details of its non-judicial foreclosure in this case trying to "end the inquiry". This court's opinion states at 5:

> "From the amended complaint, ECF No. 34, it is unclear to me which of NPL's alleged actions were good faith efforts to pursue a

[1] The Fifth Circuit, in *McGowan v. King, Inc.,* 661 F.2d 48, 51 (5th Cir. 1981), offers a word of caution:

> "The borrower's counsel did not inflate this small [Truth-In-Lending] case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.

> nonjudicial foreclosure under Colorado state law. Though Colorado state law on nonjudicial foreclosure proceedings was not briefed and is not at issue, I am doubtful that repeated phone calls and communications with a homeowner's parents are required to pursue a nonjudicial foreclosure under Colorado state law."

Plaintiff can easily brief here, in three words, the requirements of Colorado foreclosure law on calling the adult borrower's parents. *There are none*. Moreover, Defendant's motion suggests none.

The proposed amended complaint, on the other hand, sets forth almost verbatim the conversations between the Defendant's agent and the Plaintiff's parents in Paragraphs 3(f) and 5. There is absolutely no justification for them under the FDCPA, Colorado foreclosure law or any other authority. Moreover Paragraph 6 of the Complaint states:

> "6. That as a direct result thereof Plaintiff Jason Eastman suffered severe emotional distress which was a real injury and symptomatic. There were long standing emotional scars between Plaintiff Jason Eastman and Mary and Larry Eastman over the handling of obligations and the calls caused Larry Eastman and Mary Eastman to become heavily involved in the matter of this default and those wounds were opened by the third-party contact causing serious family conflict and arguments."

Cases like this are likely the very reason Congress condemned third party contact to start with. Quite bluntly, Congress has determined that telling parents even that there is a debt possibly subject to foreclosure *is* abusive, especially in family situations like this.

It is interesting how Defendant goes into great detail about the details of the non-judicial foreclosure ***here*** but mentions little else about its regular practices which are the real issue in the case. If its primary business is debt collection, the calls to the parents are illegal. If it were primarily in the foreclosure

business, it will have every chance to offer evidence of its other foreclosures (if there are any at all) and Plaintiff can ask about its collection activities. Plaintiff's complaint pleads that NPL is in the collection business and foreclosures are, if anything, incidental. It lists the collection activities it has found from the public record and limited written discovery. Even assuming there are other foreclosures commenced by Defendant, the true nature of its primary business will likely be for the jury, and Defendant will have every opportunity to argue its case.

Finally, Defendant opines that NPL did not call the parents to collect the debt and that the letters "NPL" could mean other than the phrase "non-performing loans". The text of the conversations is listed on Paragraph 3(f) of the proposed amended complaint. Defendant does little less than ask the Court to leave its common sense at home. Calls about avoiding foreclosure to the parents certainly are not calls about a "nurse progress log" (Motion to Dismiss 14); the only reasonable inference is that they are to collect the debt. Even so, Defendant can make even that argument to the jury.

The motion should thus be denied.

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent to counsel for Defendant via the ECF system.

/s/ Blair K. Drazic