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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DEBORAH COVARRUBIAS, Plaintiff and Respondent, v. ZEE LAW GROUP et al., Defendants and Appellants.	B276577 (Los Angeles County Super. Ct. No. GC051048)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Zee Law Group, Tappan Zee and Kimberly Barrientos, for Defendants and Appellants.

No appearance for Plaintiff and Respondent.

In order to recover a debt with a principal amount of approximately $1,700, a law firm representing a collection agency recorded a judgment lien on the home of the debtor's parents. The law firm then fought the parents' attempts to remove the lien, which the trial court eventually declared void more than three years after the attorney recorded it. We consider whether the record on appeal establishes the trial court erred in finding, following an unreported bench trial, that the collection agency and its counsel were liable for violating the federal Fair Debt Collection Practices Act.

I. BACKGROUND

A. Factual History

In 1997, Ignacio Covarrubias, Jr. (Ignacio Jr.)[1] stipulated to a money judgment in favor of defendant and appellant Union Adjustment Co., Inc. (Union). The total amount of the judgment was $2,189.88, comprised of $1,702.10 in principal plus $487.78 in attorney fees, interest, and costs. In April 2007, Union's attorney—defendant and appellant Tappan Zee, who is the principal of defendant and appellant Zee Law Group (we will refer to Tappan Zee and his firm as "Zee")—renewed the judgment, which then totaled $4,339.16, including accrued interest.

In 2011, the judgment was still outstanding and Zee conducted a LexisNexis records search on Ignacio Jr., who was 36 years old at the time. The resulting report identified variations of Ignacio Jr.'s name, including "Ignacio Covarrubias" without

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[1] We refer to Ignacio Jr. and his relatives by their first names for clarity.

the "Jr." Two social security numbers were listed in the report, one issued in 1957-1958 and one issued in 1988. The number issued in 1957-1958 was associated with a person identified as "Ignacio Covarrubias" or "Ignacio Covarrubias, Sr." The search results listed records of assessments and deeds pertaining to real property owned by Ignacio Covarrubias (i.e., without any "Jr."), which included a home on Windwood Drive in Walnut (the Property).

In 2012, Zee filed an Affidavit of Identity and Order maintaining that Ignacio Jr. was also known as "Ignacio Covarrubias." After a judge signed the order "virtually [as] a ministerial act," Union obtained an Abstract of Judgment against "Ignacio J. Jr. Covarrubias aka Ignacio Covarrubias" using the Property as his last known address. In July 2012, Zee filed the Abstract of Judgment with the Los Angeles County Recorder.

Ignacio Jr.'s parents, plaintiff and respondent Ignacio Covarrubias Sr. (Ignacio Sr.) and his wife Deborah Covarrubias (Deborah),[2] owned the Property outright and had a $25,000 homeowners equity line of credit with California Bank and Trust. At some point in the latter part of 2012, plaintiff learned of the Abstract of Judgment recorded against his property by Zee. Counsel for plaintiff contacted Zee, told him Ignacio Jr. had no

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[2] The underlying lawsuit was commenced by Ignacio Sr. alone, but after he died during the course of the litigation, Deborah substituted into the case in his place. For ease of reference, we refer to both Deborah and Ignacio Sr. as "plaintiff."

interest in the Property, and requested that the lien be removed.[3] Zee took no action to remove the lien.

In February 2013, Zee wrote to California Bank and Trust (plaintiff's bank) on Union's behalf. The letter stated Zee was "pursuing a judgment abstract lien on the [P]roperty" and a levy sale of the Property was "pending or proposed . . . ." The letter demanded California Bank and Trust provide information about its interest in the Property. Zee also subpoenaed California Bank and Trust records relating to the Property and to any accounts or other property interests of Ignacio Jr.

After receiving Zee's demands, California Bank and Trust froze plaintiff's line of credit. The bank informed plaintiff it had received a "'request for payoff related to an enforcement of judgment action against the [P]roperty,'" which was an "'adverse change in [plaintiff's] financial condition'" constituting "'an event of default'" under the loan documents. (Emphasis in quotations omitted.)

B. Procedural History

Plaintiff filed a verified complaint against defendants Union and Zee in March 2013, alleging causes of action for slander of title, abuse of process, violation of the federal Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 et seq.), and declaratory and injunctive relief.

The trial court denied an anti-SLAPP special motion to strike brought by defendants, but this court reversed that

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[3] Ignacio Jr. used the Property as a mailing address, but he had never held any ownership interest in the Property and he had not lived there since the mid-1990s.

decision in part, which resulted in the elimination of plaintiff's slander of title and abuse of process claims. (*Covarrubias v. Union Adjustment Co., Inc.* (Aug. 12, 2014, B250489) [nonpub. opn.].) Later on remand, the trial court granted summary adjudication for plaintiff on the cause of action for declaratory relief. The court ruled that because it was undisputed Ignacio Jr. had no interest in the Property, plaintiff was entitled to a declaration that the Abstract of Judgment did not create a judgment lien on the Property. The court issued an order declaring the judgment lien "void as to Plaintiff and [the Property]."

Plaintiff's case proceeded to a bench trial solely on the FDCPA cause of action. The record indicates Deborah, Ignacio Jr., Zee, and counsel for California Bank and Trust testified during the three-day trial, but there is no record of the evidence presented because no court reporter was present to transcribe the proceedings.

At the conclusion of trial, the trial court issued a ruling with written findings of fact. The court found defendants "threaten[ed] to sell plaintiffs' home for the debt of someone for whom plaintiffs and their home are not legally responsible," which was proscribed by a provision of the FDCPA that makes a person or entity liable for a "threat to take any action that cannot legally be taken or that is not intended to be taken." The court awarded plaintiff the maximum statutory damages available: $1,000.

II. DISCUSSION

Defendants contend the trial court erred in finding them liable under the FDCPA because they are not "debt collectors"

subject to the act and plaintiff was not a "consumer" with standing to sue under the act. Defendants further argue the litigation privilege shields them from liability. Both claims fail. In the absence of a transcript of the trial, we presume the trial court's finding of liability is correct. In addition, the litigation privilege is inapplicable to defendants' conduct as a matter of law.

A. Standard of Review

Determining whether defendants were "debt collectors" and whether plaintiff was entitled to sue under the FDCPA requires us to interpret that statute, which we do de novo, and to apply our interpretation to the facts found by the trial court, which findings we review to determine whether they are supported by substantial evidence. (*San Luis Rey Racing, Inc. v. California Horse Racing Board* (2017) 15 Cal.App.5th 67, 73; *Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 353.) The applicability vel non of the litigation privilege, Civil Code section 47, subdivision (b), is a legal question that we consider independently. (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1273.)

B. The FDCPA Applies to Defendants

The FDCPA "prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices." (*Heintz v. Jenkins* (1995) 514 U.S. 291, 292 (*Heintz*).) For example, debt collectors may not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt" (15 U.S.C. § 1692d), "use any false, deceptive, or misleading

representation or means in connection with the collection of any debt" (15 U.S.C. § 1692e), or "use unfair or unconscionable means to collect or attempt to collect any debt" (15 U.S.C. § 1692f).

A "debt collector" subject to the above provisions is "[(1)] 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 [(2)] 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).)

Union contends the trial court erred in finding it liable as a "debt collector" because it owned Ignacio Jr.'s underlying debt and was not seeking to recover that debt on behalf of another party. The person to whom a debt is originally owed is not a "debt collector" under the FDCPA. (15 U.S.C. § 1692a(6)(F).) And in *Henson v. Santander Consumer USA Inc.* (2017) 582 U.S. ___ [137 S.Ct. 1718, 1721-1722] (*Henson*), the United States Supreme Court held an entity that "regularly purchase[s] debts originated by someone else and then seek[s] to collect those debts for their own account" is not a "debt collector" under the FDCPA.

Union's argument does not carry the day, section 1692a(6)(F) and *Henson* notwithstanding. The trial court found Union was not the original owner of the debt—meaning it was not excluded from the definition of "debt collector" pursuant to § 1692a(6)(F)—but rather, had "acquired the right to collect the sum from someone else . . . ." While *Henson* provides that some third party purchasers of debts are not "debt collectors" under the FDCPA, the decision did not purport to exclude from the debt collector definition all third party purchasers of debts. Rather, *Henson* only addressed the part of the definition of "debt collector" that pertains to those "who regularly collect[ ] or

attempt[ ] to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" (15 U.S.C. § 1692a(6)). (*Henson*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1721].) The decision expressly declined to address "another statutory definition of the term 'debt collector'—one that encompasses those engaged 'in any business the principal purpose of which is the collection of any debts.' § 1692a(6)." (*Ibid*.)

It is an appellant's burden to affirmatively demonstrate error through an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) We presume the trial court's judgment is correct, and "'[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .'" (*Denham*, *supra*, at p. 564, citations omitted.) Without a reporter's transcript of the trial (or a settled or agreed statement of the proceedings), we accordingly presume sufficient evidence supports the trial court's finding that Union was a "debt collector" under the FDCPA. Because the trial court's finding that Union was a "debt collector" is presumptively supported by the record before us and is not contrary to authority, including *Henson*, Union's argument fails.

Zee similarly contends the evidence presented during trial is insufficient to establish Zee is a "debt collector" under the FDCPA because Zee was merely acting as Union's attorney and Union is itself exempt from the act. "[A]ttorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation," may be treated as debt collectors under the FDCPA. (*Heintz*, *supra*, 514 U.S. at p. 299.) Zee concedes "a reporter's transcript would be beneficial in reviewing this matter," but, again, that is quite the understatement. At the

risk of belaboring the point, the absence of a transcript of the trial means we presume sufficient evidence supports the trial court's finding that Zee satisfies the FDCPA "debt collector" definition. (*Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 186 ["The fatal problem with this appeal is that Foust fails to provide us with a reporter's transcript from his court trial or any other adequate statement of the evidence"].) Indeed, the trial court's written findings of fact indicate Zee engaged in various activities that showed he prioritized the recovery of debt over his responsibilities as an attorney.

C. Plaintiff Was Entitled to Sue Defendants Under the FDCPA

A "debt collector" who engages in conduct prohibited by the FDCPA "with respect to any person is liable to such person" for actual and statutory damages. (15 U.S.C. § 1692k(a).) By its own terms, the private enforcement provision in section 1692k "authorizes any aggrieved person" to sue under the act. (*Marx v. General Revenue Corp.* (2013) 568 U.S. 371, 374, fn. 1; see also *Carrizosa v. Stassinos* (N.D.Cal. 2009) 669 F.Supp.2d 1081, 1083 ["plain language of the statute . . . does not limit standing to consumers"]; *Dutton v. Wolhar* (D.Del. 1992) 809 F.Supp. 1130, 1134-1135 [legislative history of FDCPA specifies it "'protects people who do not owe money at all[,]'" including those "'who do not owe money, but who may be deliberately harassed [such as] the family, employer and neighbors of the consumer'"].)

Certain FDCPA subsections, however, have been interpreted as limiting private enforcement to "consumers," which the act defines as "any natural person obligated or allegedly obligated to pay any debt" (15 U.S.C. § 1692a(3)). (See,

e.g., *Reddin v. Rash Curtis & Associates* (E.D.Cal. July 13, 2016, No. 2:15-01305 WBS CKD) 2016 WL 3743148 at *3 [section 1692c, communications in connection with debt collection]); *Conboy v. AT & T Corp.* (S.D.N.Y. 2000) 84 F.Supp.2d 492, 504, affd. (2d Cir. 2001) 241 F.3d 242 [section 1692e(11), disclosure in initial communication].)

Defendants contend there is insufficient evidence plaintiff was a "consumer" entitled to sue under the FDCPA. This contention, like all the others they raise, is meritless. Defendants were found liable for violating 15 U.S.C. § 1692e(5), i.e., "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken." Enforcement of that provision is not limited to "consumers." Moreover, even if it were, the trial court found plaintiff was a "consumer" because the fact that defendants "were after their home" was "about as 'allegedly obligated to pay a debt' as it gets." The trial court's legal conclusion is supported by persuasive authority (see, e.g., *Dunham v. Portfolio Recovery Associates, LLC* (8th Cir. 2011) 663 F.3d 997, 1002 [person mistakenly dunned (i.e., subject to persistent demands) by debt collector because he shared the same name as the debtor was a "consumer"]; *Davis v. Midland Funding, LLC* (E.D.Cal. 2014) 41 F.Supp.3d 919; *Diaz v. D.L. Recovery Corp.* (E.D.Pa. 2007) 486 F.Supp.2d 474, 477), and the conclusion's factual underpinnings are unassailable for a reason we trust is not necessary to repeat for a third time.

D. The Litigation Privilege Does Not Apply to Defendants' Conduct

Civil Code section 47, subdivision (b) prohibits a party from filing a lawsuit based on communications made in judicial

proceedings or other official proceedings authorized by law. This "litigation privilege" is not without exceptions, however, and one of them applies here. Claims that are based on conduct specifically prohibited by the FDCPA are not barred by the litigation privilege. (*People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1271, 1275.) Defendants were alleged and found to have taken actions specifically prohibited by the FDCPA. Those actions, therefore, find no refuge in the litigation privilege.[4]

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[4] We also reject defendants' contention that the judgment against them is against public policy because it discourages the enforcement of judgments. The FDCPA reflects a national policy determination that "debt collectors" should be prohibited from using "abusive, deceptive, and unfair debt collection practices . . . ." (15 U.S.C. § 1692(a).) As the trial court did not err in finding defendants liable for abuse under the FDCPA, the judgment against them does not contravene but rather effectuates sound public policy goals.

DISPOSITION

The judgment is affirmed. Respondent shall recover any costs she may have incurred on appeal.

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BAKER, J.

I concur:

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

KRIEGLER, Acting P.J., concurring
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I concur in the result reached by the majority. In my view, a sufficient response to the appeal is a summary affirmance due to the absence of a reporter's transcript of trial.

Appellants concede "a reporter's transcript would be beneficial in reviewing the matter." They phrase the issues as whether the court's "evidentiary conclusions" were an abuse of discretion on the issue of whether Union is a debt collector and whether plaintiff met his burden of proof that Union was a debt collector. Because these issues are necessarily dependent on the facts, and we have no trial record, I would affirm on the basis the judgment is presumed correct and appellants have failed to carry their burden of establishing prejudicial error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

KRIEGLER, Acting P.J.