

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOEL F. BROWN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 98-444-P-C
)	
MAINE MEDICAL CENTER, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON MOTION OF DEFENDANTS TRYNOR AND
BUCHANAN TO DISMISS ALL CLAIMS**

The individual defendants, Carl R. Trynor and Norman H. Buchanan, both lawyers, move to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the federal-law claims asserted against them in this action and, pursuant to Fed. R. Civ. P. 12(b)(1), the state-law claims as well. I recommend that the court grant the motions in part and deny them in part.

I. Applicable Legal Standards

The motion to dismiss the federal-law claims invokes Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see*

also Jackson v. Faber, 834 F. Supp. 471, 473 (D. Me. 1993).

The defendants seek dismissal of the state-law claims pursuant to Fed. R. 12(b)(1). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

II. Factual Background

The complaint makes the following factual allegations concerning the federal-law claims against the individual defendants. In 1993 Brighton Medical Center obtained judgment against the plaintiff in state court in the amount of \$28,200.16 plus interest and costs. Complaint (Docket No. 1) ¶¶ 6-7. A writ of execution was duly issued and filed in the York County Registry of Deeds on October 18, 1993. *Id.* ¶ 8. In 1996 the plaintiff satisfied the judgment by means of sale of real property to a third party who gave a mortgage to Brighton Medical Center. *Id.* ¶¶ 9-11. Brighton Medical Center provided the plaintiff with a written release executed on its behalf by defendant Buchanan and acknowledged under oath before defendant Trynor. *Id.* ¶ 9 & Exh. B. The release was recorded in the York County Registry of Deeds on August 12, 1996. *Id.*

In November 1996, December 1997, July 1998 and October 1998 the defendants made written demands upon the plaintiff for payment of the satisfied judgment. *Id.* ¶¶ 12, 13, 20, 30. In March 1998 defendant Buchanan acknowledged to an attorney representing the plaintiff that the demands made in November 1996 and December 1997 were based on the 1993 judgment. *Id.* ¶ 16. In March 1998 the plaintiff's attorney informed the defendants that "erroneous adverse credit information [had been] generated by the defendants" and asked them to cooperate in correcting the erroneous information. *Id.* ¶ 19. The plaintiff then applied for credit from a bank and a leasing company to acquire equipment for his business. *Id.* ¶ 21. These applications were denied, and the leasing company informed the plaintiff that its denial was due to the outstanding Brighton Medical Center judgment reflected on his TRW credit report. *Id.* ¶ 22. A subsequent application for credit was also denied on this basis. *Id.* ¶ 23.

The plaintiff contacted TRW to dispute and correct the erroneous information on his credit report. *Id.* ¶ 24. TRW personnel subsequently reported to the plaintiff that the individual defendants had been contacted on or about May 19, 1998 and had "verified the debt as outstanding." *Id.* ¶ 25. In August 1998 the defendants executed a discharge of the mortgage given to Brighton Medical Center by the purchaser of the plaintiff's property, which was recorded on September 1, 1998 in the York County Registry of Deeds. *Id.* ¶¶ 26-29.

III. Discussion

Count I of the complaint alleges that the three defendants are "furnishers of information to consumer reporting agencies within the meaning and intent of the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*" *Id.* ¶ 32. All of the defendants are alleged to have violated 15 U.S.C.

§ 1681s-2(a) & (b), and the individual defendants are alleged to have caused damage to the plaintiff thereby. *Id.* ¶¶ 33-36. Count II seeks injunctive relief, apparently in connection with the allegations presented in Count I. *Id.* ¶¶ 37-38. Although the identical memoranda of law submitted by the individual defendants suggest that Count III, which alleges defamation and seeks punitive damages, *id.* ¶¶ 39-44, is also based on federal law, Memorandum in Support of Motion to Dismiss (“Trynor Mem.”) (Docket No. 2) at 6; Memorandum in Support of Motion to Dismiss (“Buchanan Mem.”) (Docket No. 3) at 6; Memorandum in Support of Motion for Summary Judgment (Docket No. 14) at 2; Memorandum in Support of Motion for Summary Judgment (Docket No. 12) at 2, that count by its terms can only be construed to raise state-law claims. Accordingly, my analysis of the motions to dismiss the federal claims¹ is limited to Counts I and II.

The parties spend considerable time and effort discussing whether the individual defendants are “consumer reporting agencies” within the scope of the Fair Credit Reporting Act (the “Act”) and whether the plaintiff’s claims are covered by the Act because the complaint alleges that credit was denied to the plaintiff only in connection with a business purpose.² Neither point appears relevant

¹ Both individual defendants submitted affidavits with their motions to dismiss. In their identical replies to the plaintiff’s opposition to these motions, the individual defendants have submitted unsigned memoranda of law, additional affidavits and purported statements of material fact, requesting that, in the alternative, this court treat their motions as motions for summary judgment, as provided by Fed. R. Civ. P. 12(b) (if matters outside the pleadings are considered in connection with a motion under Rule 12(b)(6), the motion shall be treated as one for summary judgment under Rule 56). None of the affidavits meets the requirements of Fed. R. Civ. P. 56(e), and neither of the statements of material facts meets the requirements of this court’s Local Rule 56. Even if that were not the case, I would recommend that the court exclude the submitted materials and treat these motions, brought soon after the complaint was filed, solely as motions to dismiss. My analysis will proceed on that basis.

² The plaintiff’s response that “counsel for the plaintiff anticipates amending the complaint to reflect . . . additional denials of credit” intended primarily for personal, family or household use, (continued...)

to the claims asserted in the complaint, which invoke only 15 U.S.C. § 1681s-2, a recent addition to the Act.³ That statute provides, in relevant part:

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if —

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

* * *

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall —

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i (a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency; and

²(...continued)

Plaintiff's Response to Motion to Dismiss (Docket No. 9) at 3, does nothing to avoid the dismissal of the complaint on this basis in the absence of a motion for leave to amend accompanied by a proposed amended complaint making such additions, neither of which has been filed in this case.

³ All of the case law cited by the parties either predates or does not mention section 1681s-2.

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.

* * *

(d) Limitation on enforcement

Subsection (a) of this section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials and the State officials identified in that section.

15 U.S.C. § 1681s-2.

The complaint does not allege that the plaintiff is one of the federal or state agencies or officials identified in 15 U.S.C. § 1681s, and no reading of the complaint, however generous, could allow the inference to be drawn that he is such an agency or official. Accordingly, section 1681s-2(d) requires that any claims asserted against the individual defendants in this action under section 1681s-2(a) be dismissed.

The same is not true of the claims asserted under section 1681s-2(b), however. That subsection does not require that the alleged violator be a consumer reporting agency; it applies to anyone who furnishes information to a consumer reporting agency. The complaint does allege that the defendants furnished information to a consumer reporting agency. Complaint ¶ 34. Section 1681s-2 has nothing to do with consumer reports; therefore, the Act's definition of that term, with its limitation to credit used primarily for personal, family or household purposes, 15 U.S.C. § 1681a(d), is irrelevant to a claim brought under section 1681s-2.

There is a possible set of facts, although discerning its existence requires an extremely generous reading of the complaint, upon which the plaintiff could recover on his claim under section 1681s-2(b). That subsection requires that persons in the position of the individual defendants here who receive notice "pursuant to section 1681i(a)(2)" of a dispute regarding information provided by

them to a consumer reporting agency properly investigate and, *inter alia*, report the results of the investigation to the consumer reporting agency. The complaint alleges that TRW, which a reader may infer from the complaint is alleged to be a consumer reporting agency, contacted the individual defendants after being informed by the plaintiff that he disputed information on his TRW credit report concerning the satisfied judgment obtained by Brighton Medical Center. Complaint ¶¶ 24-25. Section 1681i(a)(2) requires a consumer reporting agency to provide notification of such a dispute “to any person who provided any item of information in dispute, at the address and in the manner established with the person.” It is reasonable to infer from the complaint that the alleged “contact” between TRW and the individual defendants met these requirements. The complaint does not allege that the individual defendants had in fact provided any information to TRW before this “contact,” but again, reading the complaint extremely generously, it is possible under the circumstances so to infer. The complaint does allege the remaining elements of a claim under section 1681s-2(b). Complaint ¶ 34.

However, it must be noted that the allegations of the complaint do not entitle the plaintiff to recover under section 1681s-2(b) for any damage allegedly caused before May 19, 1998, the date of the only alleged notice to the individual defendants that fits within the language of section 1681i(a)(2) (notice given by a consumer reporting agency). Although it is far from clear, it appears from the complaint that the denials of credit by a bank and a leasing company which form the basis of the alleged damages occurred before the “contact” between TRW and the individual defendants. *Id.* ¶¶ 20-24. The plaintiff could not recover under section 1681s-2(b) for any damage that occurred in that time period. The complaint also alleges that a “subsequent application for credit” was denied due to the disputed information. *Id.* ¶ 23. At this stage of the proceedings, the complaint’s

allegations on this point, although marginal, may reasonably be construed to allege a timely injury. Accordingly, the motions to dismiss must be denied as to any claims under 15 U.S.C. § 1681s-2(b) for injury arising thirty days or more after May 19, 1998. 15 U.S.C. § 1681s-2(b)(2) (deadline for required actions is that provided by section 1681i(a)(1), which is 30 days beginning on the date that notice is received).

While the individual defendants' motions to dismiss the state-law claims asserted against them in the complaint invoke Rule 12(b)(1), their memoranda discuss only the court's supplemental jurisdiction under 28 U.S.C. § 1367. Trynor Mem. at 6; Buchanan Mem. at 6. That statute is the appropriate basis for consideration of the state-law claims under the current circumstances. If the court adopts my recommendation that the motions to dismiss the federal claims against the individual defendants be denied in part, the court may not decline to exercise supplemental jurisdiction over the state-law claims. The court will not have dismissed all claims over which it has original jurisdiction,⁴ the state-law claims do not raise novel or complex issues of state law, the state-law claims do not substantially predominate over the federal claims, and the individual defendants offer no compelling reason for declining jurisdiction over the state-law claims. 28 U.S.C. § 1367(c); *Murray v. Bath Iron Works Corp.*, 867 F.Supp. 33, 47 (D. Me. 1994).

IV. Conclusion

For the foregoing reasons, I recommend that the motions to dismiss of defendants Trynor and Buchanan be **GRANTED** as to any claims under 15 U.S.C. § 1681s-2(a) and as to any claims under

⁴ The federal claims against the corporate defendant are not affected by the pending motions. *See also* 28 U.S.C. § 1367(a) (supplemental jurisdiction includes claims that involve joinder of additional parties).

15 U.S.C. § 1681s-2(b) for injury arising before thirty days after May 19, 1998, and otherwise
DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 18th day of March, 1999.

*David M. Cohen
United States Magistrate Judge*