

KRISTEN L. ANDERSON,

Plaintiff

vs.

AMERICAN GENERAL
FINANCE, INC. ,

Defendant

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

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: NO. 02-00,053

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: MOTION FOR SUMMARY JUDGMENT

Date: August 17, 2004

MEMORANDUM OPINION and ORDER

Before the Court for disposition is Defendant American General Finance, Inc.'s Motion for Summary Judgment filed May 19, 2004. This case is on the Court's September Trial Term List, and in the interest of timely entry of the Order a detailed opinion will not be issued at this time. A further opinion supplementing the Court's reasoning for the entry of the order expressed herein will be entered if need be.

This case arises out of a debt claimed due by American General Finances, Inc. (hereafter "American General"). American General brought suit against Kristen L. Anderson (hereafter "Anderson") to recover the debt. In September 1998, Anderson and American General entered into an agreement to settle the suit. Pursuant to a written Settlement and Release Agreement, Anderson agreed to pay American General \$1,000 to discharge the debt and American General agreed to have removed from Anderson's credit record any reference to the alleged debt.

It appears undisputed that in 2000 Anderson discovered that the debt remained on her credit record contrary to the provision in the Settlement and Release Agreement.

American General acknowledged this in a letter between the parties' legal counsel. American General further promised that it would resolve the matter by taking steps to remove the aforementioned disputed debt from Anderson's credit record. Subsequently, in December 2001, Anderson discovered that this still was not done, and her credit record referenced the debt as being past due and discharged as a bad debt.

Basically, the Motion for Summary Judgment asserts five separate contentions, which the Court will address *seriatim*. First is the allegation that Anderson's defamation claim is barred by the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* The Court agrees that the Fair Credit Reporting Act preempts state law in this regard, and that in order to recover a showing of malice or willful intent to injure is required. 15 U.S.C. §1681t(b)(1)(F); ***Purcell v. Universal Bank, N.A.***, 2003 U.S. Dist. LEXIS 7061, 16 (E.D.Pa. 2003). The Court, however, believes Anderson has introduced evidence to support her defamation allegations that could allow a fact finder to infer malice or willful intent to injure from the asserted actions of American General in refusing to comply with the agreement to remove the credit reference against Anderson in a timely and proper manner.

Secondly, American General makes the assertion that the Statute of Limitations precludes Anderson from pursuing the defamation claim, because there was no publication of any alleged defamatory statement or communication within one year of filing the Complaint. Plaintiff initiated this action by filing a Complaint on January 14, 2002. Plaintiff has produced evidence that a publication of the defamatory credit report occurred on December 12, 2001. Therefore, the Complaint was filed within one year of this alleged publication. Plaintiff also asserts evidence that up to ten other publications were made between February 21, 2001 and

November 21, 2001. Nevertheless, American General, relying upon the single publication rule, asserts that since the initial publication was made in 1998 Anderson's defamation claim is time barred as the Statute of Limitations began to run on the date of the first publication.

Based upon *Dominick v. National Enquirer*, 266 A.2d 626 (Pa. 1969), it appears that under the statutory single publication rule 42 Pa. C.S. §8341 (cited the statute's predecessor 12 P.S. §2090.1) the day of the first publication does not necessarily commence the running of the Statute of Limitations. Rather, under the statutory single publication rule, a plaintiff may bring a cause of action within one year of any publication provided that plaintiff is limited to one single cause of action regardless of the number of publications. However, plaintiff is limited to being able to recover only the damages arising within one year prior to the filing of the complaint.

It also must be stated that the Court is not entirely satisfied, at this summary judgment stage that the single publication rule applies. Further evidence in that regard may be needed to determine whether or not the various reports to the inquirers who obtained a credit report on Anderson were similar to a further circulation of the initial publication, as referenced in *Graham v. Today's Spirit*, 468 A.2d 454 (Pa. 1983), or in fact constituted a separate and distinct publication. Regardless, the Statute of Limitations is not available as an absolute defense in this case, but at trial may be applied to prevent recovery of damages arising more than one year prior to the filing of the Complaint.

The third issue raised by the Motion for Summary Judgment relates to Count 2 of Plaintiff's Complaint, which asserts a breach of contract. Count 2 alleges that American General committed the breach of contract when it failed to appropriately correct Anderson's

credit record. American General asserts there has been no economic loss shown as a result of its alleged failure to comply with the settlement agreement. To the contrary, Anderson asserts that because American General did not correct the credit report as agreed she has been obligated to expend in excess of \$5,000 in order to prosecute this action and otherwise attempt to have her credit report brought into compliance with the agreement. The Court believes this would be an appropriate item of damages. Anderson has also provided testimony by way of deposition that her credit expenses through higher interest rates have been increased asserting that this is part of the damages. Anderson should be allowed to pursue that evidence and prove that damage claim at trial.

The fourth issue raised in the Motion for Summary Judgment is that there can be no claim for punitive damages because the evidence fails to establish actual malice. Having induced the payment of \$1,000 from what might have otherwise been a non-collectible account and then failing to live up to its bargain to remove any reference to the debt from Anderson's credit report after acknowledging the agreement had not been carried out as promised would be evidence from which a fact finder could infer malice on the part of American General. Therefore, summary judgment is denied on this issue.

American General lastly seeks a dismissal of all of Anderson's causes of action because of a "failure to prosecute." In this regard, American General asserts that once the action was filed Anderson failed to conduct any discovery in the case. Defendant's Brief filed May 19, 2004, 14. American General also asserts that Anderson's counsel took no action in the case since attending Anderson's deposition taken in March 2003 and that, as a result, there was a lack of due diligence on the part of Anderson. The Court does not believe this is an

appropriate basis for dismissal of Anderson's claims. After the original Complaint was filed on January 14, 2002, American General filed preliminary objections and in response Anderson filed an Amended Complaint on February 28, 2002. American General again filed preliminary objections, which were appropriately responded to by Anderson. The Court ruled upon the preliminary objections on July 22, 2002. In January 2004 Anderson's counsel wrote to the Court Scheduling Technician inquiring as to the status of the matter, since it had not been scheduled for disposition and he had expected it to be called for trial. Thereafter a case-flow conference was held in March 2, 2004 and the case set for trial in the Court's September 2004 Trial Term. The Summary Judgment Motion presently before the Court was thereafter filed.

When the case was started Anderson would have been required to file a case monitoring notice, under Lycoming County Rule L1007. If this notice had been filed a case scheduling conference would have been held in approximately May 2002 at which time a trial term date would have been set, probably for January or May 2003. It does not appear that Anderson filed an initial case monitoring notice and therefore a case-flow conference was not scheduled. Nevertheless defense counsel had the right to file a request for a case-flow conference at any time. American General has not asserted that Anderson has failed to provide any discovery or failed to respond to any request. There is no evidence that prejudice arose from Anderson's omission to request an earlier case-flow scheduling conference or otherwise. Therefore, the Court does not believe it would be appropriate to dismiss the claim due to lack of prosecution. Accordingly, the following Order will be entered.

ORDER

For the reasons set forth above, Defendant's Motion for Summary Judgment filed May 19, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: G. Scott Gardner, Esquire
Joseph J. Tusso, Esquire
Reed Smith, LLP; Philadelphia, PA
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)