UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-62200-CIV-DIMITROULEAS/SNOW

DAWN MIMBS,

Plaintiff,

vs.

J.A. CAMBECE LAW OFFICE, P.C.,

Defendant.
_____/

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE is before the Court on the Defendant J.A. Cambece Law Office, P.C.'s Motion for Judgment on the Pleadings [DE 11], filed herein on May 17, 2013. The Court has considered the Motion, Plaintiff Dawn Mimbs' Response [DE 12], Defendant's Reply [DE 13], and is otherwise fully advised in the premises.

I. BACKGROUND

According to the allegations of Plaintiff's Complaint [DE 1], Plaintiff, Dawn Mimbs ("Plaintiff" or "Mimbs") is a natural person who at all relevant times resided in the State of Florida, County of Broward, and City of Pompano Beach. *See* Complaint [DE 1] at ¶ 4. Plaintiff is a "consumer" under the Fair Debit Collections Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") as defined by 15 U.S.C. § 1692a(3)[1] as well as the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55 *et seq.* ("FCCPA"). *See* [DE 1] at ¶ 5. Defendant, J.A. Cambece Law Office, P.C., ("Defendant" or "Cambece") is a professional corporation and at all relevant

[1] The term "consumer" means any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. § 1602a(3).

times was engaged, by use of mails and telephone, in the business of attempting to collect a "debt" from Plaintiff, as defined by 15 U.S.C. § 1692a(5)[2] as well as the FCCPA. [DE 1] at ¶ 6. Defendant is a "debt collector" as defined by 15 U.S.C. § 1692a(6)3. [DE 1] at ¶ 7. Plaintiff is obligated, or allegedly obligated, to pay a debt owed or due to a creditor other than Defendant. [DE 1] at ¶ 8. Plaintiff's obligation due to a creditor other than Defendant arises from the use of credit card for household, family, automotive, and personal purposes. [DE 1] at ¶ 9.

In connection with an alleged debt in default (the "Debt"), Defendant, via its agents and/or employees, began placing telephone calls to Plaintiff on or about June 14, 2012. [DE 1] at ¶ 11. At such time, Plaintiff disclosed to Defendant that she was terminally ill, and demanded that Defendant stop placing telephone calls to her. [DE 1] at ¶ 12. Thereafter, on June 15, 2012 at or around 4:51 P.M., Defendant's agent and/or employee "Brian" placed a call to Plaintiff's cellular telephone and, at such time, spoke with her. [DE 1] at ¶ 13. During the June 15, 2012 telephone conversation, Plaintiff informed "Brian" that she is very ill, could hardly speak, and has terminal lung cancer. [DE 1] at ¶ 14. "Brian" responded by becoming very hostile and yelling that Plaintiff was going to pay this debt, and that it did not matter about Plaintiff's illness. [DE 1] at ¶ 14. During the same conversation, Plaintiff again demanded that Defendant stop placing telephone calls to her. [DE 1] at ¶ 15. Despite Plaintiff's repeated demands for Defendant

[2] The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C. § 1692a(5).

[3] 15 U.S.C. § 1692a(6) provides in relevant part:

> The term "debt collector" means 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 who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

to stop calling her, Defendant placed at least twelve additional calls to Plaintiff between June 14, 2012 and June 22, 2012. [DE 1] at ¶ 16.

Plaintiff alleges that as a result of Defendant's harassing and abusive efforts to collect the Debt, she has suffered from emotional distress, felt depressed, and has had undue stress while dealing with a terminal illness. [DE 1] at ¶ 17. Further, Plaintiff alleges that Defendant's actions constitute conduct highly offensive to a reasonable person, and a result of Defendant's behavior, Plaintiff suffered and continues to suffer injury to her feelings, as well as feelings of personal humiliation, embarrassment, and mental anguish and/or emotional distress. [DE 1] at ¶ 18.

Plaintiff filed the instant action on November 7, 2012, asserting four causes of action. [DE 1]. Count I alleges a violation of 15 U.S.C § 1692d(2)[4]. [DE 1] at ¶¶ 19-20. Count II alleges a violation of 15 U.S.C. § 1692d(5).[5] [DE 1] at ¶¶ 21-22. Count III alleges a violation of Fla. Stat. § 559.72(7)[6.] [DE 1] at ¶¶ 23-25. Count IV alleges a violation of Fla. Stat. § 559.72(8).[7]

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[4] 15 U.S.C § 1692d provides in relevant part:

> A debt collector 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. Without limiting the general application of the foregoing, the following conduct is a violation of this section: . . .
>
> > (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
> > .
> > .
> > .
> > (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

[5] See fn. 4.

[6] Prohibited practices generally.—In collecting consumer debts, no person shall: . . .

> > (7)Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.
>
> Fla. Stat. § 559.72(7)

[DE 1] at ¶¶ 26-28. Defendant argues that it is entitled to judgment as a matter of law with respect to Plaintiff's four claims.

II. DISCUSSION

A. Standard of Review of a Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) states: "[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." As such, the Federal Rules of Civil Procedure permit that a party may move for judgment on the pleadings for a failure to state a claim upon which relief may be granted as long as it is filed early enough not to delay trial. A motion for judgment on the pleadings [under Federal Rule of Civil Procedure 12(c)] is governed by the same standard as a Rule 12(b)(6) motion to dismiss; on a motion for judgment on the pleadings, a court must make all inferences in favor of the nonmoving party and "must 'accept the facts alleged in the complaint as true.'" *See Guarino v. Wyeth LLC*, 823 F.Supp.2d 1289, 1291 (M.D. Fla. 2011) (quoting *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998)). A motion to dismiss and a motion for judgment on the pleadings should not be granted unless "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Losey v. Warden*, 12-16363, 2013 WL 2450736, *1 (11th Cir. June 4, 2013) (quoting *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002)).

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[7] Prohibited practices generally.—In collecting consumer debts, no person shall: . . .

> (8) Use profane, obscene, vulgar, or willfully abusive language in communicating with the debtor or any member of her or his family.

Fla. Stat. § 559.72(8)

The Court must assume that all facts in the complaint are true and view those facts in a light most favorable to the non-moving party. *See Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). The main difference between a motion to dismiss and a motion for judgment on the pleadings is that a motion for judgment on the pleadings is made after an answer and that answer may also be considered in deciding the motion. *See United States v. Bahr*, 275 F.R.D. 339, 340 (M.D. Ala. 2011). Judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Mergens v. Dreyfoos*, 166 F.3d 1114, 1116–17 (11th Cir.1999)).

B. Defendant's Motion for Judgment on the Pleadings

i- Substance/content of calls

Defendant contends that the language allegedly used by Defendant when communicating with Plaintiff is insufficient to support a violation of 15 U.S.C. § 1692d(2). Defendant relies on *Mammen v. Bronson & Migliaccio, LLP*, 715 F. Supp. 2d 1210, 1218 (M.D. Fla. 2009); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1178 (11th Cir. 1985); *Kelemen v. Prof. Collection Sys.*, 2011 WL 31396 (M.D. Fla. Jan. 4, 2011); and *Montgomery v. Florida First Fin. Group, Inc.*, 2008 WL 3540374, *2-3 (M.D. Fla. Aug. 12, 2008) to argue that the factual allegations in Plaintiff's Complaint regarding the substance of the phone calls, *i.e.*, telling the Plaintiff that she was going to pay the debt and that it did not matter if she was sick, is not a violation of the relevant statutes and thus fails as a matter of law.

In Response, Plaintiff argues that Defendant's motion should be denied on the grounds that whether a debt collector's conduct is harassment requires a fact-intensive analysis and is a question of fact for the jury. Plaintiff relies on *Jeter*, 760 F.2d at 1179 ("Ordinarily, whether

conduct harasses, oppresses, or abuses will be a question for the jury. Nevertheless, Congress has indicated its desire for the courts to structure the confines of § 1692d."). Plaintiff also argues that whether the nature of Defendant's calls was harassing is a fact question and cannot be decided as a matter of law, relying on *Holland v. Bureau of Collection Recovery*, 801 F. Supp. 2d 1340, 1343 (M.D. Fla. 2011).[8][DE 12] at p. 3. Additionally, Plaintiff cites to a Federal Trade Commission ("FTC") policy statement that the "[p]rohibited actions are not limited to the six subsections listed as examples of activities that violate this provision.[9]"

In *Jeter*, the Eleventh Circuit held that "claims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse." *Jeter*, 760 F.2d at 1179. Here, Plaintiff argues that she exemplifies the standard articulated by the Eleventh Circuit, *i.e.*, that she is more susceptible to harassment or abuse due to her declining health and because she told Defendant that her illness prevented her from speaking over the phone and asked Defendant to stop calling. Defendant responds that Plaintiff's attempt to frame *Jeter* as a subjective test is incorrect. Defendant argues that the fact that the Plaintiff was allegedly in poor health at the time of the alleged calls from

[8] In support of her contention that the majority of courts regard the reasonableness of a debtor's follow up activities as a factual question, Plaintiff string cites the following cases: *see, e.g., Rucker v. Nationwide Credit, Inc.*, No. 2:09-CV-2420-GEB-EFB, 2011 WL 25300, at *2 (E.D. Cal. Jan. 5, 2011); *Brown v. Hosto & Buchan, PLLC*, 748 F. Supp. 2d 847, 853 (W.D. Tenn. 2010); *Valentine v. Brock & Scott, PLLC*, No. 2:09-CV-2555-PMD, 2010 WL 1727681, at *4 (D.S.C.. Apr. 26, 2010); *Krapf v. Nationwide Credit Inc.*, No. SACV 09-00711 JVSMLG, 2010 WL 2025323, at *3-4 (C.D. Cal. May 21, 2010); *Kerwin v. Remittance Assistance Corp.*, 559 F. Supp. 2d 117, 1124 (D. Nev. 2008): *Prewitt v. Wolpoff & Abramson, LLP*, No. 05 CV 725S(F), 2007 WL 841778 (W.D.N.Y. Mar. 19, 2007); *Akalwadi v. Risk Mgmt. Alternatives, Inc.*, 336 F. Supp. 2d 492, 506 (D. Md. 2004); *Joseph v. J.J. Mac Intyre Co.*, 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002); *Kuhn v. Account Control Tech, Inc.*, 865 F. Supp. 1443, 1453 (D. Nev. 1994); *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 376 (N.D. Tex. 1986), *affirmed*, 823 F.2d 880 (5th Cir. 1987); *Clark v. Quick Collect, Inc.*, 2005 WL 15868662, at *4 (D. Or. June 30, 2005).

[9] Plaintiff cites to: Statements of General Policy or Interpretation—Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50104-05 (Fed. Trade Comm'n Dec. 13, 1988), *available at* http://www.ftc.gov/os/statutes/fdcpa/commentary.htm#806.

Defendant has no relevance to her claims under § 1692d, as the standard upon which her claim must be evaluated is objective, not subjective.

As Defendant correctly states, *Jeter* sets up an objective test to evaluate a claim under § 1692d. The *Jeter* court explained:

> Whether a consumer is more or less likely to be harassed, oppressed, or abused by certain debt collection practices does not relate solely to the consumer's relative sophistication; rather, such susceptibility might be affect by other circumstances of the consumer or by the relationship between the consumer and the debt collection agency. . . . [C]laims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes [him or her] relatively more susceptible to harassment, oppression, or abuse.

Id. The Court agrees with Defendant that Plaintiff's attempt to frame the *Jeter* test as a subjective test is misplaced, because the "consumer whose circumstances makes [him or her] more relatively more susceptible to harassment, oppression, or abuse" is meant to be applied objectively. *Id.*

Plaintiff also relies on *Dunning*[10] to argue that the substance of Defendant's calls support the finding of harassment. [DE 12] at p. 5. The instant Complaint alleges that after Plaintiff told Defendant that she was terminally ill, Defendant became hostile and yelled at her that she was going to pay the debt and that it did not matter about her illness. [DE 1] at ¶ 14. Plaintiff argues that even though Defendant did not use profanity, that does not rule out a cause of action under § 1692d(2) because this part of the statute prohibits both "obscene or profane language *or* language the natural consequence of which is to abuse the hearer or reader." 15 U.S.C. § 1692d(2) (emphasis added).

The Court finds that Defendant's language is not violative of § 1692d(2). In *Jeter*, the

[10] *Dunning v. Portfolio Recovery Associates, LLC*, 903 F. Supp. 2d 1362, 1368 (S.D. Fla. 2012) (holding that harassment "may be inferred from the substance of calls received from the debt collector.")

court held that section 1692d(2) is meant to:

> [D]eter offensive language which is at least akin to profanity or obscenity. Such offensive language might encompass name-calling, racial or ethnic slurs, and other derogatory remarks which are similar in their offensiveness to obscene or profane remarks. This is in keeping with one of the purposes of the FDCPA '[t]hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable or civil manner.' 123 Cong. Rec 10241 (1977) (statement of Representative Annuzio, Chairperson of Subcommittee which sponsored the legislation).

760 F.2d at 1178.

The instant language does not rise to the level of offensiveness of abuse, harassment, profanity or obscenity when "viewed from the prospective of a consumer whose circumstances [make] [her] relatively more susceptible to harassment, oppression, or abuse." *See id.* at 1179. Rather, the Court finds the substance of the call in this case more similar to that in *Kelemen*, 2011 WL 31396, at *3. There, where the complaint alleged that the defendant told the plaintiff to "pay your damn bills," the court held that plaintiff's claim failed as a matter of law because:

> The [Defendant's] employee did not utilize any racial or ethnic slurs or engage in any name-calling, and when the language in this case is compared to the language that other courts have found to be abusive or harassing, it is evident that "pay your damn bills" does not rise to the level of offensiveness required by *Jeter*.

Id. In *Montgomery*, 2008 WL 3540374, defendant debt collector allegedly called the plaintiff and her mother "liars," repeatedly berated plaintiff for dishonesty for writing a bad check, and made multiple representations to the plaintiff and her mother that there was an arrest warrant out for plaintiff. *Id.* at *2-3. The court held that there was no violation of § 1692d(2) because "the term 'liar' falls short of language 'akin to profanity or obscenity' and therefore, does not violate the statute." *Id.*

This Court finds *Kelemen*, and *Montgomery* persuasive. If being called a "liar" and being told to "pay your damn bills" do not violate § 1692d, then the language used by Defendant in the

instant case also does not rise to the level necessary for a violation. This Court agrees with the *Kelemen* court that language that is "merely rude and unpleasant" does not violate the FDCPA. *See Kelemen*, 2011 WL 31396, at *3. Additionally, under *Jeter*, the language used in the instant case does not amount to the level of offensiveness that "might encompass name-calling, racial or ethnic slurs, [or] other derogatory remarks which are similar in their offensiveness to obscene or profane remarks." *Jeter*, 760 F.2d at 1178. Accordingly, Defendant does not violate § 1692d from a content-based standpoint.

ii- Volume/frequency of calls

Section 1692d(5) prohibits debt collectors from "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." Defendant argues it is entitled to judgment as a matter of law because the number of calls allegedly placed by Defendant to Plaintiff cannot support a violation of 15 U.S.C. § 1692d(5). Defendant also argues that Plaintiff's allegations do not establish that Defendant caused her phone to ring or engaged her in telephone conversation "repeatedly or continuously" as required by § 1692d(5), relying on the FTC commentary for 15 U.S.C. § 1692d(5)[11].

In determining liability under § 1692d(5), "[c]ourts have held that '[w]hether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls.'" *Brandt v. I.C. Sys., Inc.*, 2010 WL 582051 at * 2 (M.D. Fla. Feb. 19, 2010). Under this section, "[a]ctionable harassment or annoyance turns on the volume and pattern of

[11] FTC Staff Commentary on the Fair Debt Collection Practices Act located at http://www.ftc.gov/os/statutes/fdcpa/commentary.htm#806 ("'Continuously' means making a series of telephone calls, one right after the other.")

calls made, irrespective of the substance of the messages." *Majeski v. I.C. Sys., Inc.*, 2010 WL 145861, at *3 (N.D.Ill. Jan. 8, 2010).

In this case, to support her claim under section 1692d(5), Plaintiff has alleged that Defendant placed a total of fourteen calls to Plaintiff over a nine day period, that these calls resulted in a total of two (2) conversations between the parties, in which Plaintiff told Defendant to stop calling her. See [DE 1] at ¶¶ 11-16.

Here, the alleged call volume and frequency of Defendant's calls to Plaintiff does not satisfy the case law interpreting this section of the FDCPA. *See Saltzman v. I.C. Sys., Inc.*, 09-10096, 2009 WL 3190359 (E.D. Mich. Sept. 30, 2009) (granting summary judgment for defendant debt collector who telephoned plaintiff every day, several times a day, during a five week period in attempt to collect alleged debt); *Tucker v. CBE Group, Inc.*, 710 F. Supp. 2d 1301 (M.D. Fla. 2010) (granting summary judgment to defendant debt collector who placed fifty seven total calls, up to seven calls per day); *Druschel v. CCB Credit Services, Inc*., 2011 WL 2681637 (M.D. Fla. Jun. 14, 2011) *report and recommendation adopted*, 2011 WL 2681953 (M.D. Fla. Jul. 11, 2011) (summary judgment granted to defendant who allegedly placed 14 calls to plaintiff over a 17 day period). Additionally, here, as in *Saltzman*, there "a significant disparity between the number of telephone calls placed by Defendant and the number of actual successful conversations with Plaintiff" (*Saltzman* a ratio of "at best, 1:5; here an even lower ratio of 1:7), which suggests a difficulty of reaching Plaintiff, rather than an intent to harass. *See Saltzman*, 2009 WL 3190359, at * 7.

Here, unlike in cases relied upon by Plaintiff, the Complaint does not allege several calls by Defendant on the same day, impermissible automated calls, or more than two conversations with Defendant. *See Holland*, 801 F. Supp. 2d at 1343, *Brown v. Hosto & Buchan, PLLC*, 748 F.

Supp. 2d 847, 852 (W.D. Tenn. 2010), and *Akalwadi v. Risk Mgmt Alternatives, Inc.*, 336 F. Supp. 2d 492, 506 (D. Md. 2004). Plaintiff's reliance on *Dunning*, 903 F. Supp. 2d at 1368 is misplaced. There, the parties disputed the accuracy of two different sets of phone records, although the parties agreed that defendant called plaintiff anywhere between 70-120 times. 903 F. Supp. 2d at 1367. Additionally, in *Dunning*, this Court found that there was a genuine issue of fact regarding whether defendant or any of defendant's agents ever actually spoke to plaintiff in connection with collecting plaintiff's debts and, if so, what was discussed. *Id.* In *Dunning*, there was a dispute as to the content and volume/frequency of the calls, whereas here, where the Court is relying on Plaintiff's allegations as true, there is no dispute regarding content, frequency and volume.

Because the alleged call volume and frequency in the instant case is insufficient to substantiate a violation of § 1692d(5), Defendant is entitled to judgment as a matter of law on this claim.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant J.A. Cambece Law Office, P.C.'s Motion for Judgment on the Pleadings [DE 11] is hereby **GRANTED** as to Plaintiff's claims under the Fair Debit Collections Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA");
2. Pursuant to Fed. R. Civ. P. 58(a), the Court will enter a separate final judgment in Defendant's favor on Plaintiff's FDCPA claims;
3. The Court declines to exercise supplemental jurisdiction over Plaintiff's claims arising under the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55 *et seq.* ("FCCPA");

4. Plaintiff's FCCPA claims are hereby **DISMISSED WITHOUT PREJUDICE** being filed in state court.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31st day of July, 2013.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record