UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON,	
Plaintiffs,	
vs.	CIVIL ACTION
LEVYLAW, LLC and BART E. LEVY,	No.: 17-1139
Defendants.	

PLAINTIFFS' REPLY BRIEF IN SUPPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Based on Defendants' opposition to summary judgment, there is no dispute that Defendants threatened and then initiated litigation against a family of eight for money they did not owe, and demanded possession of the family's home when possession could not be granted. Nor is there any dispute that Defendants made additional misrepresentations, including demanding fees they admit were not owed, and declaring Plaintiffs' home fit for its intended use, when Philadelphia authorities declared it unfit for human occupancy. In doing so, Defendants violated §§ 1692(e), (e)2 and (e)10 of the Fair Debt Collection Practices Act, a strict liability statute, and Plaintiffs are therefore entitled to summary judgment as a matter of law.

In their pleadings, Defendants admit virtually every material fact, including that Argentina Perez Irineo, Defendants' landlord client, failed to comply with the preconditions Philadelphia sets on the collection of rent. They concede Plaintiffs' analysis of FDCPA case law, in not attempting to rebut any of it. And they do not so much as cite current Philadelphia law.

Instead, Defendants try to obscure the issue through dozens of references to immaterial facts, misrepresentations of the record, and the use of a sham affidavit by Levy that contradicts his deposition testimony and which is entirely reliant on evidence Defendants refused to produce during discovery. None of this can save Defendants. They violated the FDCPA, and they are liable.

A. Levy Demanded Money that was not Owed and Demanded Possession that the Law Says Could not be Granted

Defendants freely admit the core issue here: Philadelphia law sets preconditions on the legal collection of rent. That is, Defendants understand that a landlord in Philadelphia must have a housing license and must provide a tenant with a Certificate of Rental Suitability in order to have the legal right to collect rent. *See* Pls.' SUF ¶ 57-58; Defs.' Br. 16 (acknowledging that landlords may not collect rent without a valid license). In fact, the law is explicit:

> Any owner who fails to obtain a rental license as required by § 9-3902, or to comply with § 9-3903 regarding a Certificate of Rental Suitability, . . . **shall be denied the right to recover possession of the premises or to collect rent during or for the period of noncompliance…**

Phila. Code § 9-3901(4)(e) (emphasis added). Moreover, Defendants also admit the factual predicates at issue here: that Irineo failed to comply with these preconditions, and that, contrary to the averments of the eviction complaint, Levy's client failed to even provide heat, so the home had been declared unfit for human occupancy. Defs.' SUF ¶¶ 14, 20, 25, 40-42.[1]

Defendants nevertheless argue that landlords may pursue an eviction "regardless of whether the landlord had a valid housing inspection license for periods of time for which the landlord is demanding rent and/or the landlord possesses and/or gave to a tenant a Certificate of Rental Suitability." Defs.' Br. 16. They do not explain how they reached that conclusion, and in any case, ignore the most fundamental canon of construction, that statutory analyses begin and end with unambiguous language. *E.g.*, *Commonwealth v. Dickson*, 918 A.2d 95, 102 (Pa. 2007).

Defendants instead improperly rely on *Richetti v. Ellis*, 2017 Pa. Super. Unpub. LEXIS 2455 (Pa. Super. Ct. June 27, 2017), a nonprecedential decision analyzing a previous version of Philadelphia law. *See* Pa. IOP Super. Ct. 65.37 ("An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding . . . ."). But even were it precedential, *Richetti* is irrelevant to the issue at hand: there a jury found a landlord was only seeking rent for the period after he complied with the law. *See* 2017 Pa. Super. Unpub. LEXIS 2455 at *2-3 (noting the landlord complied in December, and sought rent for January through March). The issue, instead, was whether Philadelphia law provided for disgorgement of

[1] Defendants deny whether Plaintiffs' previous landlord complied with this law, ignoring they already admitted this fact. *Compare* Defs.' SUF ¶ 5-6 *with* Ex. B, Defs.' Ans. ¶¶ 16, 19.

previously collected funds, an issue not before this Court.[2] *Id.* at *7-8. Here there is no dispute: Defendants sued for back rent for a period in which their client was unlicensed, and sued for back rent and possession despite their clients not providing Plaintiffs with a Certificate of Rental Suitability. In other words, Defendants sued over a debt that was not owed or was unenforceable, violating the FDCPA. *See Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011).

Defendants next claim that "[u]nlike the Housing Inspection License, a landlord in Philadelphia can file a complaint in the Philadelphia Municipal Court seeking a judgment for money, possession, or both against an alleged defaulting tenant even if the landlord does not possess a Certificate of Rental Suitability at the time of filing." Defs.' Br. 17. Putting aside that their support for this proposition is an op-ed from the Legal Intelligencer, the argument makes little sense.[3] The identical section of law that bars landlords from seeking rent or possession when they fail to comply with the license requirement provides the same penalties for noncompliance with the Certificate of Rental Suitability requirement. Phila. Code § 9-3901(4)(e) (discussing consequences for an owner "who fails to obtain a rental license as required by § 9-3902 or to comply with § 9-3903 regarding a Certificate of Rental Suitability").

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[2] Defendants also cite stray dictum from *Richetti* for the proposition that Philadelphia Law does not prohibit landlords from collecting back rent after they come into compliance. That, too, would not save Defendants here, given their admission that Irineo was not complying with Philadelphia law. *See* Defs.' SUF ¶¶ 14, 25. Neither was that issue before the *Richetti* Court, which is likely why the decision does not even cite to the noncompliance provisions of Philadelphia law. In any case, the argument is wrong. The law unambiguously provides that any owner who fails to comply "shall be denied the right . . . to collect rent during **or for the period** of noncompliance." Phila. Code § 9-3901(4)(e) (emphasis added).

[3] The op-ed discusses the trial court decision in *Richetti*, 2016 Phila. Ct. Com. Pl. LEXIS 348, at *24-25 (C.P. Sep. 7, 2016). That decision, written by the Supervising Judge of Landlord-Tenant Court, repeats that the law "clearly" provides that an out of compliance party "**may not bring an action to enforce the contract and the other party may use the lack of a license as a defense to any such action**." *Id.* at *24-25 (emphasis added). In other words, it supports finding that Defendants violated the FDCPA. *See Huertas*, 641 F.3d at 32-33.

Defendants next cite the Rules of Professional Conduct, but that is not the test. *See Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 178 (3d Cir. 2015) (rejecting argument that Rules of Civil Procedure foreclose FDCPA liability). Defendants similarly devote an entire section to a discussion of Rule 11, yet ignore Circuit precedent that forecloses the relevancy of that argument. *See id.*; *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 277 (3d Cir. 2013) ("[T]he FDCPA applie[s] despite the availability during litigation of judicial oversight, due-process protections, detailed procedural rules, and remedies to curtail and punish improper actions by creditors' attorneys.").

Finally, Defendants argue that liability should not attach because Levy relied upon the representations of his client. Even were this argument relevant, Levy cannot point to any representations he relied upon, because he does not even know who from his office spoke with his client. Pls.' SUF ¶ 31. He attempts to whistle past this reality by positing that "it is likely" or he is "sure" that these representations were actually made to staff, based upon the procedures he allegedly maintains. Defs.' Br. 4, 12, 14. But Levy offers no authority for the notion that a "likely" event can create a material dispute, nor would such hearsay be admissible. *See* Fed. R. Evid. 602, 802.

In any case, Defendants put the cart before the horse. The FDCPA is a strict liability statute. *E.g.*, *Glover v. FDIC*, 698 F.3d 139, 149 (3d Cir. 2012). Thus, whether Levy was relying on client representations is irrelevant to his liability, outside of the affirmative defenses he can attempt to prove. *See Reichert v. Nat'l Credit Sys.*, 531 F.3d 1002, 1007 (9th Cir. 2008) ("When we spoke . . . of the nonliability of a debt collector who 'reasonably relies' on the reported debt, we were referring to a reliance on the basis of procedures maintained to avoid mistake."). That is, if Defendants made misrepresentations—a fact they essentially admit—their office procedures

only matter if they can prove they are entitled to the statute's bona fide error defense. As explained next, Defendants make no serious attempt to clear this hurdle.[4]

B. <u>Levy Admits his Procedures Were Not Adapted to Avoid the Misrepresentations at Issue Here</u>

A debt collector may escape liability under the FDCPA's affirmative defense if he proves each of the following: "(1) the alleged violation was unintentional, (2) the alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite procedures designed to avoid such errors." *Beck v. Maximus, Inc.*, 457 F.3d 291, 297-98 (3d Cir. 2006); 15 U.S.C. § 1692k(c). Qualifying procedures "are processes that have mechanical or other such regular orderly steps designed to avoid errors like clerical or factual mistakes." *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 394 (3d Cir. 2017) (citations and internal quotation marks omitted). "Self-proclaimed but baseless 'reliance' on . . . creditor-clients" will not suffice. *Turner v. J.V.D.B. & Assocs.*, 318 F. Supp. 2d 681, 687 (N.D. Ill. 2004).

Defendants' attempted reliance on the bona fide error defense can begin and end with their admission that they regularly file eviction actions when their clients do not comply with the law, arguing (with no legal support) that they are entitled to do so because they could sometimes win a judgment anyway. Defs.' SUF ¶¶ 57-58, 76. This aligns with Levy's inability to so much as identify what error his procedures were designed to avoid. *See* Ex. J at 139:18-140-8.

Even were a factfinder to dig deeper, however, the defense fails. In discovery, Defendants stated they possessed no documents related to their procedures to avoid error in debt collection. Ex. R. ¶ 15. Levy then identified the *totality* of his procedures as follows:

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[4] Defendants do not contest another of Plaintiffs' claims: that they asserted that the property was fit for its intended purpose when it was without heat and designated unfit for human occupancy. And Defendants do not even so much as mention the separate law which holds that such a designation means a tenant owes no rent. *See* Pls.' Br. 17-18. Any opposition to Plaintiff's argument is therefore waived. *See, e.g.*, *Childers v. Joseph*, 842 F.2d 689, 694 (3d Cir. 1988).

> An interview regarding this eviction was held with the client. The client told Defendants that the Plaintiffs failed to pay rent. There was no reason to disbelieve the client and no proof of payment of rent was ever received from Plaintiffs.

Ex. I, Defs.' Resp. to Interrogatories ¶ 15.

Bare assertions of a client interview will not suffice, particularly since Levy admits his staff asked four things from his clients for the 2-3,000 evictions he files per year: whether there was a landlord tenant relationship, whether there was a current license, whether there was an accounting system, and whether there was a lease. Defs.' SUF ¶ 70. In other words, Levy did not ask about the conditions of properties, or whether his clients complied with Philadelphia's preconditions on the collection of rent. *See Agostino v. Quest Diagnostics, Inc.*, No. 04-4362, 2011 U.S. Dist. LEXIS 127904, at *17 (D.N.J. Nov. 3, 2011) (granting summary judgment while rejecting procedures "devoid of any specificity regarding . . . how they are reasonably adapted to avoid the specific error at issue").

Defendants next make black and white misrepresentations of the record, positing that their procedures in November 2016 were to check for a Certificate of Rental Suitability and to ask whether a property was licensed during all the periods for which they demand rent. *See* Defs.' Br. 17. Levy's deposition testimony directly contradicts these brand new assertions:

> Q. Do you review whether there's a Certificate of Rental Suitability at the property?
> A. I ask.
> Q. What do you mean you ask?
> A. I ask the plaintiff for – it's one of the documents we ask for.
> Q. And so if you're reviewing a demand letter --
> A. Right.
> Q. -- and you don't see a Certificate of Rental Suitability what do you do?
> A. I ask the landlord whether they have one or not.
> Q. And what do you do if the landlord says they don't?
> A. I help them obtain one. At least I show them where to go on the City's website.
> **Q. Was that your procedure in November of 2016?**
> **A. No.**

Ex. J at 41:6-42:1 (emphasis added).

He continued:

> Q. I just want to make sure the record is clear. You asked whether he currently had a license; correct?
> A. Right.
> Q. Did you also ask your clients in November of 2016 whether they had a license for the periods in which you were demanding back rent?
> A. No.
> Q. In November of 2016, did you ask your clients for a Certificate of Rental Suitability?
> A. No.

Ex. J at 45:2-16; *see also* Defs.' SUF ¶ 56 (admitting the same). Defendants provide no explanation for these misrepresentations.

Last, Defendants suggest two documents serve as procedures to avoid error: a paralegal training manual and a workflow log. Yet Levy already disclaimed this very argument. For example, when asked why he did not produce the manual prior to his deposition, given Plaintiffs' request for any procedures maintained to avoid any bona fide errors in the collection of debts, Levy stated that his manual **"didn't fit this description at all**," Ex. J at 142:1-14, and continued:

> Q. So your training manual for paralegals --
> A. Right.
> Q. -- is not related to the procedures reasonably adapted to avoid any error in debt collection?
> A. No, that's my job. I ultimately have to do the checking.

Ex. J at 142:20-143:3. He then confirmed that following the procedures of the manual would not have stopped him from initiating the underlying eviction here. Ex. J at 141:15-18.

Levy made the same admission about the "work flow log," a document where Levy keeps allegedly relevant information, but which does even not include whether his clients acquired a license or a Certificate of Rental Suitability. Ex. J at 57:17-23. According to Levy, the log is no more relevant to avoiding errors in debt collection than the pens in his hand, *id.* 145:4-11, and he provides no explanation of how it was adapted to avoid the kind of errors Defendants made here.

Defendants' professed reliance on the training manual unmasks the cynicism of their argument. When representing *tenants*, Levy's manual instructs staff to ask about whether property conditions are habitable, identifying heat, for example, as one of "three essential things" a landlord must supply, and that the "[f]ailure to provide a tenant with one of these essential things could result in a reduction of the judgment or winning the case for the tenant." Ex. M at 12. And when representing *tenants*, Levy's manual instructs his employees that "[t]he first thing we want to look at . . . is the housing inspection license on the complaint and dates the landlord is claiming due. If the license was not valid during the time the landlord is claiming rent, the tenant may not have to pay the [*sic*] during that time period." Ex. M at 10. In this same manual, Levy instructs his employees to caution his *landlord* clients that if they sue for money when they did not comply with Philadelphia law they may not be able to collect it. *Id*. at 9. And despite that he admits he didn't ask for it, Levy's manual acknowledges that a Certificate of Rental Suitability is a "[d]ocument[] required for filing Landlord/Tenant Complaint." Ex. M at 5-6.

Philadelphia's legal requirements are no mystery to Levy. He believes, however, that so long as he represents landlords, he can ignore them without consequence. Federal law says otherwise. And Levy's failure to provide any reasonable procedures to prevent the errors at issue here precludes his reliance on the bona fide error defense.

C. Levy May Not Create a Material Dispute with a Sham Affidavit Referring to Alleged Evidence He has Withheld

In his deposition, Levy admitted to another violation of the FDCPA: demanding attorney fees that were not owed, but which were instead his estimate of what might *eventually* be charged. *See* Pls.' Br. 18-19. Faced with Levy's admission, Defendants make a last-ditch effort to defeat summary judgment with an affidavit that not only contradicts his testimony, but which wholly relies on evidence they refused to produce. It should be accorded no weight.

Under the sham affidavit doctrine, when "a nonmovant's affidavit contradicts earlier deposition testimony without a satisfactory or plausible explanation, a district court may disregard it at summary judgment in deciding if a genuine, material factual dispute exists." *Daubert*, 861 F.3d at 391. This is especially true when "the affiant was carefully questioned on the issue, had access to the relevant information at the time, and provided no satisfactory explanation for the later contradiction." *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d. Cir. 1998). A witness attempting to contradict his earlier deposition with an affidavit must show he was "confused at the earlier deposition or for some other reason misspoke" or that there is "independent evidence in the record to bolster an otherwise questionable affidavit." *Daubert*, 861 F.3d at 391.

Levy's submission is the definition of a sham affidavit. Levy was carefully questioned on his fee arrangement during his deposition. He admitted that the "$500 demanded [was] an estimate of what [he] anticipated w[ould] be incurred" but was "not what was owed at the time of filing." Ex. J, 86:8-13.[5] In his affidavit, he directly contradicts this admission by positing he actually "agreed to charge the owner $500" for filing the complaint. ECF No. 36 ¶ 8. He admitted in his deposition that he demanded $500 because "it's fully anticipated that there will be another $250 charged to complete the lockout." Ex. J, 85:14-15. Yet now, in his affidavit, he asserts "the [landlord] was obligated to pay [Levy] the full $500 under any circumstances." ECF No. 36 ¶ 19. [6] Levy provides no explanation for his contradictions.

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[5] Levy's manual describes the same pricing structure as his testimony: a charge for filing a case, and subsequent charges for additional work. Ex. M at 1.

[6] Even were it an oral agreement, Levy's instant claim is either hearsay, or it contradicts Levy's admission that he does not recall communicating with Irineo or her agent. Defs.' SUF ¶ 31. This Court should exclude the affidavit under either scenario. *See Daubert*, 861 F.3d at 391; *Smith v. City of Allentown*, 589 F.3d 684, 693 (3d Cir. 2009) (when presenting hearsay within hearsay, a

Making matters worse, Levy's entire affidavit relies on the terms of a supposed retainer agreement that Defendants refused to produce during the litigation. In discovery, Plaintiffs requested all documents relating to any fees Levy charged Plaintiffs, and any retainers Levy had with his clients. Ex. I, ¶ 19; Ex. R ¶¶ 1, 18. Levy objected on various grounds, from relevancy to privilege, and did not identify or produce a retainer (and he still does not provide it here). Ex. I, ¶19; Ex. R ¶ 18. In other words, far from using "independent evidence in the record to bolster an otherwise questionable affidavit," *Daubert*, 861 F.3d at 391, Defendants bolster their argument with a second-hand description of an alleged agreement he refused to produce. This should be rejected.[7] Levy's admissions may be unhelpful to him, but they are clear, and warrant judgment.

D. Conclusion

The undisputed facts prove Defendants initiated and threatened litigation over a debt that was not owed, misrepresented Plaintiffs owed money when they did not, threatened to take possession of Plaintiffs' home when they had no entitlement to do so, and declared Plaintiffs' home fit when it was without heat and declared unfit for human occupancy. Defendants therefore violated §§ 1692(e), (e)(2) and (e)(10) of the FDCPA, and summary judgment is warranted.

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nonmovant "must demonstrate that both layers of hearsay would be admissible at trial," or else such evidence will be excluded).

[7] The affidavit should also be excluded under Rule 37, which calls for the exclusion of undisclosed evidence "unless (a) the non-disclosing party provides substantial justification for its failure, or (b) the failure to make the required disclosure is harmless. The non-producing party shoulders the burden of proving substantial justification for its conduct or that the failure to produce was harmless." *Tolerico v. Home Depot*, 205 F.R.D. 169, 175 (M.D. Pa. 2002). Levy provides no justification, and his failure to produce the retainer has deprived Plaintiffs of the ability to question Levy about the contents of the alleged retainer and the alleged retainer's direct contradictions with Levy's testimony.

Date: March 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the enclosed brief, along with its supporting exhibit, was made on March 27, 2018, and served to counsel for Defendants via the electronic filing system.

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