

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ferris Johnson,

Civil No. 99-1699 (DWF/AJB)

Plaintiff,

v.

MEMORANDUM
OPINION AND ORDER

United States of America-Department of
Defense a/k/a Defense Finance and
Accounting Service,

Defendant.

Thomas J. Lyons, Jr., Consumer Justice Center, 1560 Beam Avenue, Suite A, St. Paul, MN
55109, appeared on behalf of Plaintiff.

Patricia R. Cangemi, Assistant United States Attorney, 600 United States Courthouse,
300 Fourth Street South, Minneapolis, MN 55415, appeared on behalf of Defendant.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on September 22, 2000, pursuant to Defendant's Motion to Dismiss and Plaintiff's Motion for a Stay. In the Complaint, Plaintiff alleges violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, credit defamation, and negligent infliction of emotional distress. For the reasons set forth below, Plaintiff's motion is denied and Defendant's motion is granted in part and denied in part.

Background

Plaintiff Ferris Johnson was honorably discharged from the United States Army on February 10, 1998. Plaintiff received separation pay in the amount of \$8,595.54. At some point after paying Mr. Johnson, the United States determined that it had inaccurately calculated his

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severance pay. In April of 1998, the United States started reporting to various credit reporting agencies ("CRAs") that Mr. Johnson owed the government money which was more than 120 days overdue.

Mr. Johnson and the government engaged in a fairly lengthy dispute over whether or not Mr. Johnson owed money back to the government. During the tenure of this dispute, the government continued to report to CRAs that Mr. Johnson was delinquent on a debt. Mr. Johnson alleges that this mark on his credit history resulted in his having to accept unfavorable terms on a mortgage. In addition, the government seized Mr. Johnson's 1998 federal tax refund in partial satisfaction of the alleged debt.

Mr. Johnson filed suit on November 3, 1999, alleging violation of the Fair Credit Reporting Act (FCRA), credit defamation, and negligent infliction of emotional distress. On June 9, 2000, Mr. Johnson filed an administrative claim with the government pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* It appears that, quite recently, the government has conceded that the original calculation of Mr. Johnson's severance pay was correct, has ceased attempting to collect money from Mr. Johnson, and has returned Mr. Johnson's 1998 federal tax refund. However, Mr. Johnson has alleged additional damages resulting from the mark on his credit report from April of 1998 to the present.

The United States has brought this motion to dismiss alleging that the portions of the FCRA Mr. Johnson references do not provide a private right of action. Further, the United States asserts that Mr. Johnson's other claims are barred because he failed to exhaust his administrative remedies as required by the Federal Tort Claims Act (FTCA); Mr. Johnson has requested that the Court stay proceedings in this action pending resolution of the administrative process.

Discussion

1. Standard of Review

This matter is before the Court on a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, alleging this Court's lack of subject matter jurisdiction and the inapplicability of the cited statutes to this cause of action. In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Id.* The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Nietzke v. Williams*, 490 U.S. 319, 326 (1989). The Court need not resolve all questions of law in a manner which favors the complainant; rather, the Court may dismiss a claim founded upon a legal theory which is "close but ultimately unavailing." *Id.* at 327.

2. Tort Actions

This Court may only entertain a suit against the United States if the United States has expressly waived its immunity to such suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). With respect to Plaintiff's claims for credit defamation and negligent infliction of emotional distress, the sole waiver of sovereign immunity for actions arising under state common law tort theories is the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* In order to maintain a lawsuit against the United States under the FTCA, a plaintiff must exhaust his administrative remedies before bringing suit. 28 U.S.C. § 2675(a). Exhaustion occurs only upon a final, written agency determination *or* if the agency fails to make any determination within six months after the claim

was filed. Defendant asserts that Plaintiff did not exhaust his administrative remedies prior to filing this claim.

Plaintiff asserts that he made his "claim" to the appropriate agency when he filed this lawsuit; because more than six months have passed since the filing of the lawsuit, his administrative remedies have been exhausted. Even if the Court were to accept the proposition that filing a lawsuit may be construed as filing a claim under the FTCA, the Court would nevertheless be compelled to dismiss Plaintiff's tort claims. In *McNeil v. United States*, 508 U.S. 106 (1993), the Supreme Court considered the issue of "whether [a tort action against the United States] may be maintained when the claimant failed to exhaust his administrative remedies prior to filing suit, but did so before substantial progress was made in the litigation." 508 U.S. at 107. The Supreme Court squarely held that the FTCA requires an exhaustion of administrative remedies before a claim is *filed*; it is not sufficient that the exhaustion of administrative remedies occur before substantial progress is made in the litigation. Even if the Court could consider the Complaint in this action to be a claim to the agency under the FTCA, the requisite six months clearly did not expire before the Complaint was filed. Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's tort claims.

Plaintiff has further moved the Court to stay this action until he can exhaust his administrative remedies under the FTCA. At this point, however, the holding in *McNeil* renders this particular Complaint—as to Plaintiff's tort claims—unsalvageable. Whenever Plaintiff manages to officially exhaust his administrative remedies, this particular Complaint will have been filed before that date and will thus be defective under *McNeil*. A stay will simply not provide Plaintiff with a remedy.

3. Plaintiff's FCRA Claim

With respect to Plaintiff's claim under the FCRA, Defendant asserts that the applicable provision of the FCRA does not provide a private right of action. The Court disagrees.

Plaintiff concedes that there is no private right of action for violations of 15 U.S.C. § 1681s-2(a); 15 U.S.C. § 1681s-2(d) specifies that claims under subsection (a) may only be enforced by federal and state agencies and officials identified elsewhere in the FCRA. No such limitation on enforcement is placed on 15 subsection (b). Plaintiff asserts that his cause of action arises under subsection (b).

Section 1681s-2(b) of Chapter 15 describes the duties of any entity which provides information to a Credit Reporting Agency when such entity is notified of a dispute regarding the completeness or accuracy of the furnished information. Plaintiff alleges that he informed the appropriate CRAs that the information reported by Defendant was inaccurate; that the CRAs notified the Defendant of the dispute; and that the Defendant failed to fulfill its obligations under 15 U.S.C. § 1681s-2(b).

Defendant argues that, to the extent that 15 U.S.C. § 1681s-2(b) creates a private right of action, it does so only for CRAs. In other words, Defendant alleges that Plaintiff might have a cause of action against the CRAs, and the CRAs might have a cause of action under 15 U.S.C. § 1681s-2(b) against the Defendant, but Plaintiff does not have a direct cause of action against the Defendant under this statute. To that end, Defendant cites *Carney v. Experian Information Solutions, Inc., et al.*, 57 F. Supp. 2d 496, 502 (W.D. Tenn. 1999). In *Carney*, the court found that the "obligation imposed on a furnisher of information is owed only to the consumer reporting agency not to the consumer" *Id.*

The *Carney* decision stands, apparently alone, against a significant number of decisions finding that both the plain language of the FCRA and its legislative history compel the opposite

conclusion: that consumers have a direct cause of action against furnishers of credit information under 15 U.S.C. § 1681s-2(b). See *Campbell v. Baldwin*, 90 F. Supp. 2d 754, 756 (E.D. Tex. 2000); *Bruce v. First U.S.A. Bank*, 103 F. Supp. 2d 1135, 1142-43 (E.D. Mo. 2000); *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 926 (N.D. Ill. 2000); *DiMezza v. First U.S.A. Bank, Inc.*, 103 F. Supp. 2d 1296, 1300 (D. N.M. 2000). The Court sees no point in reinventing the wheel. It is sufficient to note that the Court finds the logic and reasoning of this majority of cases to be persuasive. The most compelling issue for this Court, beyond the fact that the plain language of the statute fails to support the limitation on enforcement urged by the Defendant, is that the FCRA was clearly passed to protect consumers and to give consumers a tool to vindicate their rights. The Court finds that the FCRA provides a private right of action to consumers under 15 U.S.C. § 1681s-2(b).

To the extent that Defendant has further argued that Plaintiff has failed to allege the requisite elements of a claim under 15 U.S.C. § 1681s-2(b), the Court agrees that the pleading is somewhat clumsy. However, the Court finds that the pleading is sufficient to survive a motion to dismiss. It is possible that the Court will be called upon to again examine the validity of this claim after discovery; at this juncture, though, the Court will deny Defendant's motion.

For the reasons stated, **IT IS HEREBY ORDERED:**

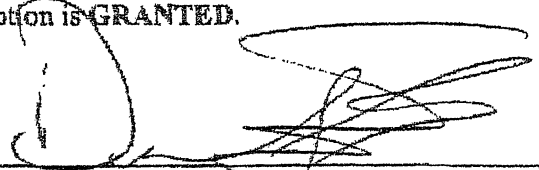
1. Plaintiff's Motion for Stay (Doc. No. 17) is **DENIED**; and
2. Defendant's Motion to Dismiss (Doc. No. 15) is **GRANTED IN PART** and

DENIED IN PART as follows:

- a. As to Plaintiff's claim under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., Defendant's motion is **DENIED**;

b. As to Plaintiff's claims for credit defamation and negligent infliction of emotional distress, Defendant's motion is **GRANTED**.

Dated: October ¹⁷ 2000



DONOVAN W. FRANK
Judge of United States District Court