

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IRA DICK
on behalf of himself and
all other similarly situated consumers

Plaintiff,

-against-

KOZENY, MCCUBBIN & KATZ LLP

Defendant.

CLASS ACTION COMPLAINT

Introduction

1. Plaintiff Ira Dick seeks redress for the illegal practices of Kozeny, McCubbin & Katz LLP, concerning the collection of debts, in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (“FDCPA”).

Parties

2. Plaintiff is a citizen of the State of New York who resides within this District.
3. Plaintiff is a consumer as that term is defined by Section 1692(a)(3) of the FDCPA, in that the alleged debt that Defendant sought to collect from Plaintiff is a consumer debt.
4. Upon information and belief, Defendant's principal place of business is located in Mellville, New York.
5. Defendant is regularly engaged, for profit, in the collection of debts allegedly owed by consumers.
6. Defendant is a “debt collector” as that term is defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

Jurisdiction and Venue

7. This Court has federal question jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.
8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), as the acts and transactions that give rise to this action occurred, in substantial part, in this district.

Allegations Particular to Ira Dick

9. Upon information and belief, on a date better known by Defendant, Defendant began to attempt to collect an alleged consumer debt from the Plaintiff.
10. On or about April 14, 2016, Defendant sent the Plaintiff a collection letter seeking to collect a balance allegedly incurred for personal purposes.
11. The said letter was the Defendant's initial communication with the Plaintiff.
12. Said letter misrepresented Plaintiff's right to dispute the debt, in violation of 15 U.S.C. §§ 1692e, 1692e(10), 1692g(a)(3), 1692g(a)(4), and 1692g(a)(5).
13. Section 1692g of the FDCPA provides:

a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

14. Said letter was void of any of the above mentioned validation rights.
15. The least sophisticated consumer would assume from the said letter, that he has no option to dispute his debt or obtain verification of the debt.
16. Said letter is false, deceptive and misleading.
17. Defendant's April 14, 2016 letter violated 15 U.S.C. §§ 1692e, 1692e(10), 1692g(a)(3), 1692g(a)(4), and 1692g(a)(5) for failing to comply with the validation notice requirements, and in particular, for misrepresenting Plaintiff's right to dispute the debt, misrepresenting Plaintiff's right to obtain verification of the debt, and for false and deceptive actions.
18. The said April 14, 2016 letter was a payoff / reinstatement collection letter and was the Defendant's initial communication with the Plaintiff.
19. The FDCPA is based upon the least sophisticated consumer standard.¹
20. The April 14, 2016 letter further stated the figures that the Defendant was owed:

"Total Unpaid Payments \$58,113.44
Foreclosure Attorney/ Trustee Fees \$2,595.00
Foreclosure Expense \$2,552.94
Grand Total \$63,261.38"
21. The letter provided an "**IMPORTANT NOTICE**" which stated as follows: "It is only required that you pay the fees and costs actually incurred as of the date of your payment. If for whatever reason your payment includes any anticipated fee(s) or cost(s) or other item, but the actual amount due on the date of payment is less, then any excess amount will be returned to you. If your reinstatement amount tendered is less than the total

¹ See *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996) (citing *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)). We ask whether "the notice fails to convey the required information 'clearly and effectively and thereby makes the least sophisticated consumer uncertain' as to the meaning of the message.", *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 161 (2d Cir. 2001) (quoting *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 85 (2d Cir. 1998))

amount due on the date of your payment, the lender or servicer reserves the right to reject your payment and continue with the legal process." Carlin v. Davidson Fink LLP, No. 15-3105-cv, 2017 U.S. App. LEXIS 5438 (2d Cir. Mar. 29, 2017). ("[T]he Payoff Statement does not specify what the "estimated fees, costs, [and] additional payments" are, and thus we cannot say whether those amounts are properly part of the amount of the debt. If [Defendant] improperly included fees and costs that it was not entitled to under the note (absent a judgment), the Payoff Statement would plainly be insufficient under § 1692g . . . The remaining inquiry is whether [Defendant] adequately stated the amount of the debt in the August Letter, as required by § 1692g. We conclude that it did not.")

22. The letter also enclosed a "**Payment Coupon**".
23. The Defendant did not provide an accurate and clear amount of the debt, as required by § 1692g(a)(I). Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th cir. 2000). (Not sufficient to state that unpaid principal balance of residential mortgage loan was \$178,844.65, and that this did not include unspecified accrued but unpaid interest, unpaid late charges, escrow advances, and other charges authorized by loan agreement).
24. The Defendant's figures did not indicate what those estimated fees, costs, or additional payments were, or how they were calculated.
25. Section 1692g of the FDCPA provides:
 - a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt

26. Absent fuller disclosure, an unsophisticated consumer may not understand how these fees are calculated, whether they may be disputed, or what provisions give rise to them.
27. The figures above give no indication as to what the *un*-accrued fees are or how they are calculated; therefore the Plaintiff cannot deduce that information from the letter's statement.
28. The said letter omits information which would allow the least sophisticated consumer to determine the minimum amount he owes at the time of the notice, what he will need to pay to resolve the debt at any given moment in the future, and an explanation of any fees and interest that will cause the balance to increase.²
29. Defendant's April 14, 2016 letter violated 15 U.S.C. § 1692g(a)(1), for failing to comply with the validation notice requirements, and in particular for failing to accurately state the amount of the debt owed by the Plaintiff.
30. Plaintiff suffered injury in fact by being subjected to unfair and abusive practices of the Defendant.
31. Plaintiff suffered actual harm by being the target of the Defendant's misleading debt collection communications.
32. Defendant violated the Plaintiff's right not to be the target of misleading debt collection communications.
33. Defendant violated the Plaintiff's right to a truthful and fair debt collection process.
34. Defendant used materially false, deceptive, misleading representations and means in its attempted collection of Plaintiff's alleged debt.

² *Avila v. Rixinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016). (A debt collector will not be subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date.)

35. Defendant's communications were designed to cause the debtor to suffer a harmful disadvantage in charting a course of action in response to Defendant's collection efforts.
36. The FDCPA ensures that consumers are fully and truthfully apprised of the facts and of their rights, the act enables them to understand, make informed decisions about, and participate fully and meaningfully in the debt collection process. The purpose of the FDCPA is to provide information that helps consumers to choose intelligently. The Defendant's false representations misled the Plaintiff in a manner that deprived him of his right to enjoy these benefits, these materially misleading statements trigger liability under section 1692e of the Act.
37. These deceptive communications additionally violated the FDCPA since they frustrate the consumer's ability to intelligently choose his or her response.
38. As an actual and proximate result of the acts and omissions of the Defendant, Plaintiff has suffered including but not limited to, fear, stress, mental anguish, emotional stress and acute embarrassment for which he should be compensated in an amount to be established by a jury at trial.

AS AND FOR A FIRST CAUSE OF ACTION

Violations of the Fair Debt Collection Practices Act brought by Plaintiff on behalf of himself and the members of a class, as against the Defendant.

39. Plaintiff re-states, re-alleges, and incorporates herein by reference, paragraphs one (1) through thirty eight (38) as if set forth fully in this cause of action.
40. This cause of action is brought on behalf of Plaintiff and the members of a class.
41. The class consists of all persons whom Defendant's records reflect resided in the State of New York and who were sent a collection letter in substantially the same form letter as the letter sent to the Plaintiff on or about April 14, 2016; and (a) the collection letter was

sent to a consumer seeking payment of a personal debt purportedly owed to Bank of America; and (b) the collection letter was returned by the postal service as undelivered; (c) and the Plaintiff asserts that the letter contained violations of 15 U.S.C. §§ 1692e, 1692e(10), 1692g(a)(1), 1692g(a)(3), 1692g(a)(4), and 1692g(a)(5) for failing to comply with the validation notice requirements, and in particular, for misrepresenting Plaintiff's right to dispute the debt, misrepresenting Plaintiff's right to obtain verification of the debt, for failing to accurately state the amount of the debt and for false and deceptive actions.

42. Pursuant to Federal Rule of Civil Procedure 23, a class action is appropriate and preferable in this case because:

- A. Based on the fact that a form collection letter is at the heart of this litigation, the class is so numerous that joinder of all members is impracticable.
- B. There are questions of law and fact common to the class and these questions predominate over any questions affecting only individual class members. The principal question presented by this claim is whether the Defendant violated the FDCPA.
- C. The only individual issue is the identification of the consumers who received such collection letters (*i.e.* the class members), a matter capable of ministerial determination from the records of Defendant.
- D. The claims of the Plaintiff are typical of those of the class members. All are based on the same facts and legal theories.
- E. The Plaintiff will fairly and adequately represent the class members' interests. The Plaintiff has retained counsel experienced in bringing class

actions and collection-abuse claims. The Plaintiff's interests are consistent with those of the members of the class.

43. A class action is superior for the fair and efficient adjudication of the class members' claims. Congress specifically envisions class actions as a principal means of enforcing the FDCPA. 15 U.S.C. § 1692(k). The members of the class are generally unsophisticated individuals, whose rights will not be vindicated in the absence of a class action. Prosecution of separate actions by individual members of the classes would create the risk of inconsistent or varying adjudications resulting in the establishment of inconsistent or varying standards for the parties and would not be in the interest of judicial economy.
44. If the facts are discovered to be appropriate, the Plaintiff will seek to certify a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.
45. Collection attempts, such as those made by the Defendant are to be evaluated by the objective standard of the hypothetical "least sophisticated consumer."

Violations of the Fair Debt Collection Practices Act

46. The Defendant's actions as set forth above in the within complaint violates the Fair Debt Collection Practices Act.
47. Because the Defendant violated the Fair Debt Collection Practices Act, the Plaintiff and the members of the class are entitled to damages in accordance with the Fair Debt Collection Practices Act.

WHEREFORE, Plaintiff, respectfully requests preliminary and permanent injunctive relief, and that this Court enter judgment in his favor and against the Defendant and award damages as follows:

- A. Statutory damages provided under the FDCPA, 15 U.S.C. § 1692(k);

- B. Attorney fees, litigation expenses and costs incurred in bringing this action;
and
- C. Any other relief that this Court deems appropriate and just under the
circumstances.

Dated: Woodmere, New York
April 6, 2017

/s/ Adam J. Fishbein
Adam J. Fishbein, P.C. (AF-9508)
Attorney At Law
Attorney for the Plaintiff
735 Central Avenue
Woodmere, New York 11598
Telephone: (516) 668-6945
Email: fishbeinadamj@gmail.com

Plaintiff requests trial by jury on all issues so triable.

/s/ Adam J. Fishbein
Adam J. Fishbein (AF-9508)

KOZENY, MCCUBBIN & KATZ, L.L.P.

ATTORNEYS AT LAW

40 Marcus Drive, Suite 200
Melville, New York 11747
Tel. (631) 454-8059

April 14, 2016

IRA DICK
580 CROWN STREET, APT 5, BROOKLYN, NY 11213
BROOKLYN, NY 11213

RE: Bank of America, N.A.
VS: IRA DICK
Loan Number: 124
Property Address: 580 CROWN STREET, APT 5, BROOKLYN, NY 11213
KMK File #: 4

Dear IRA DICK:

Please find the reinstatement quote requested. **These figures are only good through May 11, 2016.**

| | |
|---------------------------------------|-------------|
| Total Unpaid Payments | \$58,113.44 |
| Foreclosure Attorney/ Trustee Fees | \$2,595.00 |
| Foreclosure Expense | \$2,552.94 |
| Grand Total | \$63,261.38 |

If you are unable to reinstate your loan by the good through date of this letter, you may contact our office to request an updated estimate, unless a foreclosure sale has occurred. All funds tendered are subject to final verification by the note holder and are only accepted subject to such verification and collection thereof. Any funds deemed insufficient may be returned at the discretion of the note holder. The note holder retains the right to determine what is or is not full reinstatement of the loan. Neither Kozeny, McCubbin & Katz LLP, its employees, agents or principals nor the note holder, its employees, agents, assigns or principals are responsible for funds that are lost or otherwise not received. Nothing in this communication represents an agreement to postpone or cancel the foreclosure process.

During this time, additional fees and costs may be incurred, including but not limited to, title reports/curative fees, recording/filing fees, newspaper publication costs and attorneys' fees. We strongly encourage you to contact our office for an updated amount 24-hours prior to tendering funds. Failure to tender the entire amount owed may cause the funds to be rejected.

IMPORTANT NOTE: It is only required that you pay the fees and costs actually incurred as of the date of your payment. If for whatever reason your payment includes any anticipated fee(s) or cost(s) or other item, but the actual amount due on the date of payment is less, then any excess amount will be returned to you. If your reinstatement amount tendered is less than the total amount due on the date of your payment, the lender or servicer reserves the right to reject your payment and continue with the legal process.

In order to reinstate your account, provide US \$63,261.38 by way of certified funds (cashier's check, certified check, money order) made payable to **Bank of America, N.A.** by the good through date stated in this letter.

Sincerely,

KOZENY, MCCUBBIN & KATZ, LLP

This communication is an attempt to collect a debt, and any information obtained will be used for this purpose.

-----Cut Here-----

Payment Coupon

April 14, 2016

IRA DICK
580 CROWN STREET, APT 5, BROOKLYN, NY 11213
BROOKLYN, NY 11213

KMK # 4

IMPORTANT

Remit payment in the amount of US \$63,261.38 prior to the good through date listed in this letter made payable to **Bank of America.** Payment should be mailed to

Bank of America
Retail Payment Services
Mail Code: DES-023-03-04
Christiana III
900 Samoset Drive
Newark, DE 19713

We recommend sending your payment by delivery in person or over night delivery with a tracking number for your records.

To insure prompt processing of your payment this coupon must be returned with your payment.

WE WILL ONLY ACCEPT CERTIFIED CHECKS, MONEY ORDERS, OR CASHIER'S CHECKS.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

IRA DICK

Plaintiff(s)

v.

KOZENY, MCCUBBIN & KATZ LLP

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) KOZENY, MCCUBBIN & KATZ LLP
40 MARCUS DRIVE, SUITE 200
MELVILLE, NEW YORK, 11747

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Adam J. Fishbein, P.C.
735 Central Avenue
Woodmere NY 11598

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

IRA DICK

(b) County of Residence of First Listed Plaintiff Kings (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Adam J. Fishbein 735 Central Avenue Woodmere NY 11598 516 668-6945 fishbeinadamj@gmail.com

DEFENDANTS

KOZENY, MCCUBBIN & KATZ LLP

County of Residence of First Listed Defendant Nassau (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 USC 1692 FAIR DEBT COLLECTION PRACTICES ACT. Brief description of cause: Failure include validation language

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/07/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Adam J. Fishbein

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Adam J. Fishbein, counsel for Plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
the complaint seeks injunctive relief,
the matter is otherwise ineligible for the following reason Class Action

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

None

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
2.) If you answered "no" above:
a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
b) Did the events of omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

- Yes No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

- Yes (If yes, please explain) No

I certify the accuracy of all information provided above.

Signature: /s/ Adam J. Fishbein

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Debt Collector Hit with FDCPA Lawsuit](#)
