Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-045

JUNE TERM, 2008

Leslie Kevin Kozaczek and Kathryn L. Wallace	}	APPEALED FROM:
v.	}	Windham Superior Court
Jessica Ellicott, Jeanine Dumont, MBNA America Bank, Howard Lee Schiff, PC, National Arbitration Forum & Wolpoff & Abramson	}	DOCKET NO. 452-8-07 Wmcv
		Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal pro se from the trial court's dismissal of their complaint under Vermont Rule of Civil Procedure 12(b)(6). They raise numerous arguments, suggesting that their claims were improperly dismissed. We reverse and remand.

To provide some context for plaintiffs' claims, we briefly describe several events that preceded the filing of their complaint. This litigation appears to stem primarily, if not wholly, from an attempt to collect a $7776.85 debt allegedly owed by plaintiff Wallace to MBNA America Bank. A prior court decision involving MBNA and plaintiff Wallace indicates that MBNA filed a claim with the National Arbitration Forum (Forum) regarding this alleged debt, and it served notice of the impending arbitration on an unidentified individual at plaintiff Wallace's address. The Forum later issued an award in favor of MBNA for $7776.85. MBNA then moved to confirm and enforce this award in superior court. In a July 2007 order, the court denied its request, finding that MBNA failed to establish that it had a written agreement containing an arbitration provision that was binding on Wallace. The court also found that MBNA's substitute service of notice on an unknown person who refused to identify himself was inadequate under the arbitration rules, the civil rules, and the principles of due process. The court thus denied the motion to enforce, and instead vacated the arbitration award.[*]

[*] As discussed in additional detail below, this information is largely gleaned from the superior court's decision in the arbitration matter between MBNA America and plaintiff Wallace, which defendants included with their motion to dismiss. Plaintiffs certainly allude to the fact that the arbitration award was vacated, but because this material was not specifically

In August 2007, plaintiffs filed a complaint against defendants, alleging generally that defendants were harassing them by repeatedly filing frivolous and vexatious lawsuits against them. More specifically, they asserted that attorney Ellicott harassed them through persistent, oppressive, and malicious litigation, and that she improperly turned over a collection matter to another attorney, defendant Dumont, knowing that attorney Dumont was not licensed to practice law in Vermont. By doing so, plaintiffs argued, Ellicott sought to facilitate Dumont's attempts "to . . . obscure the true nature and representation of Dumont's correspondence with plaintiffs," which was a "prima facie violation" of the Fair Debt Collection Practices Act (Act), 15 U.S.C. § 1692, et seq. Plaintiffs also asserted that Ellicott violated 15 U.S.C. §§ 1692d, 1692e, 1692f, and 1692j. In a related vein, plaintiffs argued that Howard Schiff, who was attorney Ellicott's employer, "attempted to benefit financially and improperly at plaintiffs' expense by way of Ms. Ellicott's ongoing harassment of plaintiffs." They argued that Schiff engaged in a campaign of harassment and false filing of suits against them, and that he violated the same statutory provisions cited above. They also argued that the Schiff Law Office improperly filed a motion on behalf of MBNA to confirm the "unsworn and improperly generated" arbitration award, and that the firm knowingly sold an alleged debt—which plaintiffs believe can no longer be recovered due to the vacation of the arbitration award—to another debt collection agency that began collection activities on it. Plaintiffs argued that the law firm of Wolpoff & Abramson violated the provisions of the Act cited above as well.

As to MBNA, plaintiffs alleged that it filed an "improper, vexatious, frivolous and unsupportable motion to confirm an improperly purchased and unsworn arbitration award" thereby causing "severe emotional, mental, and physical distress" to plaintiffs. Plaintiffs asserted that MBNA was a "debt collector" under the Act, and that it violated the same provisions of the Act cited above. Plaintiffs further alleged that MBNA used various names and other entities to collect the alleged debt incurred by Wallace, and, through attorney Dumont, it threatened to "actually file suit" to collect this debt. Plaintiffs maintained that MBNA's actions were designed to confuse Wallace. According to plaintiffs, this "bait and switch" approach allowed attorney Dumont to threaten plaintiffs with an "unintended and unavailable" lawsuit for no reason other than to oppress and intimidate plaintiffs. Plaintiffs averred that attorney Dumont misrepresented her role as a debt collector, and tried to intimidate them by indicating that she was an attorney. They also asserted that Dumont violated 15 U.S.C. §§ 1692d, 1692e, 1692f, and 1692j.

Finally, plaintiffs alleged that the Forum willfully and fraudulently generated and then sold to MBNA a bogus and improperly unsworn arbitration award. They also alleged that the Forum was effectively acting as a debt collector and that it violated the same provisions of the Act cited above. Plaintiffs maintained that the Forum was also vicariously liable to them for the negligence of attorney Scott Cameron and Harold Kalina, who had knowingly produced and sold an "controversial and unsworn" document (the arbitration award) that was sold to MBNA and other defendants for the purpose of harassing and defrauding Wallace.

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included in plaintiffs' complaint, the material should not have been considered in deciding if plaintiffs sufficiently stated a claim in their complaint. See V.R.C.P. 12(b)(6) (if matters outside the pleadings are presented to and not excluded by court in connection with motion to dismiss, motion shall be treated as one for summary judgment).

Defendants moved to dismiss plaintiffs' complaint under Rule 12(b)(6) for failure to state a claim, and they attached numerous documents to their motion. Plaintiffs included the court order that vacated the arbitration award against Wallace, for example, as well as other materials, including the arbitration award itself, affidavits, and a prior small claims case involving a claim by Household Bank against plaintiff Wallace. In a December 2007 order, the court granted defendants' motion to dismiss. The court noted that, while defendants had filed affidavits and other extraneous matter, the court excluded and did not consider these materials in ruling on the motion to dismiss. Instead, the court considered only the allegations in plaintiffs' complaint, the two prior court orders referred to in the complaint, and the pertinent law. The court concluded that, even accepting all of the alleged facts as true, and giving plaintiffs the benefit of reasonable inferences, plaintiffs failed to establish a violation of the Fair Debt Collection Practice Act, or a breach of any other legal duties owed by defendants to plaintiffs, and they failed to state a claim for fraud.

More specifically, the court found as follows. Plaintiffs alleged that defendant collection attorneys and MBNA, in various combinations, brought legal actions to collect past-due credit card accounts from plaintiffs. When plaintiffs indicated that they would force defendants to prove the claims at trial, defendants dismissed the actions, once on the eve of trial. The court recognized the inconvenience that such actions could cause another party and the court, and noted that if a party repeatedly took such action or prejudiced the other party, a court could dismiss the case with prejudice under V.R.C.P. 42(a), as one court did in a case brought against plaintiff Wallace. But, the court explained, filing a complaint and dismissing it did not constitute wrongful conduct per se, nor was such conduct listed as an example of harassing, misleading, or unfair behavior under the Fair Debt Collection Practices Act. The court noted that while the examples provided in the statute were not exhaustive, it was notable that they included nothing similar or analogous to the activities described by plaintiffs. Indeed, the court found no authority holding that such conduct violated the Act, while it found one holding to the contrary. The court thus concluded that even if defendant attorneys and creditor brought legal actions and then dismissed them when plaintiffs insisted on going to trial, plaintiffs' legal theory with respect to their claims under the Act failed.

The court next addressed plaintiffs' assertions that, in the prior collection actions, defendant attorneys sometimes worked together and sometimes separately in ways that confused plaintiffs, and that attorney Dumont may have been practicing law in Vermont without a license. The court explained that, generally, a party could not bring an action for damages against his adversary's attorney, alleging that the attorney engaged in questionable conduct while pursing a legal action. The court stated that such actions were based on the alleged breach of duties owed by a defendant to a plaintiff, and courts had refused to rule that attorneys owed any duties to their clients' adversaries on the grounds that such duties would create an unacceptable conflict of interest that would seriously hamper attorneys' effectiveness in fulfilling their duties to their clients. The court explained that this refusal to find a duty to the client's adversary applied even if the attorney's alleged misconduct may have violated ethical or professional codes, because such codes gave rise to duties owed generally to the judicial system but not duties owed to an opposing party. The court noted, moreover, that plaintiffs' particular allegations of confusion and possible impropriety in practicing across state lines were not covered by the Fair Debt Collection Practices Act, and thus, they could not give rise to a legal action for damages unless

the court ruled, as a matter of law, that defendants owed plaintiffs a duty not to engage in this conduct.

Finally, the court addressed plaintiffs' assertion that MBNA and the Forum engaged in the fraudulent buying and selling of sham arbitration awards. The court found this allegation to be a conclusory assertion, supported only by the fact that a court had vacated a Forum arbitration award against plaintiff Wallace because of insufficient notice. It would take a major leap in reasoning, the court explained, to conclude that dismissal on such grounds demonstrated that MBNA and the Forum were engaged in the fraudulent buying and selling of arbitration awards, particularly in light of the requirement found in V.R.C.P. 9 that fraud be pled with particularity. The court thus granted the motion to dismiss. Plaintiffs filed a motion to clarify, arguing in part, that they should have been provided an opportunity to amend their complaint. The trial court determined that it had no jurisdiction to rule on the motion given that plaintiffs had already filed a notice of appeal. This appeal followed.

Plaintiffs argue that their complaint was improperly dismissed. They maintain that the court decided disputed issues of fact by referring to them as "debtors" and to defendants as "creditors." According to plaintiffs, if the court had not presumed that they were debtors, it would have accepted their claim that defendants jointly produced a fraudulent document—the arbitration award—with intent to illegally extract money from plaintiffs. Plaintiffs also assert that the court erroneously found that they were party to an arbitration hearing, when they were in fact arguing that the Forum had dishonestly concocted a false arbitration document with the intent to defraud them. They maintain they sufficiently alleged fraud by referring to the arbitration award and to defendants' conduct in connection with this document. Plaintiffs also suggest that the court was biased against them because it dismissed their complaint, denied their post-judgment motion to amend their complaint, and denied their application to proceed in forma pauperis. Additionally, plaintiffs argue that the court misread their charge against defendant Dumont—that Dumont violated the Act by improperly misrepresenting herself as an attorney licensed to practice in Vermont. Finally, plaintiffs argue that the court failed to accept their factual allegations as true in reaching its decision, and it held them to a heightened pleading standard.

In reviewing a motion to dismiss under Rule 12(b)(6), "courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 (citation omitted). In conducting its analysis, however, the court need not accept as true "[c]onclusory allegations or legal conclusions masquerading as factual conclusions." See id. ¶ 10 (citation omitted). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." Id. ¶ 5.

We conclude that the court's decision must be reversed. As noted above, when matters outside the pleading are presented to and not excluded by the court in considering a motion to dismiss for failure to state a claim, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." V.R.C.P. 12(b)(6). In this case, defendants attached numerous materials to their motion to dismiss. The court indicated that it considered only the allegations in plaintiffs' complaint, the two prior court orders referred to in

the complaint, and the pertinent law. Yet, the two court orders, while generally referred to by plaintiffs, were not included as part of plaintiffs' complaint. By considering these materials, the court essentially converted the motion to dismiss to one for summary judgment, without providing plaintiffs with the procedure attendant to that rule. When the court considers matters outside the pleadings in deciding the motion, a party is entitled to have the motion treated as one for summary judgment and to be accorded reasonable time to present pertinent and material matters under V.R.C.P. 12(c) and 56. Condosta v. Condosta, 139 Vt. 545, 546-47 (1981) (per curiam) (reaching similar conclusion). While certainly there appear to be numerous infirmities in plaintiffs' complaint, these are matters that can be addressed and potentially resolved on summary judgment. As in Condosta, plaintiffs here are entitled to have a presentation of all the relevant facts, either by summary judgment procedure or trial, and to have the merits of their claims adjudicated on those facts, and the court's consideration of outside materials cannot substitute for that procedure. Id. Because we reverse and remand, we do not address plaintiffs' remaining arguments concerning the dismissal of their complaint.

As a final matter, we reject plaintiffs' assertion that the court erred in denying plaintiff Kozaczek's application to proceed in forma pauperis. The court properly considered the income of both plaintiffs in concluding that the in forma pauperis application should be denied. See Reporter's Notes, V.R.C.P. 3.1.

Reversed and remanded.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice