BENZEMANN v. HOUSLANGER & ASSOCIATES
No. 18-1162-cv

ALEXANDER A. BENZEMANN,
Plaintiff-Appellant, v.
HOUSLANGER & ASSOCIATES, PLLC, TODD E. HOUSLANGER, and NEW CENTURY FINANCIAL SERVICES, Defendants-Appellees,
CITIBANK N.A., Defendant.

United States Court of Appeals, Second Circuit.
May 13, 2019

Before: Katzmann, Chief Judge, Walker and Cabranes, Circuit Judges.

Plaintiff-Appellant Alexander A. Benzemann ("Plaintiff") appeals from a judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) granting summary judgment in favor of Defendants-Appellees Houslanger & Associates, PLLC and Todd E. Houslanger on Plaintiff's Fair Debt Collection Practices Act ("FDCPA") claim. On appeal, the parties contest a single issue: whether Plaintiff's FDCPA claim is time-barred. We conclude that it is and therefore AFFIRM the District Court's March 23, 2018 judgment.

Andrew J. Tiajoloff, Tiajoloff & Kelly LLP, New York, NY, for Plaintiff-Appellant.
Robert J. Bergson, Abrams Garfinkel Margolis Bergson, LLP, New York, NY, for Defendants-Appellees.

José A. Cabranes, Circuit Judge:

In a final attempt to salvage his Fair Debt Collection Practices Act ("FDCPA") claim against Defendants-Appellees Houslanger & Associates, PLLC and Todd E. Houslanger (jointly, "Houslanger"), Plaintiff-Appellant Alexander A. Benzemann ("Plaintiff") asks us to endorse a novel—and potentially far-reaching—construction of the FDCPA's statute of limitations. We decline the invitation.

An FDCPA claim must be filed "within one year from the date on which the violation occurs."[1] Relying on certain language in our decision in *Benzemann v. Citibank N.A.* ("*Benzemann I*")[2], Plaintiff contends that an FDCPA "violation" does not "occur[ ]"—and the statute of limitations does not begin to run—until an individual is injured *and* receives "notice of the FDCPA violation."[3] The United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*) rejected Plaintiff's reading of *Benzemann I*, concluded that his FDCPA claim is time-barred, and granted summary judgment in Houslanger's favor. We agree and therefore **AFFIRM** the District Court's March 23, 2018 judgment.

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[1] 15 U.S.C. § 1692k(d).

[2] 806 F.3d 98 (2d Cir. 2015) ("*Benzemann I*").

[3] Pl.'s Br. 9; *see also Benzemann I*, 806 F.3d at 103.

I. BACKGROUND

We draw the facts, which are undisputed or presented in the light most favorable to Plaintiff, from the summary judgment record.[4]

A. The Restraining Notices

On April 21, 2008, Houslanger sent a restraining notice referencing a 2003 judgment against an individual named Andrew Benzemann ("Andrew") to Citibank, N.A. ("Citibank"), where Plaintiff held an account.[5] The notice named Andrew as the judgment debtor, but it listed Plaintiff's social security number and address. On April 30, 2008, Citibank "froze" Plaintiff's account. After Plaintiff's attorney notified Houslanger of the error, Houslanger withdrew the restraining notice, and Citibank lifted the freeze.

More than three years later, on December 6, 2011, Houslanger (somewhat inexplicably) sent Citibank a second restraining notice containing similar information—*i.e.*, naming Andrew as the

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[4] *In re DeRogatis*, 904 F.3d 174, 180 (2d Cir. 2018) ("Because the appeals challenge orders granting summary judgment to defendants, we present here the version of the facts most favorable to [plaintiff]'s claims, and we draw all reasonable inferences in [his] favor.").

[5] Under New York state law, a "restraining notice serves as a type of injunction prohibiting the transfer of [a] judgment debtor's property." *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 579, 439 N.Y.S.2d 316, 421 N.E.2d 808 (1981).

judgment debtor but listing Plaintiff's social security number and address. Perhaps not surprisingly, Citibank froze Plaintiff's accounts. On December 13, 2011 Plaintiff became aware that he could not gain access to his Citibank accounts. He called Citibank, but the representative with whom he spoke gave him little information about why his accounts were unavailable. Distressed, Plaintiff contacted his attorney that same evening. The next day, Plaintiff learned that his accounts had been frozen pursuant to a restraining notice. By the evening of December 15, 2011, the freeze had been lifted, and Plaintiff had regained access to his funds.

About one year later, on December 14, 2012, Plaintiff commenced this action, asserting, among others, the FDCPA claim at the center of this appeal.

B. *Benzemann I*

On June 27, 2014, the District Court dismissed Plaintiff's FDCPA claim as untimely.[6] The District Court concluded that the alleged FDCPA violation occurred, triggering the one-year statute of limitations, when Houslanger mailed the restraining notice on December 6, 2011. Because Plaintiff commenced this action one year and eight days later, the District Court held that his FDCPA claim is time-barred.

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[6] *See Benzemann v. Citibank N.A.*, No. 12 Civ. 9145 (NRB), 2014 WL 2933140, at *5–*8 (S.D.N.Y. June 27, 2014).

In *Benzemann I*, we concluded that the District Court "erred in finding that the FDCPA violation 'occurred' when Houslanger sent the restraining notice."[7] Instead, we held that "where a debt collector sends an allegedly unlawful restraining notice to a bank, the FDCPA violation does not 'occur' for purposes of [the statute of limitations] until the bank freezes the debtor's account."[8]

Because the record was at that time unclear as to whether Citibank froze Plaintiff's accounts on December 13 or December 14, 2011, we remanded for further proceedings.[9] We also directed the District Court to consider, in the event it found that the freeze occurred on December 13, 2011, whether the FDCPA's statute of limitations is subject to the common-law "discovery rule."[10]

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[7] *Benzemann I*, 806 F.3d at 103.

[8] *Id.*

[9] Though seemingly trivial on its face, as is frequently true in cases of competing claims regarding statutes of limitation, the one-day difference was potentially significant. If Citibank froze Plaintiff's accounts on December 14, 2011, then his FDCPA claim, commenced exactly one year later, is necessarily timely. If the freeze occurred even one day earlier, however, then the statute of limitations might preclude recovery.

[10] As we explain below, under the discovery rule, "a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." *Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir.

C. Additional Factual Development After Remand

After limited discovery, it became clear that Citibank froze Plaintiff's accounts on December 13, 2011.

Citibank's records, produced pursuant to a subpoena, show that Citibank "blocked" Plaintiff's accounts and an associated debit card at 6:14 p.m. on the evening of December 13, 2011. A Citibank employee testified that after that time, Plaintiff could not withdraw funds, had only limited ability to deposit funds, and did not have access to the accounts electronically.

Plaintiff's sworn declaration and deposition testimony corroborate this account. Plaintiff averred that, on December 13, 2011, in the evening, his wife informed him that "she had a problem using [his] Citibank debit card at an [automated teller machine]."[11] Plaintiff attempted to gain access to his accounts electronically but was unable to do so because they "were not visible on-line."[12] At that point, he "concluded that [his] accounts had been frozen because the same thing had occurred ... in 2008."[13] This realization was "extremely

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2007) (internal quotation marks omitted).

[11] J.A. 176.

[12] *Id.* at 177.

[13] *Id.* at 176.

distressing,"[14] and by approximately 8:00 p.m. that evening, Plaintiff "thought [he] was going to have a heart attack."[15]

Notwithstanding his distress, Plaintiff acted immediately. He contacted Citibank by telephone to learn "what happened to [his] accounts."[16] A Citibank employee informed Plaintiff that his accounts had been blocked and instructed him to call the next day for more information. Plaintiff also contacted his attorney, who represented him when Citibank erroneously froze his account in 2008, because that experience led him to believe that he "might [have] a legal problem."[17]

The next day, December 14, 2011, Plaintiff learned that Citibank had frozen his accounts pursuant to the second erroneous restraining notice sent by Houslanger on December 6, 2011.

D. The District Court's Memorandum and Order

After discovery, Houslanger moved for summary judgment, contending once again that

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[14] *Id.*

[15] *Id.* at 299.

[16] *Id.* at 176.

[17] *Id.* at 302.

Plaintiff's FDCPA claim is time-barred. The District Court agreed and granted summary judgment in Houslanger's favor.[18]

First, the District Court found that Citibank froze Plaintiff's accounts—*i.e.*, that the alleged FDCPA violation occurred, triggering the statute of limitations—on December 13, 2011. Because Plaintiff filed suit on December 14, 2012, one year and one day later, the District Court held that Plaintiff's FDCPA claim is untimely.

Second, the District Court concluded that it did not need to determine whether the discovery rule applies to FDCPA claims as a general matter because the outcome in this case would be the same in any event. The evidence established that Plaintiff learned that Citibank froze his accounts on December 13, 2011, so that the date of injury and the date of discovery were the same. Accordingly, Plaintiff's claim would be time-barred even under the discovery rule.

This appeal followed.

II. DISCUSSION

A. Standard of Review

We review an award of summary judgment, including on the basis of "an affirmative defense

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[18] *See Benzemann v. Citibank N.A.*, No. 12 Civ. 9145 (NRB), 2018 WL 1665253, at *5–*7 (S.D.N.Y. Mar. 22, 2018).

such as the statute of limitations,"[19] *de novo*, "construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences and resolving all ambiguities in [his] favor."[20] Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[21]

B. Interpreting *Benzemann I*

The parties' dispute is based principally on our construction of the FDCPA's statute of limitations in *Benzemann I*.

As noted above, an FDCPA claim must be brought "within one year from the date on which the violation occurs."[22] We held in *Benzemann I* "that where a debt collector sends an allegedly unlawful restraining notice to a bank, the FDCPA violation does not 'occur' for purposes of [the statute of limitations] until the bank freezes the debtor's account."[23] Though this conclusion appears straightforward, we also observed that "the FDCPA violation here did not 'occur' until Citibank froze

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[19] *Giordano v. Mkt. Am., Inc.*, 599 F.3d 87, 93 (2d Cir. 2010).

[20] *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 71 (2d Cir. 2019) (internal quotation mark omitted).

[21] Fed. R. Civ. P. 56(a).

[22] 15 U.S.C. § 1692k(d).

[23] *Benzemann I*, 806 F.3d at 103.

[Plaintiff]'s account because it was only then that he had a complete cause of action and *notice of the FDCPA violation*."[24]

Plaintiff makes much of this latter passage in *Benzemann I*. He contends that, as interpreted in *Benzemann I*, the FDCPA's limitations period commences only when an individual is injured by unlawful conduct *and* receives "notice of the FDCPA violation." [25] Here, under Plaintiff's theory, the statute of limitations did not begin to run until Plaintiff learned that Citibank had frozen his accounts pursuant to the unlawful restraining notice that Houslanger prepared. Plaintiff argues that, because he did not learn of the restraining notice until December 14, 2011, his FDCPA claim, which he commenced exactly one year later, is timely.

We conclude that our observation regarding "notice" cannot bear the weight Plaintiff assigns to it. To the extent our decision in *Benzemann I* created any confusion, we now make clear that an FDCPA violation occurs, triggering the statute of limitations, when an individual is injured by unlawful conduct.

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[24] *Id.* at 103 (emphasis added).

[25] Pl.'s Br. 9.

We reject Plaintiff's position for several reasons. As an initial matter, we did not consider in *Benzemann I* the issue that Plaintiff now contends we decided. The question before us in *Benzemann I* was whether an FDCPA violation can occur, for the purposes of the statute of limitations, *before* the victim is injured. We concluded that it could not. In reaching that conclusion, we were not required to—and, we now make clear, did not—examine whether the triggering of the statute of limitations also requires "notice of the FDCPA violation." Because that issue was not before us, there is no basis for assuming that we reached it, especially in light of the otherwise clear principle we expressly described as our holding.[26]

In any event, read as a whole, *Benzemann I* makes clear that we intended to tether the commencement of the FDCPA's limitations period to the date of injury. We began by reciting the "general principle of law that a cause of action accrues when conduct that invades the rights of another has caused injury."[27] We then noted that "[b]efore

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[26] *See Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 935 (2d Cir. 1980) ("[A]ppellate courts, endeavoring to rule beyond the precise holding of a case, normally make that intention unmistakably clear."); *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him.").

[27] *Benzemann I*, 806 F.3d at 101 (internal quotation marks and brackets omitted).

Citibank froze [Plaintiff]'s account, [he] had suffered no injury" and therefore "could not have sued Houslanger."[28] To avoid an "anomaly" wherein "the FDCPA's statute of limitations ... begin[s] to run before an FDCPA plaintiff [can] file suit,"[29] we concluded that an FDCPA violation cannot occur before an individual is injured by unlawful conduct.[30] Thus, from the very beginning, our focus in *Benzemann I* was the date of Plaintiff's injury.

In addition, our instructions to the District Court refute Plaintiff's interpretation. Having determined that an FDCPA violation occurs for the purposes of the statute of limitations when a bank freezes a debtor's account, we directed the District Court to conduct further proceedings to ascertain the date of the freeze.[31] If we had concluded that an FDCPA violation could not occur until an individual received "notice of the FDCPA violation," as Plaintiff suggests, this instruction presumably would have been different. We also directed the District Court to consider whether the discovery rule applies to FDCPA claims only if it determined that Citibank froze Plaintiff's accounts on December 13, 2011.[32]

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[28] *Id.*

[29] *Id.* at 101, 102.

[30] *Id.* at 103.

[31] *Id.*

[32] *Id.* at 103 n.2.

This instruction is consistent with the conclusion that Plaintiff's knowledge—or lack thereof—is irrelevant in determining when an alleged FDCPA violation occurs.

Accordingly, a careful reading makes clear that we did not intend in *Benzemann I* to expand the FDCPA's statute of limitations by requiring that individuals receive "notice of the FDCPA violation."

* * *

Aside from the fact that *Benzemann I* simply does not say what Plaintiff would like, there are other reasons to reject Plaintiff's proposed notice requirement. *First*, the statutory text provides no support for such a rule. We have observed that statutes of limitation "inevitably reflect[ ] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[33] Thus, "strict adherence to limitation periods is the best guarantee of evenhanded administration of the law."[34] Here, strict adherence requires little imagination, since the statutory text is unambiguous: FDCPA claims must be brought "within one year from the date on

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[33] *Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999) (internal quotation marks omitted).

[34] *Id.* (internal quotation marks omitted).

which the violation occurs."[35] A "violation"—"[a]n infraction or breach of the law"[36]—"occurs" when it "take[s] place."[37] It is one thing to conclude, as we did in *Benzemann I*, that a breach of the law might not take place until unlawful conduct causes an injury. But it is quite another to suggest that a breach of the law does not take place until a victim receives notice of the statutory violation. On Plaintiff's theory, if an individual never received such notice, a breach of the law never took place—no matter that the individual was in fact injured by unlawful conduct. This novel interpretation might help Plaintiff evade the FDCPA's statute of limitations, but it appears to us unsupported by the common understanding of the words "violation" and "occur."

Second, unlike the rule we adopted in *Benzemann I* and restate today, Plaintiff's proposal is not easily administrable. Plaintiff makes no attempt to define the contours of what constitutes sufficient "notice of the FDCPA violation" other than to suggest that, here, it means "notice of [a] [r]estraining [n]otice that violates the FDCPA."[38]

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[35] 15 U.S.C. § 1692k(d).

[36] *Violation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[37] *Occur*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1981).

[38] Pl.'s Br. 6.

But even this limitation provides only so much help. A restraining notice might violate the FDCPA for any number of reasons. Where, as here, a fundamental error is evident on the face of the restraining notice, the notice might itself provide "notice of the FDCPA violation." That will not always be the case, however. Yet Plaintiff does not identify a way to distinguish between this straightforward case and those instances in which the type of "notice" necessary to identify "the FDCPA violation" will be far less self-evident. Were we to adopt a notice requirement, the question of how much notice is enough would, we think, bedevil litigants and courts for some time to come.

Finally, and relatedly, Plaintiff's proposal undermines the policies that statutes of limitation serve. Among other things, limitations periods encourage putative plaintiffs to diligently prosecute their claims[39] and "promote justice by preventing surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has

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[39] *See Statute of Limitations*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The purpose of [statutes of limitation] is to require diligent prosecution of known claims ...."); *see also, e.g.*, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) ("Limitations periods are intended to ... prevent plaintiffs from sleeping on their rights."); *United States v. Wiley*, 78 U.S. (11 Wall.) 508, 513–14, 20 L.Ed. 211 (1870) (Statutes of limitation "are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue.").

been lost, memories have faded, and witnesses have disappeared." [40] Plaintiff's rule, which incents strategic delay—not to mention endless litigation concerning the sufficiency of notice—does just the opposite.

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For these reasons, we conclude that an FDCPA violation occurs for the purposes of the one-year statute of limitations when an individual is injured by unlawful conduct. Here, Plaintiff was injured on December 13, 2011, when Citibank froze his accounts. Because Plaintiff filed suit one year

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[40] *CTS Corp. v. Waldburger*, 573 U.S. 1, 8, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (internal quotation marks and brackets omitted). *See also, e.g.*, *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980) ("[T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious."); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360, 7 L.Ed. 174 (1828) (Statutes of limitation are "wise and beneficial law[s]" that "afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation."); *cf.* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476–77 (1897) ("[T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. ... A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.").

and one day later, his FDCPA claim is time-barred.

C. The "Discovery Rule"

Plaintiff also contends that his claim is timely pursuant to the common-law "discovery rule." We disagree.

Under the discovery rule, "a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation."[41] We have not had occasion to decide whether the discovery rule applies to FDCPA claims and need not do so here because, as the District Court recognized, Plaintiff's claim would be time-barred in any event.[42]

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[41] *Guilbert*, 480 F.3d at 149 (internal quotation marks omitted).

[42] In concluding that the FDCPA's text does not support Plaintiff's proposed notice requirement, we do not mean to preclude the possibility that the FDCPA's statute of limitations is subject to the discovery rule. Indeed, we have previously observed that "federal court[s] *generally* employ[ ] the 'discovery rule.' " *Id.* (emphasis added). There might be reason to question this presumption. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 27, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (noting that, though "lower federal courts generally apply a discovery accrual rule when a statute is silent on the issue," the Supreme Court has "not adopted that position as [its] own" (internal quotation marks omitted)). But we need not reach this issue here. Although we interpret the words "violation" and "occur" as a signal that the FDCPA's limitations period generally commences when an individual is injured by unlawful conduct, we do not discount the possibility that the discovery rule or, in appropriate circumstances, another doctrine could alter or extend the limitations period.

The Supreme Court has made clear that, under the discovery rule, "discovery of *the injury*, not discovery of the other elements of a claim, is what starts the clock."[43] This standard is plainly satisfied here. By Plaintiff's own account, he discovered the injury—that Citibank had frozen his accounts—on the same day that it occurred: December 13, 2011. Accordingly, Plaintiff's FDCPA claim is time-barred even under the discovery rule.[44]

In addition, we note that the Supreme Court has recently granted *certiorari* in an action that raises this question and might soon conclusively resolve the issue. *See Rotkiske v. Klemm*, 890 F.3d 422 (3d Cir. 2018), *cert. granted*, —— U.S. ——, 139 S. Ct. 1259, 203 L.Ed.2d 271 (2019).

[43] *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (emphasis added).

[44] We have previously described the discovery rule as applying to both the complained-of injury and its cause. *See A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) ("The diligence-discovery rule sets the accrual date at the time when, with reasonable diligence, the plaintiff has or ... should have discovered the critical facts of both his injury *and its cause*." (internal quotation marks omitted; emphasis added)). We need not decide today whether we can reconcile our description of the discovery rule in cases such as *A.Q.C.* with the limitation the Supreme Court expressed in *Rotella*, which we appeared to adopt in *Guilbert*. We agree with the District Court that, to the extent Plaintiff did not know the precise cause of his injury on December 13, 2011, he possessed enough information to strongly suspect that it had been caused by conduct that was legally actionable. *See Benzemann*, 2018 WL 1665253, at *6–*7 (noting Plaintiff's deposition testimony that he contacted his attorney shortly after learning his accounts were frozen because he concluded, in light of his experience in

D. "Equitable Tolling"

Finally, Plaintiff contends that his claim is timely under the doctrine of "equitable tolling." Once again, we disagree.

As an initial matter, Plaintiff failed to raise this argument before the District Court.[45] "[A]n appellate court [generally] will not consider an issue raised for the first time on appeal."[46] Although we can exercise our discretion to do so "where necessary to avoid a manifest injustice,"[47] Plaintiff has not attempted to meet this standard.

In any event, Plaintiff's argument fails on the merits. As a general matter, equitable tolling "pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance

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2008, that he "might [have] a legal problem" (internal quotation marks omitted)).

[45] We reject Plaintiff's contention that he implicitly raised the issue during oral argument before the District Court on the motion to dismiss that was the subject of our decision in *Benzemann I*. Had Plaintiff in fact intended to raise equitable tolling more than three years ago, it is highly unlikely that he would have failed to do so again in opposing Houslanger's motion for summary judgment.

[46] *Spinelli v. Nat'l Football League*, 903 F.3d 185, 198 (2d Cir. 2018) (internal quotation mark omitted).

[47] *Id.* at 198–99.

prevents him from bringing a timely action." [48] Assuming, for the sake of argument only, that the doctrine of equitable tolling applies to the FDCPA, there is ample reason to conclude that Plaintiff has failed to satisfy its requirements.

Plaintiff discovered that Citibank froze his accounts on December 13, 2011 and began investigating the incident that evening. By the next day, Plaintiff had gathered all the information necessary to bring an FDCPA claim. Yet, for reasons known only to Plaintiff and his counsel, Plaintiff waited just over one year to commence this action. In the circumstances, it would be difficult indeed to describe Plaintiff's pursuit of his rights as "diligent." Nor, in light of Plaintiff's ability to ascertain the necessary information in less than twenty-four hours, does it appear that an extraordinary circumstance prevented him from commencing this action in a timely fashion.

III. CONCLUSION

To summarize, we hold that:

(1) An FDCPA violation "occurs," for the purposes of the FDCPA's one-year statute of limitations, when an individual is injured by the alleged unlawful conduct. Because Plaintiff filed suit one year and one day after Citibank froze his accounts—the

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[48] *CTS Corp.*, 573 U.S. at 9, 134 S.Ct. 2175 (internal quotation marks omitted).

injury caused by the claimed FDCPA violation—his claim is time-barred.

(2) Even if the "discovery rule" applies to FDCPA claims as a general matter—an issue we do not decide—Plaintiff's claim is time-barred because he discovered his injury on the same day that it occurred.

(3) Even if Plaintiff had properly raised the doctrine of "equitable tolling" before the District Court, it would not salvage his claim because he did not diligently pursue his rights, and no extraordinary circumstance precluded him from timely commencing this action.

For the foregoing reasons, we **AFFIRM** the District Court's March 23, 2018 judgment.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of May, two thousand and nineteen.

Before: Robert A. Katzmann,
Chief Judge,
John M. Walker, Jr.,
José A. Cabranes,
Circuit Judges.

Alexander A. Benzemann,
Plaintiff - Appellant,
v.
Houslanger & Associates, PLLC, Todd E. Houslanger,
New Century Financial Services,
Defendants - Appellees,
Citibank, N.A.,
Defendant.

JUDGMENT
Docket No. 18-1162

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the

district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

MANDATE ISSUED ON 06/03/2019

BENZEMANN V. CITIBANK N.A.,
2018 WL 1665253

ALEXANDER A. BENZEMANN, Plaintiff,
v.
CITIBANK N.A., HOUSLANGER & ASSOCIATES P.L.L.C., TODD E. HOUSLANGER, and NEW CENTURY FINANCIAL SERVICES, Defendants.

12 Civ. 9145 (NRB)
United States District Court, S.D. New York.
March 22, 2018

Attorneys and Law Firms
Andrew L. Tiajoloff, Edward P. Kelly, Tiajoloff & Kelly LLP, New York, NY, for Plaintiff.
Anthony Ignatius Giacobbe, Jr., Barry Jay Glickman, Zeichner Ellman & Krause LLP, Robert Joseph Bergson, Eric B. Post, Abrams Garfinkel Margolis Bergson, LLP, New York, NY, Mitchell Lee Williamson, Barron & Newburger, P.C., Somerset, NJ, for Defendants.

MEMORANDUM AND ORDER
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE

This matter returns from the Court of Appeals, which vacated our June 2014 Memorandum and Order granting Houslanger & Associates P.L.L.C. ("H&A"), Todd E. Houslanger

("Houslanger"), and New Century Financial Services' ("New Century" and, collectively, the "Houslanger defendants") motion to dismiss plaintiff Alexander A. Benzemann's ("plaintiff") claims against them. In a November 2015 opinion, the Second Circuit reversed our determination of the trigger date for the statute of limitations for plaintiff's claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. Following discovery on this issue, the Houslanger defendants have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons discussed below, their motion is granted.

BACKGROUND

I. Factual Background

In April 2003, a judgment was entered in the Civil Court of the City of New York in favor of New Century, an assignee of Citibank N.A. ("Citibank"), against Andrew Benzemann. Amended Complaint ("Am. Compl.") ¶ 11.

On April 21, 2008, Houslanger (of Houslanger & Associates), on behalf of New Century, sent a restraining notice to Citibank referencing the 2003 judgment.[49] See Declaration of Andrew L. Tiajoloff

[49] A restraining notice "enjoins the person served from giving over the defendant's property.... It is in every sense an injunction, and acts as such under the signature of the lawyer without a court order or any other preliminary leave." David D. Siegel, New York Practice § 508 (6th ed. 2018).

("Tiajoloff Decl.") Ex. A. Despite naming the judgment debtor *Andrew* Benzemann, the social security number and home address listed were those of *Alexander* Benzemann, Andrew's brother and the plaintiff in this action. Houslanger Defendants' Rule 56.1 Statement ("Defs.' 56.1") ¶ 2; Affidavit of Alexander Benzemann ("Benzemann Aff.") ¶ 4. Citibank received the restraining notice on April 30, 2008, and proceeded to freeze plaintiff's bank account. Id. ¶ 1. In the days following, plaintiff and his counsel (both then and now), Andrew Tiajoloff ("Tiajoloff"), repeatedly contacted H&A, after which the restraining notice was withdrawn and the account unfrozen. See Tiajoloff Decl. ¶¶ 2-6 & Exs. B, C, D.

Several years later, on December 6, 2011, the Houslanger defendants mailed a "substantially similar" restraining notice, once again containing Andrew Benzemann's name but Alexander Benzemann's social security number and address. See Defs.' 56.1 ¶ 4. Upon receipt, Citibank "blocked" or "restrained" plaintiff's two extant accounts: as of 6:14 P.M. on December 13, 2011, "no funds could come out of" either. Deposition of Polly Wagner[50] ("Wagner Dep.") 17:5-22. To make a withdrawal, plaintiff was thereafter required to visit a financial center and endeavor to obtain permission from

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[50] Polly Wagner, Citibank's Manager of Legal Operations, is responsible for managing the department that handles restraining notices served on Citibank. Defs.' 56.1 ¶ 5.

Citibank legal operations; online and ATM access was "frozen." Id. 47:10-16; see id. 38:3-12.

Later in the evening of December 13, 2011, after his wife informed him that she had "had a problem using [his] Citibank debit card at an ATM," plaintiff attempted to access his accounts through the Citibank website. Benzemann Aff. ¶ 8. The accounts, however, "were not visible on-line at all." Id. ¶ 14. "[B]ecause the same thing had occurred when [his] account was frozen in 2008," plaintiff reached the "extremely distressing" conclusion "that [his] accounts had been frozen." Id. ¶¶ 8, 10; see Deposition of Alexander Benzemann ("Benzemann Dep.") 19:16-20 ("By 8 o'clock, I thought I was going to have a heart attack because I felt such pressure on my chest.... Q. Why was that? A. Because the accounts were gone."). Recognizing that he had a "serious problem" that "might be a legal problem," plaintiff called Tiajoloff sometime between 6:30 and 7:30 P.M. to report "that he was unable to access his bank accounts via the Citibank website and that he called Citibank to inquire about why that had happened." Id. 25:16-20, 26:20-27:2; Tiajoloff Decl. ¶ 7. Plaintiff explained that the Citibank representative with whom he spoke "told him that the accounts were blocked but that no other information [was] available." Tiajoloff Decl. ¶ 7.

The next morning, December 14, 2011, plaintiff left a message with Tiajoloff's secretary, saying "the bank won't give him any information today and maybe not tomorrow either. They said they are preparing the documents." Id. ¶ 10 & Ex. E.

"Shortly after," plaintiff made contact with Tiajoloff, and informed him "that he had by then learned from Citibank that his accounts had been frozen based on a Restraining Notice issued by the Houslanger defendants." Id. ¶ 11. Later that afternoon, Citibank, pursuant to its internal "practice," segregated a sum equal to twice the amount sought in the restraining notice ($898.02) from plaintiff's accounts into Citibank's legal holding account. See Wagner Dep. 23:19-23, 47:34-49:12; see also Tiajoloff Decl. ¶ 12 & Ex. F (describing and attaching the letter Citibank sent plaintiff informing him of the funds segregation).

On December 15, 2011, after receiving a telephone call from Tiajoloff, Citibank restored all funds to plaintiff's accounts and removed the associated restrictions; the accounts were fully "unblocked" as of 11:47 P.M. that night. See Wagner Dep. 56:21-57:12, 70:14-71:3.

II. Procedural Background

After the events in December 2011 described *supra,* plaintiff's counsel, for inexplicable reasons, waited an entire year before bringing suit against Citibank and the Houslanger defendants on December 14, 2012. Plaintiff filed the operative, amended complaint on June 6, 2013, asserting fourteen claims for relief against Citibank and ten against the Houslanger defendants. See Am. Compl. ¶¶ 38-87. Under federal law, the amended complaint asserted FDCPA, § 1983, and due process claims against all defendants, and a separate claim under the Electronic Fund Transfer Act, 15 U.S.C. §

1693 et seq., against Citibank. See Am. Compl. ¶¶ 38-40, 63-65, 81-87. Plaintiff's state law claims included fraud, abuse of process, negligence, negligent and intentional infliction of emotional distress, breach of Article 4 of the Uniform Commercial Code, breach of contract, defamation, tortious interference with contract, and breach of fiduciary duty. See id. ¶¶ 41-62, 66-80. In September and October 2013, Citibank moved to dismiss the claims against it and to compel arbitration, and the Houslanger defendants moved to dismiss all of the claims against them.

In a June 27, 2014 Memorandum and Order, we granted Citibank's motions to compel arbitration and to dismiss. See Benzemann v. Citibank N.A. (Benzemann I), No. 12 Civ. 9145 (NRB), 2014 WL 2933140, at *2-6 (S.D.N.Y. June 27, 2014). We also granted the Houslanger defendants' motion to dismiss all federal claims against them. First, we found plaintiff's due process and § 1983 claims to be meritless because none of the Houslanger defendants' conduct "constitute[d] state action under the Fourteenth Amendment or under color of state law." See id. at *8-9 (internal quotation marks omitted). Second, we found that plaintiff's FDCPA claims were time-barred because we determined that the FDCPA's one-year limitations period commenced when the Houslanger defendants mailed the restraining notice to Citibank on December 6, 2011, and plaintiff's complaint was filed on December 14, 2012. See id. at *5-8. Finally, having dismissed all of plaintiff's federal claims, we declined to exercise supplemental jurisdiction over

plaintiff's pendent state law claims, and dismissed them without prejudice. See id. at *9.

On appeal, the Second Circuit affirmed this Court's judgment insofar as we had (1) dismissed plaintiff's due process and § 1983 claims against the Houslanger defendants, and (2) compelled arbitration of, and dismissed, plaintiff's claims against Citibank. See Benzemann v. Citibank N.A., 622 Fed.Appx. 16 (2d Cir. 2015). However, in a separate opinion, the Second Circuit vacated our dismissal of plaintiff's FDCPA claims against the Houslanger defendants. See Benzemann v. Citibank N.A. (Benzemann II), 806 F.3d 98 (2d Cir. 2015). As we describe more fully *infra,* the Second Circuit concluded that the FDCPA's limitations period was triggered with respect to the Houslanger defendants when plaintiff's account was frozen, not when the restraining notice was mailed. See id. at 103. Accordingly, the Second Circuit remanded the case for this Court to determine when plaintiff's account was frozen. See id. Further, because the FDCPA claim had been resuscitated, the Second Circuit also vacated our dismissal of plaintiff's pendent state law claims for lack of supplemental jurisdiction. See id. at 104.

While his appeal was pending before the Second Circuit, plaintiff filed a largely duplicative action in New York State Supreme Court. See Declaration of Robert J. Bergson ("Bergson Decl.") Ex. E ¶ 10 ("Plaintiff filed civil action no. 12 Civ. 9145 (NRB) in the U.S. District Court for the Southern District of New York based on the same

series of transactions as are set out here."). In this new action, plaintiff not only asserted the pendent state law claims against the Houslanger defendants over which we declined to exercise supplemental jurisdiction, he also (1) re-asserted due process claims, despite this Court's holding that the Houslanger defendants' conduct could not be considered state action, and (2) again named Citibank as a defendant, despite this Court having granted Citibank's motion to compel arbitration.[51] Compare id., with Am. Compl.

On August 11, 2015, the Supreme Court dismissed all of plaintiff's claims on the grounds of res judicata, collateral estoppel, statute of limitations, and/or failure to state a claim. Bergson Decl. Ex. F; see N.Y. C.P.L.R. § 3211(a)(5) & (7). Plaintiff appealed the dismissal as to his "causes of actions [sic] sounding in (1) negligence, (2) wrongful

[51] In dismissing plaintiff's claims against Citibank, the State Supreme Court observed that "[p]laintiff's inclusion of Citibank in this action is improper because the court specifically held in the federal court action that the claims against Citibank were dismissed on the ground it was up to the arbitrator to determine under the first instance whether plaintiff's claims against Citibank were subject to arbitration. The facts in the amended complaint in this action are precisely the facts alleged in the first action in federal court." Bergson Decl. Ex. F, at 9. As we stated at oral argument, plaintiff counsel's decision to reassert his due process claims against the Houslanger defendants, and to reassert *any* claims outside of arbitration against Citibank, "wasted a great deal of the time of the judiciary." Oral Arg. Tr. 8:2-7.

attachment, and (3) violation of due process under the New York State Constitution against all defendants other than Citibank N.A." Benzemann v. Citibank N.A., 149 A.D.3d 586, 586, 55 N.Y.S.3d 33, 34 (1st Dep't 2017). In April 2017, the First Department unanimously affirmed the Supreme Court's decision. Id. at 586, ¶¶ N.Y.S.3d at 34. At oral argument on the pending summary judgment motion, plaintiff's counsel represented that he had filed an appeal with the New York State Court of Appeals in October 2017 and was awaiting a decision.[52] Oral Arg. Tr. 16:6-12.

DISCUSSION

A motion for summary judgment may be granted if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); see Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 326 (2d Cir. 2011). In ruling on a summary judgment motion, we are to "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." McCarthy v. Dun &

[52] As we noted at oral argument, plaintiff's pendent state-law claims, now having been brought (and subsequently dismissed and affirmed on appeal) in New York State court, are no longer before us in this action. See Oral Arg. Tr. 13:24-17:10.

Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (internal quotation marks omitted).

I. Legal Principles: Benzemann I and II

Plaintiff's amended complaint alleged that "on or about December 14, 2011, pursuant to a Restraining Notice dated December 6, 2011," Citibank "froze and segregated all funds on deposit in Plaintiff's account." Am. Compl. ¶ 27. According to plaintiff, "Defendants' actions or inactions in attempting to collect the Andrew Benzemann judgment, including creating or processing the Restraining Notices," constituted a violation of the FDCPA. Id. ¶ 40; see 15 U.S.C. § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.").

Under the FDCPA, "[a]n action to enforce any liability ... may be brought ... within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In Benzemann I, we concluded that the Houslanger defendants had "committed their alleged violation" of the FDCPA, triggering the statute of limitations, by "sending Citibank the purported 'false, deceptive, or misleading representation' in the form of restraining notices" on December 6, 2011. See 2014 WL 2933140, at *7 (quoting 15 U.S.C. § 1692e). In contrast, Citibank's alleged violation had occurred on December 14, 2011, when it allegedly processed the restraining notice and froze plaintiff's accounts. See id.

On appeal, the Second Circuit observed that this approach had "create[d] an anomaly": by the time the statute of limitations began with respect to Citibank, on December 14, 2011, it had already been running for eight days with respect to plaintiff's claims against the Houslanger defendants. See Benzemann II, 806 F.3d at 101. Rather, a single trigger was appropriate, i.e., the date of injury, because "a cause of action accrues when conduct that invades the rights of another has caused injury. When the injury occurs, the injured party has the right to bring suit for all of the damages, past, present and future, caused by the defendant's acts." Id. (quoting Leonhard v. United States, 633 F.2d 599, 613 (2d Cir. 1980)).

In this case, plaintiff was injured when his account was frozen: "Before Citibank froze Benzemann's account, Benzemann had suffered no injury." Id. (citing Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir. 1992)). Indeed, as counsel for the Houslanger defendants apparently conceded at oral argument before the Court of Appeals, "Benzemann could not have sued Houslanger before Citibank froze his account. Before that time, he had 'no complete and present cause of action' against Houslanger." Id. (quoting Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 445-46, 448 (5th Cir. 2013)).

Seeing "no indication" that Congress intended for Section 1692k(d)'s limitations period to begin any earlier than when plaintiff was injured, the Second Circuit "h[e]ld ... that where a debt collector

sends an allegedly unlawful restraining notice to a bank, the FDCPA violation does not 'occur' for purposes of Section 1692k(d) until the bank freezes the debtor's account." Id. at 102-03.

The record, however, was ambiguous as to when plaintiff's account was frozen. While the complaint alleged that the freeze occurred "on or about December 14, 2011," which would render plaintiff's December 14, 2012 claim timely, plaintiff's counsel had indicated at oral argument before this Court "that the freeze may have actually been imposed on December 13, 2011." Id. at 103. Accordingly, the Second Circuit remanded the case "for whatever further proceedings are necessary to resolve this issue." Id.

Following discovery upon remand, the Houslanger defendants have moved for summary judgment on plaintiff's cause of action under the FDCPA, the only claim remaining.

II. Plaintiff's Account Was Frozen, and the Statute of Limitations Was Triggered, on December 13, 2011

Following further development of the record, it is indisputable that plaintiff was injured on the evening of December 13, 2011, when his account was frozen, thereby triggering the FDCPA's one-year statute of limitations. See Benzemann II, 806 F.3d at 103.

As plaintiff conceded at oral argument on the pending motion, he was injured when online access to his accounts was restricted between 6:30 and 7:30 P.M. on December 13, 2011:

The Court: Mr. Tiajoloff, do you dispute the facts/legal conclusion that Mr. Benzemann was injured when he went online on December 13th, 2011, between 6:30 and 7:30 p.m. and learned that his accounts were inaccessible?

Mr. Tiajoloff: No, your Honor, we don't dispute the injury.

Oral Arg. Tr. 2:21-3:1; see id. 3:25-4:5 ("The Court: [The] FDCPA violation here did not occur until Citibank froze Benzemann's account because it was only then that he had a complete cause of action and notice of the FDCPA violation.... I asked you was he injured that night. Mr. Tiajoloff: That's correct, your Honor."), 4:14-20 ("Mr. Tiajoloff: [T]here has to be a complete cause of action, and that probably occurred—The Court: And they say that is when someone is injured. Mr. Tiajoloff: That's correct. The Court: He was injured. Mr. Tiajoloff: That's correct, that occur[red]."); see also Wagner Dep. 17:5-22 (explaining that no funds could be removed from either of plaintiff's Citibank accounts as of 6:14 P.M. on December 13, 2011).

Moreover, plaintiff was further injured on the evening of December 13, 2011, when he first experienced the emotional distress for which he seeks damages under the FDCPA. Am. Compl. ¶ 37; see McPhatter v. M. Callahan & Assocs., LLC, No.

11-CV-05321 (NGG)(LB), 2013 WL 5209926, at *4 (E.D.N.Y. Sept. 13, 2013) ("Emotional distress damages are recoverable in cases alleging a violation of the FDCPA." (alterations incorporated) (quoting Conboy v. AT&T Corp., 84 F. Supp. 2d 492, 507 (S.D.N.Y. 2000))).

As plaintiff testified,

Answer: By 8 o'clock, I thought I was going to have a heart attack because I felt such pressure on my chest. That was about 8 o'clock.

Question: Why was that?

Answer: Because the accounts were gone.

Benzemann Dep. 19:16-20; see id. 33:16-23 (Q. "[Y]ou recall at some point in the evening advising your wife as to what had happened when you attempted to access your accounts online, correct? A. Yes. Q. And what, if anything, was your wife's response to what you had told her? A. She kept telling me to take deep breaths.").

Thus, plaintiff was injured on December 13, 2011, when his account was frozen, at which point the "violation" of the FDCPA "occur[red]," and the one-year statute of limitations was triggered. See Benzemann II, 806 F.3d at 103.

Despite the Second Circuit's clear holding that the FDCPA's limitations period is triggered when "the bank freezes the debtor's account," id., plaintiff contends that the limitations period should

have begun the *next* day, when he allegedly first became aware: (1) that it was the Houslanger defendants who were responsible for his account being frozen; (2) that the account freeze was not "justified;" and (3) that he had a cause of action under the FDCPA. See Tiajoloff Decl. ¶ 9. Each of these contentions is completely meritless: either the record demonstrates that he actually knew this information on December 13, 2011, or his alleged ignorance is irrelevant for statute of limitations purposes, or both. We consider each contention *seriatim*.

At oral argument, plaintiff referred the Court to a footnote in Benzemann II, in which the Second Circuit "question[ed] whether" two cases from the Eighth and Eleventh Circuits "meaningfully confront the rule that ... a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." 806 F.3d at 103 n.1 (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc., 522 U.S. 192, 201 (1997)); see Oral Arg. Tr. 10:18-11:2. According to plaintiff, he could not have "file[d] suit and obtain[ed] relief" against the Houslanger defendants on December 13, 2011, because it was not until December 14, 2011, that he learned that it was they who had issued the restraining notice that induced the account freeze. See Tiajoloff Decl. ¶ 9.

This argument is unavailing. As an initial matter, plaintiff was *not* truly ignorant of the Houslanger defendants' likely role in his account

freeze until December 14, 2011. As early as December 13, 2011, plaintiff "concluded that [his] accounts had been frozen because the same thing had occurred when [his] account was frozen in 2008." Benzemann Aff. ¶ 8. In reaching this conclusion, plaintiff would have recalled not only that his account had been frozen three years prior, but also how it had occurred and who had been responsible.

Regardless, plaintiff is incorrect, as a matter of law, that commencement of the statute of limitations awaits plaintiff learning the identity of all of his tortfeasors. This can be inferred from the fact that "John Doe" pleadings, in which a plaintiff files a complaint against an unknown defendant, "cannot be used to circumvent statutes of limitations." Hogan v. Fischer, 738 F.3d 509, 517 (2d Cir. 2013) (citing Aslandis v. U.S. Lines, Inc., 7 F.3d 1067, 1075 (2d Cir. 1993)). Once the unknown defendant's identity is learned, "an amended complaint adding new defendants does not relate back to the original complaint if the defendants were not originally named because plaintiff did not know their identities at the time that the complaint was filed." Franks v. City of New York, No. 13-CV-6254(KAM)(RER), 2017 WL 1194500, at *5 (E.D.N.Y. Mar. 31, 2017) (citing Scott v. Village of Spring Valley, 577 Fed.Appx. 81, 82-83 (2d Cir. 2014)). In other words, the statute of limitations runs against unidentified defendants just as it does against the identified defendants whom plaintiff

names in his initial complaint.[53]

Next, plaintiff contends that, by operation of the discovery rule of federal common law, the statute of limitations could not have been triggered on December 13, 2011, when he was unsure if the freeze was justified, and ignorant of his FDCPA cause of action. See Tiajoloff Decl. ¶ 9. The discovery rule, if applicable, "postpones the beginning of the limitations period ... from when the plaintiff is wronged to the date when he discovers he has been injured." SEC v. Wyly, 788 F. Supp. 2d 92, 102 (S.D.N.Y. 2012) (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990)). The date of "discovery," for purposes of the discovery rule, is the earlier of "when the litigant first knows or with due diligence should know the facts that will form the basis for an action." Merck & Co. v. Reynolds, 559 U.S. 633, 644 (2010) (internal quotation marks omitted); Guilbert v. Gardner, 480 F.3d 140, 149 (2d Cir. 2009) ("A federal court generally employs the discovery rule, under which a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." (internal quotation marks omitted)). We need not decide whether the

[53] Moreover, unlike the "single trigger" approach that we have applied, "the plaintiff's limitations clock was ticking before the plaintiff was able to file suit" in both of the cases to which the Second Circuit was referring in its footnote. See Benzemann II, 806 F.3d at 103 n.1 (citing Maloy v. Phillips, 64 F.3d 607, 608 (11th Cir. 1995); Mattson v. U.S. W. Commc'ns, Inc., 967 F.2d 259, 261 (8th Cir. 1992)).

discovery rule is compatible with the FDCPA because applying the rule in this case would be futile: as we have already explained, plaintiff "discovered ... the injury" on December 13, 2011.[54] See Guilbert, 480 F.3d at 149.

Moreover, contrary to his contentions, plaintiff had determined, as of December 13, 2011, that the freeze on his account was not "justified." Plaintiff called his lawyer within thirty minutes of attempting to access his account online because he

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[54] According to the record at the time of Benzemann I, plaintiff "became aware" on December 14, as opposed to December 13, 2011, "that [his] two bank accounts at Citibank had been frozen late that day by accessing the Citibank online banking website." See Declaration of Andrew Benzemann ¶ 8. Initially, we considered but rejected plaintiff's argument that the discovery rule applies to FDCPA claims, finding that application of the discovery rule would be inconsistent with the plain language and self-proclaimed purpose of the FDCPA. See Benzemann I, 2014 WL 2933140, at *5-7. The Second Circuit, also operating under the assumption that plaintiff became aware of the freeze on December 14, wrote in a footnote that "[i]f the district court were to find ... that the freeze occurred on December 13, 2011, it would then need to determine whether the discovery rule applies." Benzemann II, 806 F.3d at 102, 103 n.2. However, plaintiff has corrected the record on remand so as to make such a decision unnecessary as there is no difference between the freeze date and the discovery date. In his affidavit in opposition to the pending motion, plaintiff explains that his attorney drafted his prior declaration "with some incorrect dates." Benzemann Aff. ¶ 14 ("I believed that the dates provided in the [prior declaration] were correct based on his assurances."). Plaintiff now represents that he attempted to access his account online on December 13, rather than December 14, 2011 and was unable to do so. See id. ¶ 8.

recognized he had a "serious problem," that "might be a legal problem." See Benzemann Dep. 26:20-27:2. Further, when pressed at oral argument, plaintiff's counsel could not say that plaintiff was unaware at the time of any outstanding judgments against him. See Oral Arg. Tr. 4:25-5:11. That no outstanding judgments appeared to exist as of that date means, *ipso facto,* that the restraint on his accounts was not justified.

Plaintiff's assertion that he was ignorant of "whether a cause of action could have existed" on December 13, 2011 fares no better. "[D]iscovery of the injury, not discovery of the other elements of a claim, is what starts the clock." Koch v. Christie's Int'l, PLC, 699 F.3d 141, 148 (2d Cir. 2012) (quoting Rotella v. Wood, 528 U.S. 549, 555 (2000)). The fact that plaintiff, recognizing that he had been injured, was unsure as to which causes of action he might be able to assert does not impact the statute of limitations analysis.

Plaintiff was injured on the evening of December 13, 2011, when his account was frozen, thereby triggering the FDCPA's one-year statute of limitations. Plaintiff's suit, filed one year and one day later, is untimely. Plaintiff's argument, that the limitations period was triggered on December 14, 2011 due to his professed ignorance of legally irrelevant facts, is completely irreconcilable with the Second Circuit's holding in Benzemann II. As Houslanger and H&A's counsel succinctly summarized this case at oral argument, "Counsel knew about this action on the 13th and waited a

year and a day. If there's any fault here, all he needs to do is look in the mirror." Oral Arg. Tr. 13:18-20.

CONCLUSION

For the aforementioned reasons, the Houslanger defendants' motion for summary judgment is granted. The Clerk of the Court is respectfully directed to terminate docket number 85; enter judgment for defendants Houslanger & Associates P.L.L.C., Todd E. Houslanger, and New Century Financial Services; and close this case.