21-124

IN THE
SUPREME COURT OF THE UNITED SATES

EMMANUEL TORRES

Petitioners

V

BAY AREA CREDIT SERVICESET AL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EMMANUEL TORRES
120 ALCOTT PLACE APR 28E
BRONX NEW YORK 10472
646-529-8531

–v–

QUESTION PRESNETED

Does a consumer have a private right of action under New York General Business Law Section 349 for a Fair Debt Collection Practices Act Violation.

OPINIONS BELOW

The decision of the United States District of Columbia Southern District of New York is an unpublished decision issued on December 23, 2019, by the Honorable Paul Engelmayer 19-cv-9557. The case was timely appealed to the United States Court of Appeals for the Second Circuit Jan 22, 2020, the appeal was docketed 20-297. The Circuit Panel dismissed the Appeal in an unpublished decision dated January 25, 2021. A timely petition for rehearing and rehearing en bank was filed February 8, 2021. Petitioner was advised by the Clerk of the Court he could not file for rehearing en bank, until he first filed a petition for reconsideration. Petitioner filed the petition for reconsideration on March 3, 2021. The Circuit Panel Parker, Lohier and Menashi denied the petition for reconsideration March 26, 221 and issued its mandate April 2, 2021, this petition follows.

PARTIES TO THE ACTION

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CONSTITUTUIONAL, STATUTORY, REGULATORY PROVISIONS INVOLVED

Federal Statutes
15 U.S.C. 1692
15 U.S.C. 1692e(2)(A)
15 U.S.C. 1692e (10)
15 U.S.C. 1692f) (1)

TABLE OF CONTENTS

INDEX OF APPENDIX

TABLE OF AUTHORITIES

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BASIS FOR JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C.1254(1)

CONSTITUTUIONAL, STATUTORY, REGULATORY PROVISIONS INVOLVED

State Statutes

New York General Business Section 349
New York general Business Law Section 601

Federal Statutes

15 U.S.C. 1692
15 U.S.C. 1692e(2)(A)
15 U.S.C. 1692e (10)
15 U.S.C. 1692f) (1)

STATEMENT OF THE CASE

This case arises out of a fair debt collection practices act violation, which was filed in the Civil Court for the City of New York County of the Bronx in a matter entitled Emmanuel Torres v American Medical Response and Bay Area Credit Services. The instant matter specifically in volved a series of debt collection violations, were Defendants. Engaged collection efforts, seeking to collect debt, from a Manuel Torres a California resident. Petitioner sought to have the matter corrected, he alerted Respondents to their error. He indicated he was a New York Resident. He indicated he has never been to California. Lastly, he could not have been the individual who was the subject of the ambulance ride to the San Diego Medical Center. The matter was removed by Defendant American Medical Response to the United States District Court Southern District of New York Case No 19-CV-9557.

After the status conference, initial terms of a settlement were reached in principle, the matter was agreed to be settled for $1,500. Bur before the final agreement was executed, petitioner was notified his credit monitoring agency (life-lock). That another debt collection matter had been entered on his credit profile. After some initial inquiries concerning the derogatory credit entry. Petitioner discovered that Rural Metro Ambulance Company the reporting "creditor" and Wakefield & Associates the "collection agency". Had sought to collect on the same debt, as was thought in the first action, Torres v American Medical Response. (Torres 1). However, after further review petitioner realized that the event dates and pick up locations sought to be collected. Were in fact two separate incidents-accidents and were two separate individuals who just happen to have the same last name.

Petitioner then went to the California Secretary of State website and located the corporation filing documents for American Medical Response Inc. Petitioner then further researched Rural Metro Ambulance Corporation and discovered that Rural Metro, had been purchased lock, stock and barrel by American Medical Response in 2015. Petitioner located the corporate name change documents which indicated its name was changed from Rural Metro Ambulance Corp to American Medical Response.

Petitioner conducted a PACER search for American Medical Response and Rural Metro Ambulance Company. Petitioner located a US District Court Case from the Southern District of California. Laila Abikhail v American Medical Response Ambulance Services Inc Case No 2:15-cv-09358. Petitioner also located a second case from the Southern District of California Normal R. Beachel v Credence Resource Management Inc, et al Case No 3:17-cv-012444-L. Petitioner searched the legal docket and at docket entry no 8, notice of interested parties. Rural Metro Ambulance Corp indicated that Rural Metro is a wholly owned by Rural Metro Corporation,

which is wholly owned by WP Rocket Holdings Inc, which is wholly owned by AMR (American Medical Response Corporation). The notice was filed with the District Court by Harijot S. Khalsa Attorney at Law Sessions, Fishman Nathan & Israel LLP.

Petitioner provided all of the copies of the relevant corporation documents which were filed with the California Secretary of State. Because the documents were obtained from a source whose accuracy could not be reasonably questioned. Petitioner had submitted a valid offer of proof under Fed Rules of Evidence. The documents which were provided the Engelmayer Court. The documents clearly established the incontrovertible fact. That Mr. Aaron Easley counsel for American Medical Response made material and factual misstatements to the Engelmayer Court. The material misstatement which was material to Petitioner's motion seeking to reopen the closed case was the fact that. Mr. Easley falsely testified to the Engelmayer Court that American Medical Response and Rural Metro Ambulance Corp were in fact unrelated entities,

Petitioner asserts that based in part on newly discovered facts and evidence that sufficient cause existed to warrant the reopening of the "settled matter". Petitioner asserts that it was not harmless error for a District Court Judge, when presented with a valid offer of proof in the form of public records. Subject to Federal Rules of Evidence 201. To ignore material evidence of attorney misconduct (which is subject to judicial notice) is not a discretionary function. At the core the issue which called into question the settlement agreement, was the misrepresentation by Mr. Easley, that American Medical Response and Rural Metro Ambulance Services were separate an un-related entity. Because the Engelmayer Court, adopted the position of American Medical Response. It denied the motion to reopen and motion for leave to file the First Amended Complaint. The Engelmayer dismissal order included a proviso which read in part as follows: "If *plaintiff wishes to pursue litigation against these new defendants he may do so in a court of appropriate jurisdiction*". This matter, however, will remain closed. The clerk is directed to mail a copy of this order to plaintiff". Petitioner timely appealed the order to the Second Circuit.

APPELLANT FOLLOWED THE ENGELMAYER COURTS DIRECTIVE AND SOUGHT RELIEF IN A COURT OF COMPENTENT JURISDICTION

Petitioner filed two state court actions, alleging violations of New York State Fair Debt Collection Practices Act and General Business Law violations of Section 349 and 601. The actions were filed in the Civil Court of the City of New York County of the Bronx. On November 6, 2020, defendants to avoid default, removed both Torres v Bay Area Credit Services Civil Case No 11449-2020 and Torres v Wakefield & Associates Civil Case No 11448-2020 to the District Court. The newly assigned district court case numbers were Emmanuel Torres v Bay Area Credit Services et al

20-cv-9342 and Emmanuel Torres v Wakefield & Associates et al 20-cv-9343.

PETITIONER IMMEDIATELY OPPOSED THE REMOVAL MOTIONS

Petitioner filed two motions seeking an order of summary remand one before the Honorable Mary Vyskocil and the second one before Honorable Andrew Carter Jr. Judge Carter had denied the motion for summary remand without prejudice. Having determined in his initial review of the complaint, found "the complaint alleges violations of the New York Fair Debt Collection Practices Act and General Business Law Section 349. No federal claim is presented on the face of the complaint." Further Rule 12(h) of the Federal Rules of Civil Procedure requires courts to dismiss an action "if [it] determines at any time it lacks subject-matter jurisdiction".

JUDGE CARTER AND JUDGE VOYKSIL REMANDED THE CASES AFTER CONSIDERATION OF THE MERITS

The Carter Court has set an order to show cause to which Petitioner responded as did Defendants American Medical Response and Bay Area Credit Service who filed their oppositions. Judge Voyksil who was the judge in the second matter Torres v Wakefield & Associates et al. Likewise found the jurisdictional premise for removal questionable and set a briefing schedule to address the summary remand motion.

Judge Carter after consideration of the merits of the supporting and opposing briefs found. That instant matter Torres v Bay Area Credit Services et al was improperly removed to District Court. He further found, no federal cause of action was alleged, all of the allegations against Defendants. Were New York State causes of action for violations of New York State Fair Debt Collection Practices Act. Accordingly, he remanded the case.

Judge Vyskocil likewise after consideration of a fully briefed motion found "[D]efendants has the burden to establish that removal was proper. United Food & Commercial Workers Union, Local 919 v Center Mark Props, Meridien Square, Inc., 30 F.3d 298, 301 (2nd Cir 1994). To do so, in its opposition to remand Rural Metro cites several decisions from courts in this Circuit holding that certain state claims are preempted by the Fair Credit Reporting Act ('FCRA") and to a lesser extent, Fair Debt Collection Practices Act ("FDCPA"). In essence Rural Metro submits that such preemption means that Plaintiff could only succeed by bringing federal claims. However, whether the claims as plead in plaintiff's complaint can succeed is not the operative question for removal.

"Ordinarily, preemption is a defense to be asserted in state court and is not a ground for the removal, except in a limited number of cases in which complete-preemption applies. Under the complete preemption doctrine, certain federal

statutes are construed to have such extraordinary preemptive force that state law claims coming within the scope of the federal statues are transformed, for jurisdictional purposes, into federal claims i.e., completely preempted" Holmes v Experian Information Solutions, Inc., 507 Fed. Apx 33, 34 (2nd Cir 2013) (summary order) (quoting Sullivan v Am, Airlines, Inc., 424 F.3d 267, 272-273 (2nd Cir 2005)).

The Vyskocil court agreed with the majority of other courts "Plaintiff's complaint does not in any fashion allege the violation of any federal law and defendants cannot rely on the complete preemption removal doctrine to convert plaintiffs state claim into a FRCA claim" citing Gonzalez-Blanco v Bank of Am, N.A. No 11-cv-07139 (TPG), 2011 WL 5433687, at 1 (SDNY Nov 9, 2011).Consistent with instruction that the "statutory procedures for removal are to be strictly construed" and that any doubts about jurisdiction should never be resolved "against removability" In re Methyl Tertiary Butyl Ether ("MTBE") Prods Liability Litig, 488 F.3d 112, 124 (2nd Cir 2007) (internal citations omitted) Plaintiffs claims should be litigated in state court, The motion to remand is granted.

The Second Circuit panel dismissed the appeal as moot. Petitioner filed the petitions for rehearing en bank and reconsideration. Judge Vyskocil remanded the matter, and the Second Circuit denied the petition for rehearing, issued its mandate and this petition followed.

MEMORANDUM OF POINTS AND AUTHORITIES

Judge Carter in Morales v Kavulich & Associates 294 F. Supp 3d 193 (2018) found that Morales argues that Kavulich violated § 349 by (1) enforcing non-existent judgments, (2) sending out Restraints and Executions that systematically fail to credit money paid on those judgments, and (3) falsely implying he had performed a meaningful review in signing and serving the Restraint and Execution. Defendants counter with two arguments. First, Kavulich's conduct falls under GBL § 601(8), which prohibits a creditor or an agent thereof from "claim[ing], or attempt[ing] or theaten[ing] to enforce a right with knowledge or reason to know that the right does not exist," and thus Morales cannot bring an action alleging a violation of § 349 based on those acts. Second, pointing to Morales's affidavit, he was not deceived or misled into believing there was a judgment against him and thus Kavulich's conduct was not materially misleading. Both arguments fail.

Regarding the first argument, Defendants rely on *Gomez v. Resurgent Capital Servs., LP*, 129 F.Supp.3d 147 (S.D.N.Y. 2015) for the argument that a claim under § 601 precludes a claim under § 349, although they acknowledge that courts have disagreed with that decision. In *Gomez,* the court relying on *Conboy v. AT & T Corp.,* 241 F.3d 242, 258 (2d Cir. 2001), held that defendant's conduct, which involved

enforcing sewer service default judgments on time-barred debts and the "robo-signing" of the execution paperwork, was a violation of § 601 and thus precludes § 349. 129 F.Supp.3d at 158-59. In *Conboy,* the Second Circuit held that a plaintiff could not plead a claim for violation of § 349 by alleging that a violation of GBL § 601(6) necessarily constitutes a deceptive act under GBL § 349. 241 F.3d at 258. Other courts have found that the *Gomez* court's reading of *Conboy* is too broad and interpret, instead, *Conboy* to prohibit a claim for § 349 that is "solely a violation of Section 601." *Martinez v. Lvnv Funding, LLC,* No. 14-CV-00677 (RRM) (ST), 2016 WL 5719718, at *3 (E.D.N.Y. Sept. 30, 2016); *Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP,* 163 F.Supp.3d 109, 117 (S.D.N.Y. 2016) ("*Conboy* simply stands for the proposition that a § 601 claim is not necessarily a § 349 violation: it did not address conduct that supports claims under both § 601 and § 349."); *Scott v. Greenberg,* 15-CV-05527 (MKB), 2017 WL 1214441, at *19-20 (E.D.N.Y. Mar. 31, 2017) ("*Conboy* does not hold that a section 349 claim may never overlap with a section 601 claim, only that a plaintiff cannot successfully avoid the lack of a private right of action under section 601 by bringing a section 349 claim."). The Court finds *Gomez* unpersuasive and joins the weight of the authority in finding that a plaintiff can bring a § 349 claim based on conduct that is also violative of a § 601 claim, as long as the conduct meets all of the elements of a § 349 claim.

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." GBL § 349(a). To assert a claim under § 349, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Nick's Garage, Inc. v. Progressive Casualty Ins. Co.,* 875 F.3d 107, 124 (2d Cir. 2017). Defendants contest only the second element of the § 349 claim, that Kavulich's conduct was materially misleading. Whether an act is materially misleading is defined objectively and looks to whether the act is likely to mislead a reasonable consumer acting reasonably under the circumstances. *Spagnola v. Chubb Corp.,* 574 F.3d 64, 74 (2d Cir. 2009). The reasonable consumer element may either present issues of fact or be resolved as a matter of law. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) ("[The] test ... may be determined as a matter of law or fact (as individual cases require).").

In response to the restraint of his account, Morales, confused, went to the bank to inquire about what was going on and sought legal assistance. See Morales Aff. 11-16. Defendants argue these actions demonstrate that he was not deceived or led into believing there was a judgment against him. See Morales Aff. 11-16. The argument is baseless; on the contrary, these undisputed facts establish that Morales was

misled. After receiving an information subpoena or notice of the restraint, a reasonable consumer reading those documents would likely be misled into believing that the judgment exists and that the amount owed on these documents is accurate. See Winslow v. Forster & Garbus, LLP, CV 15-2996 (AYS), 2017 WL 6375744, at *13 (E.D.N.Y. Dec 13, 2017) (holding "as a matter of law that statement, viewed objectively, might lead a debtor to be confused as to the nature of the debt sought to be collected and is therefore misleading"); Martinez, 2016 WL 5719718, at *3 (finding that the practice of attempting to collect on previously vacated judgments "is deceptive on its face"); Hunter v. Palisades Acquisition XVI, LLC, 2017 WL 5513636, at 8 (S.D.N.Y. Nov. 16, 2017) (finding that issuance of restraint based on vacated judgment is materially misleading). The undisputed facts are that Morales received a restraining notice and execution that misrepresented that he had a judgment entered against him. Accordingly, the information subpoena and restraining notice were materially misleading, and Morales is entitled to summary judgment on his § 349 claim.

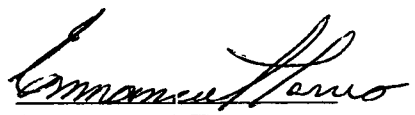
The holding within the Second Circuit was that New York General Business Law Section 349 did not create "a private right of action" citing as its authority Fernandez v Peter J. Craig & Associates PC, 985 F. Supp 2d 363, 371 (E.D.N.Y. 2013), and General Business Law Section 602(2). However, three cases have rejected the Gomez reasoning, Samma v Abrams, Fensterman, Fensterman, Esiman, Formato, Ferrara & Wolf LLP 163 F. Supp 3d 109, 117 (SDNY 2016), provided a more accurate reading of Comboy, explaining "proposition that a 601 claim is not necessarily a 349 conduct that supports both 601 and 349. In particular, it does not disallow a 349 claim because the underlying conduct also constitutes a violation of 601. Similarly Martinez v LVNV Funding LLC No 14-cv-00677 (RMM) (ST), 2016 WL 5719718 at 3 E.D. N.Y. (Sept 30, 2016) found Gomez "unpersuasive and against the weight of more compelling authority" Martinez adopted Samms holding that a private right of action under GBL 349 is not barred simply because he facts also give rise to a GBL 601 claim. A plaintiff may still assert a free standing GBL 349 claim so long as they meet all of the GBL 349 elements id at 2-3 see also Scott v Greenberg 15-cv-05527 (MKB), 2017 WL 1214441 at 19 E.D.N.Y. Mar 31, 2017, adopting Samms and Martinez.

REASONS FOR GRANTING THE WRIT

The Second Circuit has permitted an inter-district and an inter circuit conflict to remain unresolved. The basic question remains does a consumer who is asserting injury on account of a fair debt collection practices act violation have a private right of action?

CONCLUSION

Petitioner asserts that clarity is an absolute and necessary function when it comes to the regulation of and enforcement of fair debt collection violations. At issue is the question does a litigant have a "private right of action" for a debt collection violation.



Emmanuel Torres