

Stoddard v. Nationwide Recovery Serv. CV-03-334-JD 11/25/03  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Perley H. Stoddard, Jr., et al.

v.

Civil No. 03-334-JD  
Opinion No. 2003 DNH 202

Nationwide Recovery Service, Inc.

O R D E R

The plaintiff, Perley H. Stoddard, Jr., filed a class action complaint, alleging that the defendant, Nationwide Recovery Service, Inc., violated provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692d(a) and §§ 1692e(10) and (11). Nationwide brought a counterclaim, alleging that Stoddard brought the claims in bad faith and for harassment and seeking an award of attorneys' fees and costs pursuant to 15 U.S.C. § 1692k(a)(3). Stoddard moves to dismiss the counterclaim as premature.<sup>1</sup>

Section 1692k(a)(3) provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." Before Nationwide may prevail on that claim, however, Stoddard would have to lose all three of his

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<sup>1</sup>To the extent Stoddard may also have intended to challenge the counterclaim on the merits, that cannot be resolved at this stage of the litigation.

claims and Nationwide would have to demonstrate to the court that all three claims were brought in bad faith and for the purpose of harassment. Horkey v. J.V.D.B. & Assoc., 333 F.3d 769, 775 (7th Cir. 2003); Chaudhry v. Gallerizzo, 174 F.3d 394, 411 (4th Cir. 1999); Savino v. Computer Credit, Inc., 164 F.3d 81, 88 n.3 (2d Cir. 1998). That determination cannot be made until the merits of the plaintiff's claims are resolved. Micare v. Foster & Garbus, 132 F. Supp. 2d 77, 82 (N.D.N.Y. 2001).

The dispute raised in Stoddard's motion is whether Nationwide may invoke § 1692k(a)(3) in a counterclaim or whether it must wait until the conclusion of the litigation and then, if appropriate, move for an award under that section. The parties have cited cases that have addressed the issue in both procedural postures. Despite Stoddard's argument that the court lacks jurisdiction to consider the issue as a counterclaim, no case law is cited to support that assertion.

Although it might be better practice to raise a claim under § 1692k(a)(3) in a motion at the conclusion of the litigation, that procedure does not appear to be jurisdictionally required. Whether brought as a counterclaim or by motion, a claim under that section is decided by the court only after the litigation has been resolved against the plaintiff. Therefore, Nationwide's counterclaim will be considered by the court after Stoddard's

claims are finally resolved, and no mention of or evidence pertaining to the counterclaim will be allowed at trial.

Conclusion

For the foregoing reasons, the plaintiff's motion to dismiss (document no. 7) is denied. The plaintiff shall serve and file a reply to the counterclaim pursuant to Federal Rule of Civil Procedure 12(a).

SO ORDERED.

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Joseph A. DiClerico, Jr.  
United States District Judge

November 25, 2003

cc: O. Randolph Bragg, Esquire  
Robert A. Jutras, Esquire  
Joel Rosen, Esquire  
Christopher J. Seufert, Esquire