UNITED STATES DISTRICT COURT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS GRAY,

Plaintiff,

v.

TROTT & TROTT, P.C.,

Defendant.
_____/

File No. 1:16-cv-237

HON. ROBERT HOLMES BELL

MEMORANDUM OPINION AND ORDER

Plaintiff filed a class action complaint alleging violations of the Fair Debt Collection Practices Act ("Act"), 15 U.S.C. § 1692 *et seq.* Plaintiff alleges that Defendant used illegal practices in connection with its attempt to collect debts. On November 10, 2016, the Court denied Defendant's motion for judgment on the pleadings. (ECF No. 26.) The matter is before the Court on Defendant's motion for reconsideration. (ECF No. 27.)

I.

To succeed on a motion for reconsideration, Defendant must "not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof." W.D. Mich. LCivR 7.4(a). "A defect is palpable if it is easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct or manifest." *Witherspoon v. Howes*, No. 1:07-cv-981, 2008 WL 4155350, at *1 (W.D. Mich. Sep. 5, 2008) (citing *Compuware Corp. v. Serena Software Int'l,*

Inc., 77 F. Supp. 2d 816, 819 (E.D. Mich. 1999)). The decision to grant or deny a motion for reconsideration under this Local Rule falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691 (6th Cir. 2012).

A motion for reconsideration presents an opportunity for the Court to address an erroneous factual conclusion, because the Court overlooked or misconstrued the record, or to correct a misunderstanding of the law, because the Court applied the wrong standard, wrong test, relied on bad precedent, or something similar. *Fleet Eng'rs, Inc. v. Mudguard Tech., LLC*, No. 1:12-CV-1143, 2013 WL 12085183, at *1 (W.D. Mich. Dec. 31, 2013). Disagreement with the Court's interpretations of facts, or applications of the correct law, rarely provide a sound basis for a motion for reconsideration. *Id.*

II.

Defendant argues that the Court misapplied Sixth Circuit precedent. Defendant also contends that the Court summarily dismissed case law that a debt-collection disclosure is largely irrelevant to determine whether a notice qualifies as a communication subject to the Act. Finally, Defendant argues that the Court summarily disregarded the Federal Trade Commission's ("FTC") Staff Commentary.

First, the Court relied upon *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), to reach the conclusion that the notice of sale was a communication made for the purpose of obtaining payment on the underlying debt. Defendants rely on *Goodson v. Bank of America*, 600 F. App'x 422 (6th Cir. 2015), to argue that the Court did not consider the animating purpose of the notice of sale. But the Court distinguished the letter at issue in

Goodson from the notice of sale. In *Goodson*, the Sixth Circuit held that the letter's purpose was to inform the plaintiff of the status of her loan. *Goodson*, 600 F. App'x at 431-32 ("[T]he animating purpose . . . was to inform Goodson about a change in her loan servicer, not to induce her to resume payments on her defaulted mortgage."). Moreover, in *Glazer*, the Sixth Circuit opined that:

> *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt).

Glazer, 704 F.3d at 461 (emphasis in original). A review of the language and structure of the notice of sale shows that it was sent for the purpose of obtaining payment—by compulsion— of the underlying debt, not to inform Plaintiff of a change in his loan.

Likewise, in *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011), the Sixth Circuit noted that, "to use the language of § 1692e, a letter that is not itself a collection attempt, but that aims to make such an attempt more likely to succeed, is one that has the requisite connection." *Id.* In *Grden* and *Goodson*, the Sixth Circuit considered the following factors in order to determine whether the Act applied to the communication at issue: (1) the nature of the relationship of the parties; (2) whether the communication expressly demanded payment or stated a balance due; (3) whether it was sent in response to an inquiry or request by the debtor; (4) whether the statements were part of a strategy to make payment more likely; (5) whether the communication was from a debt collector; (6) whether it stated that it was an attempt to collect a debt; and (7) whether it threatened

consequences should the debtor fail to pay. *Goodson*, 600 F. App'x at 431 (citing *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011) and *McDermott v. Randall S. Miller & Assocs., P.C.*, 835 F. Supp. 2d 362, 370-71 (E.D. Mich. 2011)).

Several of these factors weigh in favor of the Court's conclusion. "Lawyers who meet the general definition of a 'debt collector' must comply with [the Act] when engaged in mortgage foreclosure." *Glazer*, 704 F.3d at 464. Under the Act, a debt collector either (1) has as his principal business purpose "the collection of any debts" or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due . . . another." *Id.* (quoting § 1692a(6)). The complaint pleads that Defendant is engaged in the business of collecting mortgage debts for its bank clients through foreclosure, and the notice of sale states that the firm is a debt collector. (ECF No. 1, PageID.3-4, PageID.8.) As such, Defendant satisfies the Act's definition for a debt collector, and the nature of the parties' relationship is that of a debt collector and debtor. Moreover, the notice of sale indicates the total amount owed and states that it is due "at the date hereof." (*Id.* at PageID.10.)

In addition, the Sixth Circuit noted in *Grden* that "the decisive point" among the factors considered was that the defendant "made the balance statements only after Grden called and asked for them. The statements were merely a ministerial response to a debtor inquiry, rather than part of a strategy to make payment more likely." *Grden*, 643 F.3d at 173. Here, the notice of sale was not sent in response to Plaintiff's inquiry. Defendant admits that it published the notice of sale in order to adhere to the requirements of Michigan's foreclosure-by-advertisement statute. Further, the notice of sale also includes a disclaimer

that "this firm is a debt collector attempting to collect a debt. Any information we obtain will be used for that purpose." (ECF No. 1, PageID.10.) Thus, the purpose of the notice of sale was to make payment of the debt more likely through statutory foreclosure.

A review of the factors relied upon by the Sixth Circuit in *Goodson* and *Grden* shows that the animating purpose of the notice of sale was to induce payment through Michigan's foreclosure-by-advertisement statute. In fact, Defendant admits that the notice of sale "was posted and published for the purpose of satisfying the statutory requirements of Michigan's foreclosure by advertisement statute." (ECF No. 28, PageID.260.) The Court did not apply the wrong standard, the wrong test, or rely on bad precedent. Nor was there an obvious or plain error. Thus, there is no palpable defect that the Court relied upon in its order denying Defendant's motion for judgment on the pleadings, and a different disposition is not warranted.

Finally, Defendant argues that the Court summarily disregarded the FTC's guidance on the matter. In the Court's order, it noted that the FTC's staff commentary is not binding on the Court. *See Heintz v. Jenkins*, 514 U.S. 291, 298 (1995). Further, the FTC Staff Commentary that Defendant cites is from 1988. The Act was amended in 2010, and the Sixth Circuit has interpreted the Act in recent years. In *Heintz*, the Supreme Court rejected a "nonbinding 'Commentary' by the Federal Trade Commission's staff" as "unconvincing." *Heintz*, 514 U.S. at 298. The Court explained that it could not "give conclusive weight" to the FTC Staff Commentary. *Id.* It noted that the Commentary itself stated that it was "not binding on the Commission or the public." *Id.* More importantly, the Supreme Court found

"nothing either in the Act or elsewhere indicating that Congress intended to authorize the FTC['s interpretation.]" *Id.* Similarly, this Court declined to rely on the FTC's commentary, which directly refuted binding Sixth Circuit precedent. *See Glazer*, 704 F.3d at 462 ("*[A]ny* type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act.") (emphasis in original). It was not a palpable defect for the Court to do so. Accordingly,

IT IS HEREBY ORDERED that Defendant's motion for reconsideration (ECF No. 27) is **DENIED**.

Dated: January 19, 2017

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE