Not Reported in F.Supp.2d, 2012 WL 1795058 (E.D.Tenn.)
(Cite as: 2012 WL 1795058 (E.D.Tenn.))

United States District Court, E.D. Tennessee.
Linda G. MARCUM and Larry Marcum
v.
EASTMAN CREDIT UNION, Johnson City Towing, Kenneth Carroll, and Glen Keller.

No. 2:10–CV–10.
May 7, 2012.

Linda G. Marcum, Larry Marcum, Johnson City, TN, pro se.

Alan C. Lee, Talbott, TN, for Linda G. Marcum and Larry Marcum.

Dan D Rhea, Arnett, Draper & Hagood, Knoxville, TN, William S Nunnally, Rogers, Laughlin, Nunnally, Hood & Crum, Greeneville, TN, for Eastman Credit Union, Johnson City Towing, Kenneth Carroll, and Glen Keller.

ORDER

J. RONNIE GREER, District Judge.

***1** On April 18, 2012, the Court provided the parties notice of its intention to grant, *sua sponte*, summary judgment to defendants on Counts I and II. [Doc. 29]. A copy of the Proposed Order was attached to this notice. [Doc. 29–1]. Plaintiffs were given fourteen (14) days to show cause why summary judgment on these Counts was not warranted and to provide evidence creating a genuine issue of material fact. Plaintiffs' time to respond has passed with no response.

In light of the foregoing, the Court hereby ADOPTS its Proposed Order of April 18, 2012. [Doc. 29–1]. Accordingly, Eastman Credit Union's Motion for Summary Judgment [Doc. 24] is GRANTED, the Court *sua sponte* GRANTS summary judgment to Johnson City Towing, Kenneth Carroll, and Glen Keller on Counts I and II, and the remaining claims (Counts III–VI) are hereby DISMISSED for lack of jurisdiction.

ORDER

Defendant Eastman Credit Union ("ECU") filed a motion for summary judgment [Doc. 24]. ECU raises several arguments as to why it is entitled to summary judgment. These arguments include: (1) ECU was not a "Debt Collector" subject to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"); (2) the FDCPA does not incorporate the limitations found in the Uniform Commercial Code ("UCC") on self-help repossessions; and (3) the plaintiffs' state law claims substantially predominate over the FDCPA claim. The plaintiffs have responded, and the matter is ripe for review. For the following reasons, the motion is **GRANTED.**

I. FACTS

The following material facts are either not in dispute *[See*, Docs. 24 at 2–3, 27 at 3] or are viewed in the light most favorable to the plaintiffs. On November 28, 2006, the plaintiffs, Linda and Larry Marcum, signed a Credit and Security Agreement (the "Agreement") with ECU, pursuant to which the Marcums borrowed $26,000 from ECU. To collateralize this loan, the Agreement granted ECU a security interest in a 2007 Dodge Nitro motor vehicle the Marcums were purchasing. The Agreement specifically granted ECU the following rights in the event of a default:

> You agree the Credit Union has the right to take possession of any property given as security under

> the Plan, without judicial process, if this can be done without breach of the peace. If we ask, you promise to deliver the property at a time and place we choose.

The Marcums subsequently defaulted on their loan repayment obligations to ECU under the Agreement. ECU subsequently contracted with a wrecker service, Johnson City Towing, to take possession of the 2007 Dodge Nitro from the Marcums and deliver it to ECU. On September 29, 2009, Johnson City Towing spotted the vehicle parked in the public parking garage of the Johnson City, Tennessee civic building and courthouse. The doors on the vehicle were locked, and the windows were up. Furthermore, the ability of the tow truck operators to see inside the vehicle was impaired because plaintiffs had applied an after-market tint to all of the windows.

Without any discussion or interaction with plaintiffs, the tow truck operators for Johnson City Towing attached their towing apparatus to the rear of the vehicle, and commenced towing the vehicle out of the parking space it had been occupying. When the tow truck operators stopped in the traffic lane of the parking garage, Mrs. Marcum, who had been resting in the Nitro with the driver's seat reclined, became aware of the repossession-at which time she exited the vehicle and resisted the tow operators' efforts to take the car. A confrontation ensued, which ended only when a police officer arrived on the scene and ordered Mrs. Marcum to surrender the vehicle to the tow truck operators, whereupon they completed their task of delivering the vehicle to ECU.

***2** The Marcums subsequently filed the instant action in this Court, claiming that ECU, Johnson City Towing, and the tow operators Kenneth Carroll and Glen Keller are liable to them for violations of the FDCPA (Count I) and various pendent state law claims including wrongful repossession in violation of the UCC (Count II), assault (Count III), intention infliction of emotion distress (Count IV), negligence (Count V), and invasion of privacy by intrusion upon seclusion and by revelation of private financial data to third parties (Count VI).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving ty. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir.2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To refute such a showing, the nonmoving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Id.* at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McClain v. Ontario, Ltd.*, 244 F.3d 797, 800 (6th Cir.2000). This Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248–49; *Nat'l Satellite Sports*, 253 F.3d at 907. If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. If this Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving

party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994).

The party opposing a Rule 56 motion may not simply rest on the mere allegations or denials contained in the party's pleadings. *Anderson*, 477 U.S. at 256. Instead, an opposing party must affirmatively present competent evidence sufficient to establish a genuine issue of material fact necessitating the trial of that issue. *Id.* Merely alleging that a factual dispute exists cannot defeat a properly supported motion for summary judgment. *Id.* A genuine issue for trial is not established by evidence that is "merely colorable," or by factual disputes that are irrelevant or unnecessary. *Id.* at 248–52.

III. ANALYSIS

a. *Is ECU Subject to the FDCPA?*

***3** The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The statute defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). On the other hand, a "creditor" is "any person who offers or extends credit creating a debt or to whom a debt is owed...." 15 U.S.C. § 1692a(4). It is established law that "a bank that is a creditor is not a debt collector for purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts." *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir.2003). In light of the foregoing, it is clear that ECU, as the originator of credit to the Marcums, is a creditor and is not subject to the FDCPA. Plaintiffs concede this point in their Response [Doc. 27 at 15]. Consequently, ECU is entitled to summary judgment on Count I of plaintiffs' Complaint, which alleges violations of the FDCPA.

Anticipating that the Court would reach the foregoing conclusion, ECU requests that the Court decline to exercise jurisdiction over plaintiffs' pendent state law claims and dismiss it from this action. After careful consideration, the Court agrees that this is the proper course of action, for the reasons discussed, *infra*.

b. *Are Johnson City Towing, Carroll, and Keller (the "Towing Defendants") Entitled to Summary Judgment on Plaintiffs' FDCPA Claim and UCC Claim?*

Tennessee has adopted the UCC. *See*, T.C.A. § 47–1–101, *et seq.* UCC § 9–609(a)(1) states that "after default" a secured party "may take possession of the collateral." UCC § 9–609(b)(2) states that a secured party may take possession of such collateral "without judicial process, if it proceeds *without breach of the peace.*" (emphasis added). Plaintiffs maintain that (1) the Towing Defendants violated this provision of the UCC because there was a breach of the peace during the repossession and, consequently, that (2) the Towing Defendants violated 15 U.S.C. § 1692f(6) which provides, in pertinent part,

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ... (6) Taking or threatening to take any nonjudicial action to effect dispossession ... of property if-(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest....

***4** There is some disagreement among courts regarding whether a debt collector loses his "present right to possession" of collateral if such repossession results in a breach of the peace. *Compare* *Osborne v. Minnesota Recovery Bureau, Inc.*, 2006 WL 1314420 (D.Minn. May 12, 2006) ("[A] breach of the peace [for purposes of UCC § 9–609] does not necessarily suspend a repossession company's present right to possession [for purposes of the FDCPA]") *with* *Fleming–Dudley v. Legal Investigations, Inc.*, 2007 WL 952026 (N.D.Ill. March 22, 2007) ("[I]f the debt collector violated the self-help repossession statute [UCC § 9–609], by breach of the peace or otherwise, then the collector had no present right to possession of the property under [15 U.S.C.] § 1692f(6)." By Order dated September 28, 2010 [Doc. 19] the Court sided with the view espoused in the latter opinion, and concluded that the Towing Defendants could arguably be held liable for violating 15 U.S.C. § 1692f(6) *if* they breached the peace in effectuating the repossession. [FN1] The Court further concluded that, "based upon the filings to date in the case," there was a genuine issue of material fact whether a breach of the peace was employed by the defendants in the repossession of the plaintiffs' automobile. [Doc. 19 at 6].

> FN1. Contrary to plaintiffs' assertion in their memorandum in opposition to ECU's motion, the Court did not previously definitively hold that the Towing Defendants were debt collectors for the purposes of § 1692f(6). The Court merely held that it was arguably so if the necessary factual predicate were established.

A year and a half have passed since the prior Order and, in the interim, new evidence has been filed with the Court. Such evidence now leads the Court to re-examine, *sua sponte*, if a genuine issue of material fact remains regarding whether a breach of the peace was employed by the defendants when they repossessed the vehicle.

In Tennessee, "determining whether a particular secured creditor's conduct amounts to a breach of the peace requires a review of the reasonableness of the secured party's conduct in light of the facts of the case." *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn.App.1991). For further guidance, the Court in *Davenport* stated that the relevant inquiry should take into consideration (1) where the repossession took place, (2) the debtor's express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception. *Id.*

This repossession took place in broad daylight in a public parking garage at the Johnson City Courthouse and no deception was employed. There is no evidence regarding the reactions of third parties and plaintiffs have made no allegations regarding such reactions. Consequently, factors (1), (4), and (5) weigh in favor of finding that defendants acted reasonably and factor (3) is neutral. The only question is what impact the debtor's objections, factor (2), have in this inquiry. To understand this, a careful analysis of the unique facts of this case is required.

Mrs. Marcum stated in her deposition as follows:

***5** Q. You left the windows up?

A. Yeah.

Q. And did you lock the doors?

A. Yes.

Q. Locked yourself inside?

A. Yes.

Q. Okay. Why did you do that?

A. Because I was by myself and I was already a little bit tired, so—

Q. Did you fall asleep in the car?

A. No, I didn't go to sleep. I was kind of relaxing.

...

Q. It [the seat back] kind of reclines backwards sometimes?

A. Yes.

Q. Did you move it back?

A. Yes.

Q. How far?

A. I don't know. I wasn't touching the ground.

Q. Well, would you have been visible for somebody looking through the window?

A. Probably not.

Q. Would you have been visible for somebody looking through the windshield?

A. Probably not. Not unless they got right up on the window.

Q. Were the windows in the vehicle tinted or obstructed?

A. Yes, tinted.

Q. Tinted. Why did you have tinted windows?

A. It's just something I did with the cars.

...

A. Next thing I remember is I felt something behind me being pulled, like being pulled, and I looked around and opened the door. I was out in the middle of the what's call area—the traffic flow.

Q. You mean the vehicle was out—

A. The vehicle. I'm sorry. The vehicle was out in the middle of traffic flow.

...

Q. How did your vehicle end up there out in the travel portion?

A. They had pulled it out with the tow truck.

Q. So it was already hooked up to the tow truck when you looked around?

A. Yes.

Q. At that point, when you saw your vehicle out in the travel portion of the parking garage, did you have any exchange of words with these two gentlemen?

A. Not till I seen Mr. Carroll and I asked him what was going on, and that's when he came up to the side of the car.

[Doc. 25–1 at 5–9]

As Mrs. Marcum concedes in her deposition, due to the fact that the Dodge Nitro had heavily tinted windows, coupled with the fact that she was resting in a reclined position in the vehicle, there is no reason to believe that the Towing Defendants would have been

able to see her in the vehicle at the time they initiated the repossession process. Furthermore, there is no evidence indicating that the Towing Defendants had actual knowledge of her presence in the vehicle. Additionally, Mrs. Marcum did not object to the repossession prior to or at the moment it was initiated. Consequently, a reasonable finder of fact would have no choice but to conclude that the Towing Defendants acted reasonably when they *initiated* the repossession of plaintiffs' vehicle. The only question remaining is whether the Towing Defendants acted reasonably in *completing* the repossession in light of Mrs. Marcum's subsequent objection and the ensuing confrontation.

It is well-established that once a repossession agent has gained sufficient dominion over his collateral to control it, the repossession has been completed and objection by the debtor will be of no avail. *Wallace v. Chrysler Credit Corporation*, 743 F.Supp. 1228, 1233 (W.D.Va.1990); *James v. Ford Motor Credit Company*, 842 F.Supp. 1202, 1209 (D.Minn.1994); *Clark v. Auto Recovery Bureau Conn., Inc.*, 889 F.Supp. 543, 547 (D.Conn.1994); *Thompson v. First State Bank of Fertile*, 709 N.W.2d 307, 311 (Minn.App.2006). The *Clark* case is instructive on this point. In *Clark*, the plaintiff was at a picnic and learned that her vehicle in the nearby parking lot was being repossessed. She ran over to try to stop the repossession, but by the time she arrived, the vehicle had already been hooked up to the tow truck and had been moved from its parking spot. The court held that the plaintiff's objection had come too late because the act of repossession had been completed. The *Thompson* case is also instructive. In *Thompson*, the repossession agent had hooked the debtor's vehicle to the tow truck and lifted the vehicle's rear wheels off the ground before he had contact with the debtor. The court held that by this alone, the repossession agent had established sufficient dominion and control over the vehicle so as to complete the act of repossession and, consequently, that the confrontation that immediately followed was of no legal consequence in evaluating the propriety of the repossession under the UCC. The Court further stated that to hold otherwise would actually encourage breaches of the peace.

The Court finds the foregoing analyses persuasive, and finds them equally applicable to the facts of this case. By Mrs. Marcum's own admission, the Towing Defendants had already attached the vehicle to the tow truck and towed it from the parking spot into the flow of traffic before she made her presence known and objected to the repossession. Consequently, Mrs. Marcum's objection was of no legal consequence and factor (2) of the *Davenport* factors is neutral, because it was lodged after the Towing Defendants had completed the repossession. Thus, applying the *Davenport* framework, a reasonable finder of fact would have no choice but to conclude that the Towing Defendants acted reasonably from the moment they initiated the repossession, until the moment they completed it, such that they did not employ a breach of the peace. [FN2] As such, the defendants in this matter are entitled to summary judgment on Count II, wrongful repossession under the UCC.

> FN2. The Court wishes to note that this conclusion does not mean that the Towing Defendants necessarily acted reasonably in the period of time immediately following the completion of the repossession (i.e. the period of time between the moment the repossession was completed and the moment Carroll and Keller exited the parking garage with the vehicle). For example, plaintiffs have alleged in Count III that Carroll and Keller assaulted Mrs. Marcum before they left the parking garage, and the Court agrees that there is a genuine issue of material fact regarding this matter.

***6** Because the Court finds no breach of the peace under the UCC, the plaintiffs' Fair Debt Collection Practices Act claim (Count I) fails as well. As discussed, *supra*, the FDCPA requires a wrongful pos-

session for a claim to be maintained. *See* 15 U.S.C. § 1692f(6). The defendants had a present right of possession of the car under the FDCPA. *See, Clarin v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 665 (8th Cir.1999); *see also* Barkley Clark, *The Law of Secured Transactions under the Uniform Commercial Code* ¶ 4.05[2][b] (Rev. ed. Supp.1997). Accordingly, the Fair Debt Collection Practices Act claim (Count I) fails.

c. *The Remaining Pendent State Law Claims.*

The only remaining Counts (Counts III–VI) in this matter are pendent state law claims, which ECU moves to dismiss for lack of jurisdiction. "Whether or not to dismiss a pendent state claim after all federal claims have been disposed of is a question generally left to the discretion of the district court." *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir.1987). Moreover, this circuit has consistently expressed a strong policy in favor of dismissing such state law claims. *See, Service, Hospital Nursing Home & Public Employees Union, Local No. 47 v. Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir.1985). After careful consideration, the Court concludes that dismissal of the remaining pendent state law claims (Counts III–VI) is warranted.

IV. CONCLUSION

For the foregoing reasons, it is clear that plaintiffs cannot prevail against the defendants on their FDCPA claim (Count I) and their UCC claim (Count II). Consequently, Eastman Credit Union's Motion for Summary Judgment [Doc. 24] is GRANTED, the Court *sua sponte* GRANTS summary judgment to Johnson City Towing, Kenneth Carroll, and Glen Keller on Counts I and II, and the remaining claims (Counts III–VI) are hereby DISMISSED for lack of jurisdiction.

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