

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED

2009 JAN 26 PM 4:33

CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

CAUSE NO. A-08-CA-737-JRN

DEPUTY

BRYAN POWERS, §  
Plaintiff, §  
v. §  
McCREARY, VESELKA, BRAGG, & §  
ALLEN, P.C.; S.J. VESELKA; and §  
HARVEY M. ALLEN, §  
Defendants. §

**ORDER**

Before the Court in the above-styled and numbered case are Defendants' Motion for Judgment on the Pleadings (Doc. #8), filed November 21, 2008; Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings (Doc. #9), filed December 2, 2008; and Defendants' Reply to Plaintiff's Response (Doc. #10), filed December 15, 2008. For all of the reasons stated herein, Defendants' Motion for Judgment on the Pleadings is **GRANTED**.

**I. FACTUAL BACKGROUND**

Pro se Plaintiff Bryan Powers (hereinafter "Plaintiff") owns property in the County of Brewster that is subject to property taxes in the following taxing districts: Brewster County; Terilingua Independent School District; and Big Bend Regional Medical District. Plaintiff is allegedly delinquent in paying the property taxes levied by these taxing districts for 1993 through 2007 in the amount of approximately \$1,634.00. For this reason, Brewster County engaged Defendant McCreary, Veselka, Bragg & Allen, P.C., a private law firm, (hereinafter "Defendants") to collect the delinquent property taxes.<sup>1</sup> Defendants, in turn, filed a state court collection action against Plaintiff. For this reason, Defendants sent Plaintiff a notice of the tax liens, a citation in the lawsuit and a copy of the state court petition. In response, Plaintiff filed the instant lawsuit against Defendants claiming the written notices, citation and petition constitute violations

---

<sup>1</sup>S.J. Veselka and Harvey M. Allen, shareholders of McCreary, Veselka, Bragg & Allen, P.C., are also named, individually as defendants. The Court includes Mr. Veselka and Mr. Allen in the collective term "Defendants".

of the Fair Debt Collection Practices Act, 15 U.S.C. §§192 et. Seq., and the Texas Debt Collection Practices Act, Tex. Fin. Code §§392.001 et. Seq. It should also be noted that Plaintiff also seeks to certify a class.<sup>2</sup> Defendants' present motion asks the Court to enter a judgment on the pleadings under Federal Rule of Civil Procedure 12(c) because neither the Fair Debt Collection Practices Act's definition of "debt" nor the Texas Debt Collection Practices Act's definition of "consumer debt" apply to property tax delinquencies.

## II. STANDARD OF REVIEW

The standard for addressing a Rule 12(c) motion is the same as that used for deciding motions to dismiss pursuant to Rule 12(b)(6). *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 313 n. 8 (5th Cir. 2002). The issue for the Court is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001). In considering the motion, the pleadings should be construed liberally and judgment on the pleadings granted only if there are no disputed issues of fact and only questions of law remain. *Id.* at 420. "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

---

<sup>2</sup> The Court notes that Plaintiff formerly filed a lawsuit, on behalf of Gracie Lopez, involving claims under the Texas Debts Collection Practices Act and the Fair Debts Collection Practices Act. *See, Lopez v. Wolpoff & Abramson, L.L.P.*, cause number 1:08-CV-00510-SS. Lopez was sued in Guadalupe County state court by a collection law firm. Lopez alleged the collection agency's debt collection practices violated the Fair debt Collection Practices Act and the Texas Debt Collection Practices Act. The case was removed to the Honorable Sam Sparks's court. Analogous to the present case, Powers filed a Motion for Class Certification. Judge Sparks found the "motion for class certification to be so groundless in law or fact that Powers, by signing it, has violated Rule 11 of the Federal Rules of Civil Procedure." *Id.* (Doc.#37). Judge Sparks "found Powers had evidenced either ignorance of or disregard for every single familiar requirement of Federal Rule of Civil Procedure 23(a)". *Id.* (Doc. #48). The Court finds similar problems with the present case, but the issue of class certification is not currently before the Court and the Court need not address the issue because the issue has become moot as of the issuance of the Court's present Order.

### III. DISCUSSION

The first issue raised by Defendant's Motion is whether a property tax is a "debt" within the scope of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692. The FDCPA defines the term "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligations has been reduced to judgment." *See*, 15 U.S.C. §1692(a)(5). Based upon this statutory definition, Defendants specifically argue that tax obligations are not "debts" because: (1) tax obligations do not arise out of a transaction; and (2) tax obligations are not incurred primarily for personal, family or household purposes. *See*, Defendants' Motion for Judgment on the Pleadings at 4-5.

Defendants present an important threshold issue for the Court to consider because in order "for the FDCPA to apply, the obligation at issue must qualify as a 'debt'." *Hamilton v. United Healthcare of La., Inc.*, 310 F.3d 385, 388 (5th Cir. 2002). Neither the United States Supreme Court nor the Fifth Circuit Court of Appeals have addressed this specific issue. Therefore, the issue is one of first impression in the Fifth Circuit.<sup>3</sup> However, the courts of appeals and the district courts that have considered the issue have all uniformly held, without exception, that tax obligations are not "debts" within the meaning of the FDCPA. *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 401 (3rd Cir. 2000) ("We further agree with the district court's conclusion that homeowners' property tax obligations do not constitute 'debts' under the FDCPA."), *accord*, *Staub v. Harris*, 626 F.2d 275, 279 (3rd Cir. 1980) ("we believe the Act does not apply to practices occurring in the course of collection of taxes."); *Beggs v. Rossi*, 145 F.3d 511 (2nd Cir. 1998) (per curiam); *Bandy v. U.S.*, 2008 WL 1867991, at \*8 (D.Kan. April 24, 2008) ("Contrary to plaintiff's assertion . . . federal taxes are not a 'debt' under the FDCPA's definitions of 'debt'"); *Mortland*

---

<sup>3</sup>However, it must be noted that in *Mortland v. I.R.S.*, Judge Sam Sparks did hold that "Plaintiffs have failed to state a claim under the FDCPA because unpaid *income taxes* are not considered debts for purposes of the Act." *Mortland v. I.R.S.*, 2003 WL 21791249, at \*3 (W.D.Tex. June 24, 2003) (Sparks, J.)

v. *I.R.S.*, 2003 WL 21791249, at \*3 (W.D.Tex. June 24, 2003)(Sparks, J.); *Mathis v. U.S. ex. Rel. C.I.R.*, 2003 WL 1950071, at \*6 (D.S.D. March 19, 2003)(“Plaintiffs do not have a cause of action . . . under the FDCPA . . . because taxes are not debts”).<sup>4</sup> Therefore, although there is no binding precedent in this circuit, there is ample persuasive authority to guide the Court’s analysis. *See, Massingill v. Livingston*, 2008 WL 1984265, at \*2 (5th Cir. May 8, 2008)(explaining that cases from other circuits and district courts are persuasive authority).

As such, the overwhelming weight of persuasive authority persuades the Court to conclude that tax obligations are not “debts” within the meaning of the FDCPA. In particular, the Court is persuaded by the Third Circuit’s reasoning that:

. . . at a minimum, the statute contemplates that the debt has arisen as a result of the rendition of a service or purchase of property or other item of value. The relationship between the taxpayer and taxing authority does not encompass that type of pro tanto exchange which the statutory definition envisages.

---

<sup>4</sup> In the interest of being thorough, the Court also notes that the Federal Trade Commission’s policy statement interpreting the FDCPA and the FDCPA’s legislative history both support the conclusion that tax obligations are not “debts” within the meaning of the FDCPA. Specifically, the FTC, the administrative agency responsible for enforcement of the FDCPA, concluded that “The term [“debt” under §803(5)] does not include: *unpaid taxes* . . . because they are not debts incurred from a ‘transportation (involving the purchase of) property or services for personal, family or household purposes.’” *See, Federal Trade Commission, Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097, 50102 (Dec. 13, 1988)(emphasis added). The Fifth Circuit has ruled that the FTC’s interpretation of the FDCPA is “entitled to respect . . . but only to the extent that those interpretations have the power to persuade.” *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 493, n. 1 (5th Cir. 2004)(quoting *Christen v. Harris Cty.*, 529 U.S. 576, 587 (2000)). Similarly, the Third Circuit Court of Appeals pointed out that “the legislative history of the FDCPA is bereft of any explicit reference to taxes . . . [and] there is nothing in the language or history of the FDCPA to lead us to believe that Congress intended to extend the scope of the Act to encompass debtors of any kind other than consumer debtors.” *Staub*, 626 F.2d. At 278. However, when courts interpret statutes, the initial inquiry is the language of the statute itself. *U.S. v. James*, 478 U.S. 597, 604 (1986). Therefore, the Court does not look beyond the plain meaning of the statute unless the statute is absurd or ambiguous. *Goswami v. Am. Collections Enterprise, Inc.*, 377 F.3d 488, 492-93 (5th Cir. 2004). A statute is ambiguous if “it is open to more than one reasonable interpretation.” *Id.* at 493. In the present case, the Court does not find the statute to be ambiguous. Therefore, although persuasive and worthy of notation, the Court does not need to rely upon the FTC interpretation or legislative history in order to conclude that tax obligations are not “debts” within the meaning of the FDCPA.

*Staub*, 626 F.2d at 278. For this reason, Plaintiff's obligation to pay taxes does not arise out of a "transaction" as required under the FDCPA. Further, the Court is persuaded by the Third Circuit's cogent reasoning that taxes are not primarily for "personal, family, or household purposes" as required by the statute, but instead "provide funds for such nonpersonal purposes as prisons, roads, defense, courts and other governmental services." *Id.*

Importantly, Plaintiff has not directed the Court to even a single contrary authority,<sup>5</sup> and the Court's independent research has not revealed a single exception to the numerous cases cited above. Instead, Plaintiff merely argues in a conclusory fashion that "The transaction out of which the alleged obligation of plaintiff to pay money arises is the purchase of the land on which defendants' client has rendered taxes—a consensual transaction in which plaintiff became primarily liable for personal purposes associated with land ownership." *See*, Plaintiff's Response at 1. The Third Circuit Court of Appeals rejected a similar argument in concluding that "Unlike a sales tax, for example, which arguably arises from the sale transaction, the property taxes at issue here arose not from the purchase of property but from *the fact of ownership*." *Pollice*, 225 F.3d at 402.<sup>6</sup> Based upon this same reasoning, the Court rejects Plaintiff's argument that Plaintiff's delinquent taxes arise out of a transaction for purposes of the FDCPA. *Id.*

In the alternative, Plaintiff also cites the Seventh Circuit's opinion in *Shula v. Lawent* for the proposition that court costs are non-tax obligations that may satisfy the definition of debt. *See*, Pl.'s Resp.

---

<sup>5</sup>Pursuant to Local Rule CV-7, the specific legal authorities supporting any pleading shall be cited. *See*, Local rule CV-7(c).

<sup>6</sup>This conclusion is congruent with the Fifth Circuit's dicta in *Hamilton v. United Healthcare of La., Inc.* As indicated, the Fifth Circuit has never addressed the precise issue presented in this case. However, in a distinguishable case, the Fifth Circuit did interpret the meaning of the terms "arising out of" and "transaction" as those terms apply to the FDCPA's definition of debt. *Hamilton v. United Healthcare of La., Inc.*, 310 F.3d 385, 391-92 (5th Cir. 2002). The Fifth Circuit defined "arising out of" as "stemming from". *Id.* at 391. The Court also explained that "the ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties." *Id.* Applying the Fifth's Circuit's statutory construction of the FDCPA to the present case, it is clear that Plaintiff's obligation to pay taxes does not "stem from" "business dealings".

at 2. However, *Shula v. Lawent* is distinguishable from the present case. In *Shula*, a debtor obtained physician services from a doctor. *Shula v. Lawent*, 359 F.3d 489, 490 (7th Cir. 2004). Thereafter, debt collectors filed suit in state court on behalf of the doctor seeking the amount owed for the physician services provided to the debtor plus court costs. *Id.* The debtor paid the doctor the amount owed, and the court subsequently dismissed the lawsuit against the debtor without awarding any court costs to the doctor. *Id.* The collection agency nevertheless sent the debtor a letter attempting to collect the amount of the court costs. *Id.* at 490-91. Plaintiff highlights the Seventh Circuit's dicta that "If the court had awarded costs, they would have become a debt . . ." *Id.* at 491. However, the Seventh Circuit also made certain to clarify that "All this assumes of course that the costs . . . constituted a (claimed) 'debt' . . . for if not [the collection agency] did not violate [the FDCPA]." Therefore, *Shula* is distinguishable because the alleged obligation to pay court costs arose from a consumer transaction primarily for personal purposes, *i.e.* physician services. In the present case, the costs, interests and penalties do not arise from the purchase of property, but instead arise from plaintiff's failure to pay his delinquent taxes. Therefore, the costs, interests and penalties, like the taxes themselves, are not the subject of a transaction primarily for personal, family or household purposes as required to constitute a "debt" under the FDCPA.<sup>7</sup>

Finally, Defendants ask the Court to enter a judgment on Plaintiff's Texas Debt Collection Practices Act (TDCPA) claims because the TDCPA's definition of "consumer debt" does not apply to property tax delinquencies. Defendants point out that "Texas courts have apparently not been given the opportunity to decide whether collection activity on a tax can be the basis of a claim under the TDCPA", but Defendants nevertheless advocate that similarities between the Texas Act and the Federal Act dictate that tax obligations are not "consumer debts" under the TDCPA. *See*, Defs.' Mot. for J. on the Pleadings at 5. Importantly, the Court notes that Plaintiff completely fails to even address Defendants' request for

---

<sup>7</sup>The Court also rejects Plaintiff's argument on the additional ground that in evaluating whether Plaintiff has alleged sufficient facts to state a plausible claim for relief, the Court need not and should not accept allegations that amount to legal conclusions. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 363 (5th Cir. 2003).

judgment on Plaintiff's TDCPA pleadings.

Despite the dearth of discussion from Texas courts on the present issue, the Court is nevertheless required to resolve the dispute. When adjudicating claims for which state law provides the rules of decision, the Court is bound to apply the law as interpreted by the state's highest court, in this case, the Texas Supreme Court. *Barfield v. Madison County, Miss.*, 22 F.3d 269, 271-72 (5th Cir. 2000). However, if the state's highest court has not definitively ruled on a particular issue, it is the Court's duty to predict how the highest court of the state would decide the issue. *Id.* (citing *Transcont. Gas v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992)).

Similar to the FDCPA, the TDCPA defines "consumer debt" as "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction." *See*, Tex. Fin. Code §392.001(2). The Act does not define the term "personal." Thus, consistent with the purpose of the TDCPA, several Texas courts of appeals have given the term "personal" its common meaning. Those courts have defined the term "personal" as "of relating to a particular person; affecting one individual or each of many individuals; peculiar or proper to private concerns; not public or general." *Monroe v. Frank*, 936 S.W.2d 654, 660 (Tex. App.—Dallas 1996, no pet.) (quoting Webster's Third International Dictionary (1981)); *accord*, *Pruncuntz v. Quinney*, 2001 WL 1627650, at \*4 (Tex. App.—Austin Dec. 20, 2001, no writ) (not designated for publication); *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 136 (Tex. App.—Corpus Christi 2001, no writ). No Texas court has defined the terms "household" or "family", but consistent with the purpose of the TDCPA and in line with the Texas courts of Appeals, this Court must give these terms their common meanings as well. *Id.*<sup>8</sup> The term "household" is defined as "those who live under the same roof and compose a family". *See*, Merriam-Webster

---

<sup>8</sup>Construction of a statute is a questions of law. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). The Court begins statutory analysis by reviewing the statute. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). If a statute is ambiguous, the Court seeks the intent of the legislature as found in the plain and common meaning of the words and terms used. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990).

Dictionary, <http://www.merriam-webster.com>. The term "family" is defined as "a group of individuals living under one roof." *Id.* Based upon these common definitions, it is clear that taxes are not primarily for "personal, family, or household purposes" as required in order to constitute a "consumer debt" under the TDCPA. To the contrary, taxes are for non-personal or public purposes as discussed above. Furthermore, property taxes do not arise out of a transaction as required under the TDCPA. Accordingly, the Court must conclude that the TDCPA's definition of "consumer debt" does not encompass delinquent property taxes.


Viewing Defendants' Motion in the light most favorable to Plaintiff, it is evident for all of the foregoing reasons that Plaintiff's complaint fails to state a valid claim for relief because Plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint.

**IT IS THEREFORE ORDERED** that pursuant to Federal Rule of Civil Procedure 12(c), Plaintiff Bryan Power's claims against Defendants McCreary, Veselka, Bragg & Allen, P.C., Shelburne J. Veselka and Harvey M. Allen are hereby **DISMISSED WITH PREJUDICE**.<sup>9</sup>

**IT IS FURTHER ORDERED** that all pending motions are **MOOT**.

**IT IS FINALLY ORDERED** that this action is hereby **CLOSED**.

SIGNED this 26<sup>th</sup> day of January, 2009.

  
JAMES R. NOWLIN  
UNITED STATES DISTRICT JUDGE

---

<sup>9</sup>A judgment on the pleadings goes to the merits of the plaintiff's claims and thus results in a dismissal of the claims with prejudice. *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).