COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT

MIDLAND FUNDING, LLC, AS ASSIGNEE OF FIA CARD SERVICES, N.A./WORLDPOINTS vs. JUDY JUBA	APPELLATE DIVISION: Southern District NO.: 16-ADMS-40011 TRIAL COURT: Dedham Division DOCKET NO.: 1354CV0462

DECISION AND ORDER

This cause was before the Appellate Division for the Southern District. It is hereby ordered that the Clerk of the Trial Court make the following entry on the docket of this case:

The Appellate Division answers, "yes," to each of the questions reported by the trial judge, and so we reverse the trial court's denial of the defendant's motion for summary judgment on the plaintiff's liability on the defendant's counterclaims. The case is returned to the trial court for further hearing on the issue of the defendant's damages.

Opinion filed herewith.

Date: Feb 15, 2017

HON. KATHRYN E. HAND
Justice

HON. KEVIN J. FINNERTY
Justice

HON. J. THOMAS KIRKMAN
Justice

A true copy. Attest

Brian M. Cooper
Appellate Division Clerk

COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
SOUTHERN DISTRICT

MIDLAND FUNDING, LLC[1]

V.

JUDY JUBA

NO. 16-ADMS-40011

In the DEDHAM DIVISION:

Justice: Heffernan, J.
Docket No. 1354CV0462
Date of Report: April 13, 2016
Date of Entry in the Appellate Division: May 4, 2016

In the APPELLATE DIVISION:

Justices: Hand, P.J., Finnerty & Kirkman, JJ.
Sitting in: Plymouth, Massachusetts
Date of Hearing: July 15, 2016
Date Opinion Certified: February 15, 2017

COUNSEL FOR PLAINTIFF

William T. Bogaert, Esq.
Erik J. Tomberg, Esq.
Wilson, Elser, Moskowitz, Edelman
& Dicker, LLP
260 Franklin Street, 14th Floor
Boston, MA 02110

Sean M. Callahan, Esq.
Lustig, Glaser & Wilson, P.C.
P.O. Box 549287
Waltham, MA 02154

COUNSEL FOR DEFENDANT

Elizabeth A. Miller, Esq.
99 High Street, Suite 304
Boston, MA 02110

Roger Bertling, Esq.
Legal Services Center of Harvard
Law School
122 Boylston Street
Jamaica Plain, MA 02130

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1 As Assignee of FIA Card Services, N.A./Worldpoints

OPINION

HAND, P.J. This case arises out of attempts to collect a consumer debt allegedly incurred to FIA Card Services, N.A. by defendant Judy Juba ("Juba"), and acquired by plaintiff Midland Funding, LLC, assignee of FIA Card Services, N.A./Worldpoints ("Midland"), after Juba had defaulted on the debt. In answering Midland's complaint, Juba counterclaimed against Midland for unfair and deceptive debt collection practices under the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.; the Massachusetts debt collection statute, G.L. c. 93, §§ 24-28 and 49; the Massachusetts Attorney General's debt collection regulations, 940 Code Mass. Regs. 7:00 et seq., the Massachusetts Banking Commissioner's regulations, 209 Code Mass. Regs. 18.00; and G.L. c. 93A. At the heart of Juba's amended counterclaims is the argument that Midland is a debt collector not licensed as state and Federal law require it to be. Midland's position is that it is merely a passive holder of Juba's debt, not subject to the licensing requirements that apply to debt collectors.

Midland moved for summary judgment against Juba on Juba's amended counterclaims. Juba moved for summary judgment against Midland on its claims against her, and for summary judgment in her favor as to liability on her amended counterclaims.[2] The court denied each of the parties' motions, and pursuant to Dist./Mun. Cts. R. A. D. A. 5,[3] reported to us three questions of law, each of which goes to Juba's counterclaims against Midland:

> "1. Whether Midland Funding is required to be licensed by the Massachusetts Division of Banks as a debt collector pursuant to M.G.L. c. 93, § 24A.

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2 Juba also moved to strike the affidavits of Cristina Ordonez and Kyle Hannan filed in support of Midland's motion.

3 Rule 5, pursuant to G.L. c. 231, § 108, permits a judge, within his or her discretion, to report "a judgment, interlocutory or other ruling, finding or decision for determination by the Appellate Division." Dist./Mun. Cts. R. A. D. A. 5.

"2. Whether Midland Funding violated M.G.L. c. 93A.

"3. Whether Midland Funding violated the Fair Debt Collection Practices Act, 15 U.S.C. §§1692e and/or 1692f."

Reviewing the trial court's rulings, we address each of these questions to the extent necessary to determine the correctness of the trial court's rulings on the parties' motions. See *Maher v. Retirement Bd. of Quincy*, 452 Mass. 517, 522 n.9 (2008); *B.C. v. F.C.*, 90 Mass. App. Ct. 345, 346 n.4 (2016). Having done so, we answer each question, "yes," and so reverse the trial court's denial of Juba's motion for summary judgment on Midland's liability on Juba's counterclaims.

1. *Standard of review.* It is well settled that summary judgment is appropriate only in the absence of any genuine issue of material fact and where, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). See *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). Once the moving party has established the absence of a triable issue of fact, the party opposing the motion must point to specific facts establishing the existence of a material fact in dispute in order to defeat the motion. *Pederson*, *supra*. We review a trial court's ruling on such a motion de novo, "consider[ing] the record and the legal principles involved without deference to the motion judge's reasoning." *Donovan v. Mahoney*, 2008 Mass. App. Div. 41, 42, quoting *Clean Harbors, Inc. v. John Hancock Life Ins. Co.*, 64 Mass. App. Ct. 347, 357 n.9 (2005). See *Nova Assignments, Inc. v. Kunian*, 77 Mass. App. Ct. 34, 35 (2010) (de novo standard of review of allowance of motion for summary judgment).

2. *Discussion.* On the record before us, Midland is a corporation whose primary business is purchasing on a large scale defaulted credit card debt in order to collect on those past-due accounts. At the times relevant to this action, Midland contracted the bulk of the practical aspects of the collection of that debt to another entity, Midland Credit Management, Inc. ("MCM"), through a Servicing Agreement.[4]

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[4] Both Midland and MCM are wholly-owned subsidiaries of a third entity that is not a party here.

While, under the Servicing Agreement, MCM is responsible for nearly all collection activity directly involving the individual debtors on the accounts owned by Midland, the terms of the Servicing Agreement do not entirely divest Midland of its control over accounts subject to the Servicing Agreement: the Servicing Agreement requires MCM "to act in accordance with all reasonable policies, procedures and instructions conveyed to it by [Midland] and related to the performance of the Services,"[5] and envisions Midland's ongoing oversight of the processing and handling of MCM's servicing efforts.[6]

In this case, Midland filed suit against Juba in July, 2013, having purchased certain of Juba's defaulted consumer debt from another entity.[7] There is no dispute that the account at issue was in default at the time that Midland acquired it. Midland, as the owner of Juba's debt, is the named plaintiff in this lawsuit; additionally, the debt was reported "in Midland's name" to three credit reporting agencies.[8]

Juba's counterclaims in this case include: unfair and deceptive debt collection practices under the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.; the Massachusetts debt collection statute, G.L. c. 93, §§ 24-28 and 49; the Massachusetts Attorney General's debt collection regulations, 940 Code Mass. Regs. 7:00 et seq.; the Massachusetts Banking Commissioner's regulations, 209 Code

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5 Additionally, while granting MCM "the full power and authority to conduct its servicing, administration and collection activities for and on behalf of [Midland]," it also provides "that the authority granted above shall not be exercised by [MCM] unless consistent with" other provisions of the Servicing Agreement, including section 2.6. That section, which provides that "[MCM] shall have authority to compromise, settle or cooperate with [Midland] in selling any Account or other Asset," suggests that Midland had not entirely surrendered to MCM its control over the sales of the defaulted debt that it owns.

6 "Section 4.5 Reporting and Processes. Servicer will cooperate and assist Owner in the implementation of any reasonably requested changes to its processing or handling of the Services and with any reporting required or requested by Owner in connection with any Services."

7 LHR, Inc., which had, in turn, purchased that debt from FIA Card Services, N.A.

8 It is not clear from the wording of the undisputed facts provided by the parties here whether Midland or MCM actually submitted the information about Juba's overdue account to the credit reporting agencies. SF, pars. 9-10 ("This debt was reported in Midland Funding's name . . . .").

Mass. Regs. 18.00; and G.L. c. 93A. The counterclaims turn on whether Midland is, as Juba contends, a "debt collector" for the purposes of the Massachusetts Debt Collection Practices Act, G.L. c. 93, § 24 ("MDCPA"), or instead, as Midland argues, merely a passive holder of Juba's debt, not subject to the requirements of the MDCPA. As we discuss below, we are persuaded that Midland is a debt collector that must, by statute, be licensed. Midland's failure to obtain the appropriate licensure is a violation of G.L. c. 93, § 24 and is a per se violation of G.L. c. 93A. G.L. c. 93, § 28 ("Failure to comply with any provision . . . of section twenty-four to twenty-seven, inclusive, or any regulation promulgated in accordance with the provisions of section twenty-four shall constitute an unfair or deceptive act or practice under the provisions of paragraph (a) of section two of chapter ninety-three A."); *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 117-118 (1st Cir. 2014) (where per se liability under G.L. c. 93A arises from the text of an independent statute, "it is a clear directive by the Legislature that a violation of that particular statute constitutes an automatic violation of Chapter 93A, without the need of showing the act was otherwise 'unfair or deceptive' or occurred in 'trade or commerce'").

The MDCPA is intended to protect consumers from predatory collections activities. Modeled after and paralleling the language of the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p, the MDCPA defines "debt collector" and "creditor,"[9] and requires that a "debt collector" be licensed and that it post a bond.[10] The statute defines "debt collector" to include "any person who

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[9] The term "creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed, but the term shall not include a person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of the debt for another." G.L. c. 93, § 24.

The term "debt collector" means "any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt, or who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another." *Id.*

[10] Section 24A of G.L. c. 93 provides:

> "(a) No person shall directly or indirectly engage in the commonwealth in the business of a debt collector, or engage in the commonwealth in soliciting the right to collect or receive payment for another of an account, bill or other indebtedness, or advertise for or solicit in

uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt, or who regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another." G.L. c. 93, § 24.

A debt collector's failure to be properly licensed and bonded is a per se violation of G.L. c. 93A. G.L. c. 93, § 28.

Midland is not licensed, but argues that it need not be. Midland contends that it is not a "debt collector" for the purposes of the statute, despite its ownership of distressed debt, because it has contracted all collections activity on its defaulted debt accounts to the licensed and bonded servicer, MCM. On that basis, Midland argues that it is merely a passive holder of the debt, and so is not subject to the licensing requirements of the statute, or to liability under G.L. c. 93A for violation of the licensing requirements.

There is no controlling Massachusetts precedent on this issue, although the applicability of G.L. c. 93, § 24 to buyers of defaulted consumer debt has been addressed thoughtfully in the trial court. See e.g., *Gomes v. Midland Funding, LLC*, Suffolk Superior Court, No. SUCV2011-01469 (Sept. 19, 2012) (denying 12(b)(6) motion to dismiss G.L. c. 93A claims against Midland where plaintiff alleged that Midland was "actively engaged in the debt collection business" through its directing its attorneys to attempt to collect on debts by filing lawsuits, obtaining judgments, and seeking to have judgments enforced). Given the similarities between the MDCPA and the federal corollary, we look to Federal law interpreting the FDCPA for guidance in interpreting our statute. See *Modern Cont'l/Obayashi v. Massachusetts Comm'n Against Discrimination*, 445 Mass. 96, 107 n.15 (2005).

The FDCPA defines "debt collectors" and "creditors" differently, 15 U.S.C. §§ 1692a(4),

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print the right to collect or receive payment for another of an account, bill or other indebtedness, without first obtaining from the commissioner a license to carry on the business, nor unless the person or the person for whom he or it may be acting as agent has on file with the state treasurer a good and sufficient bond."

1692a(6), and for the purposes of the Act, "as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' . . . because those terms are mutually exclusive." *Federal Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159, 173 (3rd Cir. 2007). See *Gomes, supra.* "The FDCPA's prohibitions against unfair debt collection practices distinguish between 'debt collectors' and 'creditors.' Creditors, 'who generally are restrained by the desire to protect their good will when collecting past due accounts,' S. Rep. 95-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696, are not covered by the Act. Instead, the Act is aimed at debt collectors, who may have 'no future contact with the consumer and often are unconcerned with the consumer's opinion of them.' See *id.* In general, a creditor is broadly defined as one who 'offers or extends credit creating a debt or to whom a debt is owed,' 15 U.S.C. § 1692a(4), whereas a debt collector is one who attempts to collect debts 'owed or due or asserted to be owed or due another.' *Id.* § 1692a(6)." *Sullivan v. Ocwen Loan Servicing LLC*, U.S. Dist. Ct., No. 08-CV-02079 (D. Colo. Jan. 14, 2009). An entity is a "creditor" if it is attempting to collect a debt that it generated, or that it acquired when it was not in default; if the debt was in default when the collecting party acquired it, the collecting party is a "debt collector." See, e.g., *Check Investors, Inc., supra* at 173; *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003), citing *Bailey v. Security Nat'l Serving Corp.*, 154 F.3d 384, 387 (7th Cir. 1998), *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir. 1998), *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d Cir. 2000), *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996), and *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[T]he Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not."). See also *Kasalo v. Trident Asset Mgt., LLC*, 53 F. Supp. 3d 1072, 1077 (N.D. Ill. 2014) (same); *In re: JPMorgan Chase Mtg. Modification Litigation*, 880 F. Supp. 2d 220, 243 (1st Cir. 2012) (loan servicer will become debt collector under FDCPA if debt was in default when it was acquired).

The status, vis-á-vis the distinction between creditor and debt collector, of an entity that acquires

defaulted debt becomes less clear when the owner of that debt delegates some or all of its collection activities to a separate, licensed debt collector, or to a licensed attorney. The issue has been heavily litigated, is very fact specific, and has not been answered with any bright-line test. Unsurprisingly, the more control the purchaser or assignee of the defaulted debt maintains over efforts to collect that debt, the more likely the owner is to be a "debt collector" for the purposes of the FDCPA. See, e.g., *Ruth v. Triumph Partnerships*, 577 F.3d 790, 796-799 (7th Cir. 2009) (holding that where purchaser of defaulted debt hired others to collect debt, but purchaser drafted notice to debtor and directed that notice be included and mailed with collection letter, that drafting and direction "constituted affirmative conduct with regard to collecting a debt," and owner was "debt collector"); *Harrison v. NBD Inc.*, 968 F. Supp. 837, 843 (E.D.N.Y 1997) (creditor's approval of debt collector's actions do not transform creditor into "debt collector" for purposes of FDCPA). Conversely, where the purchaser of the defaulted debt delegates all responsibility for collection to another entity, it may be exempt from the FDCPA licensing requirements. See, e.g., *Kasalo*, *supra at* 1078-1079 ("An entity that acquires a consumer's debt hoping to collect it but that does not have any interaction with the consumer itself does not necessarily undertake activities that fall within [the category of abusive debt-collections activities policed through the FDCPA]."); *Scally v. Hilco Receivables, LLC*, 392 F. Supp. 2d 1036, 1041 (N.D. Ill. 2005) (holding owner of defaulted debt that delegates to separate servicing entity all contact with debtors, not vicariously liable for conduct of servicing entity).

Several Federal courts have explicitly held that the owner of defaulted debt "has engaged in collection activity [for the purposes of the FDCPA] as a result of its initiation of state court lawsuits" against individual debtors. *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719, 724-725 (D. Md. 2011), citing *Heintz v. Jenkins*, 514 U.S. 291, 297 (1995) (holding that litigation to collect debt is collection activity under FDCPA). See also *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193 (11th Cir. 2010) (summarily rejecting debt collector's claim that filing lawsuits to collect debt is not

"collection activity" under FDCPA); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230 (4th Cir. 2007).

Midland points to several opinion letters of the Massachusetts Division of Banks, relying most heavily on a March 4, 2014 letter opining that if represented by a licensed attorney, Midland's being named as a plaintiff in a suit to collect on defaulted debt that Midland owned would not remove Midland from the category of a "passive debt buyer," and would not trigger a requirement that Midland be licensed under Massachusetts law. General Laws c. 30A, § 8, provides:

> "On request of any interested person, an agency may make an advisory ruling with respect to the applicability to any person, property or state of facts of any statute or regulation enforced or administered by that agency. In issuing the advisory ruling, the agency need not comply with the requirements of this chapter with respect to regulations."

The advisory opinions issued by the Massachusetts Division of Banks, and on which Midland relies in support of its argument that "passive debt buyers" need not be licensed, do not compel an outcome different from the one that we reach here. First, the advisory opinions are not binding precedent. See *Metropolitan Dist. Police Relief Ass'n v. Commissioner of Ins.*, 347 Mass. 686, 689 (1964) (fact of agency's advisory ruling, issued pursuant to G.L. c. 30A, § 8, without adjudicatory proceeding, does not preclude judicial relief). Second, it is not clear to us that the Division of Banks, in opining that where "all collection activity" is outsourced to licensed third parties, a purchaser of defaulted debt is a "passive debt buyer" not subject to the statutory licensing requirements, took into account the case in which the debt owner was named as a plaintiff in Massachusetts lawsuits intended to recover on debt that it owns. Further, we are concerned that the opinion letters on which Midland relies, including the March 4, 2014, letter, appear to consider only the effect of the debt buyer's delegating "direct" collection activities to licensed third parties, despite the fact that G.L. c. 93, § 24, defines a debt collector as one "who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt, or who regularly collects or attempts to collect, *directly or indirectly*, a debt owed or

due or asserted to be owed or due another" (emphasis added).[11]

Although Midland's October 20, 2013, request to the Division of Banks for an opinion on its need to be licensed raised this very question, and was answered in the negative, the answer was not provided until after suit was filed in this case; Midland cannot claim to have relied on that opinion here. While G.L. c. 93A, § 3 states, "Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States," it also provides that "[f]or the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions." Midland has not met this burden.

In this case, Midland exists only to own defaulted debt and, presumably, to receive any money collected on those obligations.[12] While MCM does much of the legwork and nearly all the prelitigation consumer contact intended to make Midland's holdings profitable, its actions are subject to Midland's approval and oversight. If, as presumably happened here, MCM decides that litigation is appropriate, then Midland becomes the plaintiff in the lawsuit seeking to collect on the account that Midland owns. Lastly, Midland is at least the nominal reporter of Juba's debt to three national credit reporting agencies. In our view, it is clear that despite its agreement with MCM to handle the majority of the direct

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We are aware of the fact that in this case, Midland alleges that it acquired title to Juba's defaulted debt, and so is the owner of that debt. We read the reference in G.L. c. 93, § 24 to "a debt owed or due or asserted to be owed or due to another" to mean a debt originally incurred to a creditor other than the current owner, and on which the debtor defaulted before the debt was sold. Even if that were not the case, the fact that Midland "indirectly engage[s] . . . in the business of a debt collector," G.L. c. 93, § 24A, by "us[ing] an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt," G.L. c. 90, § 24, would, in light of the fact that Midland is the plaintiff in the collection action and receives the money recovered, mean that Midland was a "debt collector" for the purposes of that section.

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While Midland's answers to interrogatories in this case state that Midland purchases defaulted debt using loans from MCM, the accounts are held in the name of Midland. Midland Funding LLC's Answers to Defendant's Third Set of Interrogatories to Midland Funding, LLC, Answer No. 1. As Midland is the owner of Juba's account, it is the real party in interest, and so must be named as the plaintiff in a suit brought to collect the debt. See Mass. R. Civ. P. 17. See also J.W. Smith and H.B. Zobel, Rules Practice § 17.5, at 290 (2d ed. 2006).

collections efforts, Midland regularly participates indirectly in MCM's attempts to collect Midland-owned defaulted consumer debt. Accordingly, Midland is, in our view, required to submit to the licensure requirements and corresponding oversight and supervision mandated under G.L. c. 93, § 24B and 209 Code Mass. Regs., and subsequent sections. Its failure to be licensed is, under these circumstances, a violation of the MDCPA and the FDCPA. Its bringing suit, even through counsel, without the required license is a per se violation of G.L. c. 93A. See *Gomes*, *supra*, and cases cited. We answer, "yes," to each of the questions reported to us by the trial judge, and so reverse the trial court's denial of Juba's motion for summary judgment on Midland's liability on Juba's counterclaims. The case is returned to the trial court for further hearing on the issue of Juba's damages.

HON. KATHRYN E. HAND, Presiding Justice
HON. KEVIN J. FINNERTY, Justice
HON. J. THOMAS KIRKMAN, Justice

This certifies that this is the Opinion of the Appellate Division in this case. A True Copy, Attest:

Brien M. Cooper

Brien M. Cooper, Clerk