UNITED STATES DISTRICT COURT
SOUTHERN DISTRIT OF FLORIDA

CASE NO. 21-60195-CV-DIMITROULEAS

MARNI LEDWITZ,

Plaintiff,

v.

NADERPOUR & ASSOCIATES, PA and
WELLS FARGO BANK, NA,

Defendants.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE is before the Court on Defendants' February 26, 2021 Motion to Dismiss Complaint [DE 11] ("Motion"). The Court has reviewed the Motion, Plaintiff's April 12, 2021 Response [DE 20] and Defendants' April 26, 2021 Reply [DE 23], and is otherwise fully advised in the premises.

I. BACKGROUND

This matter arises from an attempt by Defendant Wells Fargo Bank, NA ("Wells Fargo") to collect an alleged debt from Plaintiff Marni Ledwitz ("Plaintiff"). In its efforts to collect this debt, Wells Fargo, through the Defendant Naderpour & Associates, PA ("Naderpour Firm"), (collectively "Defendants") filed a complaint in state court for damages as a result of non-payment of a credit card. Compl. ¶¶ 10, 12 [DE 1]. On January 15, 2020, a final judgment was entered against Plaintiff in state court. Compl. ¶ 13. Defendants then filed a motion for continuing writ of garnishment, which they obtained on June 8, 2020 for Garnishee MDLV, LLC. Compl. ¶ 14, Ex. A. On July 7, 2020, the Garnishee MDLV, LLC was served with the writ of garnishment, but ultimately, failed to file an answer to the writ of garnishment. Compl. ¶ 14.

On October 13, 2020, Defendants voluntarily dismissed the writ of garnishment against the Garnishee MDLV, LLC. See Compl., Ex. A.

In the present case, Plaintiff Marni Ledwitz brings a claim against the Naderpour Firm for a violation of the FDCPA and against both Defendants for wrongful garnishment. The Naderpour Firm, Plaintiff alleges, was required to send notice to Plaintiff of the garnishment not later than July 28, 2020 under Florida Statute § 77.055 but failed to do so. Compl. ¶¶ 17, 18. Plaintiff alleges that the Naderpour Firm continued to cause the Garnishee, MDLV, LLC, to withhold Plaintiff income for two and one-half months after the Naderpour firm failed to comply with Florida Statute § 77.055. Compl. ¶ 28.

II. STANDARD OF LAW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. When reviewing a motion under Rule 12(b)(6), the court must accept the plaintiff's well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

III. DISCUSSION

Defendants Wells Fargo and the Naderpour Firm request that Plaintiff's complaint be dismissed with prejudice. Defendants argue that the violation of Florida Statute § 77.055 that

Plaintiff alleges does not constitute an act or omission prohibited by the FDCPA and as such Plaintiff has failed to state an FDCPA claim. Defendants also contend Plaintiff has failed to establish the elements of a claim for wrongful garnishment under Florida law.

A. FDCPA Claim

To state a claim under the FDCPA, a plaintiff must demonstrate that: "(1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA." *Kaplan v. Assetcare, Inc.,* 88 F. Supp. 2d 1355, 1360–61 (S.D. Fla. 2000) (quoting *Sibley v. Firstcollect, Inc.,* 913 F.Supp. 469, 470 (M.D.La.1995)). Plaintiff's FDCPA claim alleges Defendants failure to provide notice under Florida law constitutes an omission in violation of § 1692f of the FDCPA, which prohibits debt collection practices which are "unfair or unconscionable". *See* 15 U.S.C. § 1692f. Plaintiff contends that Defendants' conduct which failed to comply with Florida Statute § 77.055 and caused Plaintiff's wages to be withheld for an additional two and one-half (2½) past the statutory notice deadline was unfair or unconscionable. Further, Plaintiff argues determining whether such conduct was unfair or unconscionable is a question of fact.

Defendants request that this Court apply the holding in *Shanklin v. Midland Funding, LLC*, wherein Judge Singhal found that the plaintiffs failed to state a claim for wrongful garnishment or violations of 15 U.S.C. § 1692e which "broadly prohibits any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Shanklin v. Midland Funding, LLC*, No. 20-60096-CIV, 2020 WL 6498718, at *4 (S.D. Fla. Oct. 31, 2020). In *Shanklin*, Judge Singhal found that nothing in the notices sent to the plaintiffs or in an affidavit filed with the state court were "misleading or deceptive", even though some of the

documents may have been procedurally untimely or incorrectly addressed. *Id.* Judge Singhal found that the allegation that one of the notices sent to plaintiffs was not properly addressed did not give rise to a violation of the FDCPA under § 1692e. *Id.* Regarding the timeliness of the notices, Judge Singhal noted that the plaintiffs' amended complaint alleged at least one timely notice to the plaintiffs, and as such, the timeliness allegations similarly did not state a claim under § 1692e. *Id.*

Plaintiffs in turn argues that she has standing to bring her claims and that this Court should not apply the holding in *Shanklin*. Plaintiff contends that she was deceived by Defendants' failure to provide notice under § 77.055 "by not being apprised of her right to move to dissolve the garnishment under Florida Statute § 77.055 and not having the use of her wages for over two (2) months" and that to find a violation under the FDCPA the Court would not have to determine whether "Defendants have complied with state statutes" as Florida courts have already found that a failure to comply with § 77.055 is grounds for dissolution of a writ of garnishment. [DE 20] p. 4. Plaintiff further contends that she has standing to bring her claim as she is entitled to at least nominal damages and has pled actual harm in the form of having her wages withheld for an additional two and one-half months. [DE 20] p. 6.

The Court, ultimately, does not find Plaintiff's arguments persuasive. First, it seems that Plaintiff misapprehends the potential applicability of *Shaklin*. Judge Singhal in *Shaklin* held that certain violations of Florida state garnishment law did not constitute a false, deceptive, or misleading representation which would amount to a violation of § 1692e of the FDCPA. Similarly, here, this Court questions whether Defendant's failure to provide notice under § 77.055 and subsequent voluntary dismissal of the continuing writ of garnishment could amount

to an "unfair or unconscionable" act or omission in violation of § 1692f of the FDCPA.[1] *Shaklin*, however, did not directly address the plaintiffs' standing to bring an FDCPA claim or whether the plaintiffs' alleged damages, nominal or otherwise, constituted an injury in fact. *See Shanklin v. Midland Funding, LLC*, No. 20-60096-CIV, 2020 WL 6498718, at *4 (S.D. Fla. Oct. 31, 2020) (discussing whether the plaintiffs' factual allegations gave rise to a claim for an FDCPA violation).

Here, the Court does find that Plaintiff has failed to allege facts which, taken as true, demonstrate Plaintiff has standing to bring her FDCPA claim. Plaintiff's Article III standing to bring a claim is a threshold jurisdictional question which the Court must address prior to analyzing the merits of Plaintiff's claims. *DiMaio v. Democratic Nat. Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008) "The party invoking federal jurisdiction bears the burden of establishing" standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The Court has an obligation to satisfy itself that plaintiff has standing to bring her claims even if, as here, the defendant has not raised this issue or sought dismissal on this ground. *Fla. Ass'n of Med. Equip. Dealers, Med-Health Care v. Apfel*, 194 F.3d 1227, 1230 (11th Cir. 1999).

Article III standing consists of three elements, a plaintiff must have 1) suffered an injury in fact which is 2) fairly traceable to the defendant's conduct and 3) likely redressable by a

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[1] Other district courts, like Judge Singhal in *Shaklin*, have been wary of converting state debt collection law violations into FDCPA violations. *See, e.g. Drennan v. First Resol. Inv. Corp*., No. 2:08-CV-461-TJW-CE, 2010 WL 11619554, at *4 (E.D. Tex. Mar. 1, 2010), *report and recommendation adopted*, No. 2:08-CV-461-TJW-CE, 2010 WL 11619564 (E.D. Tex. Mar. 10, 2010), *aff'd*, 389 F. App'x 352 (5th Cir. 2010) ("The FDCPA was designed to provide basic, overarching rules for debt collection activities; it was not meant to convert every violation of a state debt collection law into a federal violation.") (citing *Carlson v. First Revenue Assurance*, 359 F.3d 1015, 1018 (8th Cir. 2004); *Washington v. North Star Capital Acquisition, LLC*, 2008 WL 4280139, *2 (N.D. Ill. 2008)). In *Anglin v. Merchants Credit Corporation*, the United States District Court for the Western District of Washington found that a defendant's violation of the state's garnishment procedure did not amount to a violation of the FDCPA. *Anglin v. Merchants Credit Corp.*, No. 18-CV-507-BJR, 2020 WL 4000966, at *4 (W.D. Wash. July 15, 2020). The district court stated that "generally, such procedural mishaps in state court cannot be the basis for a FDCPA claim." *Id.* at *5. The Court reasoned that the appropriate response to the defendant's procedural violation was to seek to quash the writ of garnishment in the state court from which it was issued, which the Plaintiffs had done. *Id.* at *4.

favorable court decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "Under *Spokeo*, a plaintiff may establish a concrete injury-in-fact three ways: (i) by alleging facts to establish statutory violations of the type that are sufficient without the need to allege additional harm; (ii) by alleging facts to establish that the alleged statutory violations created a material risk of harm; or (iii) by alleging facts to establish that the alleged violations caused actual harm." *Davis v. CACH, LLC*, No. 14-CV-03892-BLF, 2021 WL 1626484, at *3 (N.D. Cal. Apr. 6, 2021) (internal quotations omitted)

Plaintiff seeks statutory, compensatory, and punitive damages from an injury she incurred, namely having her money withheld for an additional two months, which Plaintiff alleges was caused by Defendants unfair or unconscionable practice of failing to give Plaintiff proper notice under Florida Statute § 77.055. *See* Compl. ¶¶ 24, 26. In addition, Plaintiff's argues that seeking nominal damages for Defendant's failure to provide proper notice, which would be a violation of a right create by a Florida state law, should be sufficient to establish her standing. Plaintiff does not appear to argue that there is a material risk of future harm to her based-on Defendants' violation, as such the Court need not address whether Plaintiff could establish an injury-in-fact based on such a theory.

Plaintiff appears to allege actual harm in the form of her wages being withheld for two and one-half "additional" months. The Complaint's factual allegations, however, are insufficient to demonstrate that this harm, the elongated withhold of her wages, is fairly traceable to the procedural violation of Defendants failing to provide her with notice under 77.055. Further, Plaintiff does not allege what redress a judgement from this Court could provide as the writ of garnishment has already been voluntarily dismissed. Accordingly, the Court finds that as

presently pled, Plaintiff's allegations of actual harm fail to establish Plaintiff's standing to bring a claim under the FDCPA.

Plaintiff also argues that Defendant's invasion of her right to notice within a certain time period, from which she believes she could claim at least nominal damages, should alone be sufficient to establish standing. A plaintiff cannot "satisfy the demands of Article III by alleging a bare procedural violation," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016), *as revised* (May 24, 2016); however, some violations of rights created by statute, can provide a plaintiff with standing in certain situations. *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 993 (11th Cir. 2016) ("An injury-in-fact, as required by Article III, 'may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing....'") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)). Further, in some instances "a plaintiff ... need not allege any *additional* harm beyond the one Congress has identified" in creating the right. *Church v. Accretive Health, Inc*., 654 F. App'x 990, 993 (11th Cir. 2016) (quoting *Spokeo*, 136 U.S. 1540, 1549 (emphasis in original)). For instance, the Eleventh Circuit has found that a defendant's failure to provide certain disclosures during or soon after an initial communication with a debtor, in violation of the FDCPA, can alone constitute a concrete injury satisfying the injury in fact requirement. *Church v. Accretive Health, Inc.,* 654 F. App'x 990, 995 (11th Cir. 2016). Such a holding, mirrors the holding of courts throughout the country which have held that "FDCPA informational violations are sufficient to confer standing absent allegations of additional harm because in passing the FDCPA Congress created a substantive right for debtors to receive information." *Davis v. CACH, LLC*, No. 14-CV-03892-BLF, 2021 WL 1626484, at *2 (N.D. Cal. Apr. 6, 2021).

Here, however, Plaintiff does not allege a violation of a specific requirement of the FDCPA but rather of Florida State law. Courts have drawn a distinction between violations of rights which Congress has elevated to an injury through the FDCPA and rights created by state law. *See, e.g. Davis v. CACH, LLC*, No. 14-CV-03892-BLF, 2021 WL 1626484, at *3 (N.D. Cal. Apr. 6, 2021) (finding that the plaintiff had failed to identify any "authority in which the mere violation of a state civil procedure statute—as opposed to a violation of the FDCPA—establishes Article III standing to bring an FDCPA claim" and compiling cases concluding the opposite). *See also Dickens on behalf of estate of Dickens v. GC Servs. Ltd. P'ship*, 336 F. Supp. 3d 1369, 1376 (M.D. Fla. 2018) (reconciling the Eleventh Circuit's holdings in *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002 (11th Cir. 2016) and *Church v. Accretive Health, Inc.,* 654 F. App'x 990, 995 (11th Cir. 2016) by explaining that "*Nicklaw* analyzed a right provided to the plaintiff by a state law, and *Church* involved a right 'Congress elevated' to an injury with the FDCPA.").

In *Nicklaw v. Citimortgage Inc.*, the Eleventh Circuit analyzed whether a plaintiff could establish standing to sue in federal court over a violation of a New York statute. *See Nicklaw*, 839 F.3d at 1002 (11th Cir. 2016). The plaintiff in *Nicklaw* alleged that the defendant had violated two New York statutes by failing to timely record a certificate of discharge after the plaintiff had satisfied his mortgage. *Id.* at 1000–01. In analyzing, the plaintiff's Article III standing to sue in federal court, the Eleventh Circuit stated that the relevant question was not whether the state law created a right, but whether [the plaintiff] was harmed when this statutory right was violated. *Id.* Ultimately, the Eleventh Circuit found that the plaintiff had failed to establish such harm, enumerating a number of potential ways the complaint could have alleged sufficient injury but did not, including failing to allege that the plaintiff lost any money or that

his credit or reputation suffered by the defendant's state law violation. *Id.* at 1003. The Eleventh Circuit concluded,

> That Nicklaw does not allege a sufficient injury in fact under Article III does not mean that New York law does not create a right that, when violated, could form the basis of a cause of action in a court of New York. But Nicklaw chose to sue CitiMortgage in federal court, and the requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation. ... A plaintiff must suffer some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court.

Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1003 (11th Cir. 2016) (internal citations omitted).

Here, Plaintiff does not allege an injury based on some right created by the FDCPA, rather Plaintiff asks this Court to find that a violation of state law could serve as a basis for an FDCPA violation and thereby create an injury-in-fact establishing standing. Based on the foregoing discussion, the Court finds that Plaintiff has failed to allege any actual harm which is traceable to Defendant's conduct and redressable by this Court and has not demonstrated that the statutory violation alleged is the type which can form a concrete injury without additional allegations of harm.

B. Wrongful Garnishment Claim

To state a claim for wrongful garnishment, a Plaintiff must demonstrate that: (1) the defendant commenced or continued a proceeding against the plaintiffs, (2) the defendant was the legal cause of that proceeding, (3) the plaintiffs received a 'bona fide termination' of the proceeding in their favor, (4) the defendant did not have 'probable cause' for the proceeding, (5) the defendant acted with 'legal malice'; and (6) the plaintiffs suffered damages. *See Barniv v. BankTrust*, 579 F. App'x 719, 720 (11th Cir. 2014) (citing *Adams v. Whitfield,* 290 So.2d 49, 51 (Fla.1974)).

The Court agrees with Defendants and the analysis conducted by Judge Singhal in *Shanklin*. Plaintiffs have failed to state a claim for wrongful garnishment.

First, Plaintiff has failed to allege facts which would demonstrate that she received a 'bona fide termination' of the proceeding in her favor. Plaintiff cites to no authority which would permit this Court to conclude that Defendants voluntary dismissal of the garnishment is a "bona fide termination" on the merits. Further, there are no facts alleged in the Complaint which suggest that the garnishment could have been dismissed on the merits; rather the Plaintiff specifically argues that Defendants failure to comply with Florida Statute § 77.055 would have served as a basis to dismiss the writ of garnishment. [DE 20] p. 6-7. "A termination is not 'bona fide' in this context unless it is on the merits instead of for a procedural reason." *Barniv v. BankTrust*, 579 F. App'x 719, 721 (11th Cir. 2014). Here, the writ of garnishment was not dismissed on the merits, rather it was voluntarily dismissed by Defendants, and had it not been, Plaintiff only alleges that the writ could have been dismissed due to Defendants failure to follow the procedure laid out in Florida Statute § 77.055. *See Shanklin v. Midland Funding, LLC*, No. 20-60096-CIV, 2020 WL 6498718, at *3 (S.D. Fla. Oct. 31, 2020).

The absence of allegations establishing a "bona fide termination" are alone sufficient to defeat Plaintiff's wrongful garnishment claim, *Barniv v. BankTrust*, 579 F. App'x 719, 721 (11th Cir. 2014); however, the Court also finds Plaintiff has failed to demonstrate that Defendant did not have 'probable cause' for the garnishment proceeding. The Court agrees with Judge Singhal's reasoning that a violation of the notice requirement in § 77.055 does not cause Defendants' probable cause in pursuing the writ of garnishment to automatically dissipate as Plaintiff argue. *Shanklin v. Midland Funding, LLC*, No. 20-60096-CIV, 2020 WL 6498718, at *3

(S.D. Fla. Oct. 31, 2020). Accordingly, Plaintiff has also failed to allege that Defendants did not have probable cause for the pursuing the writ of garnishment.

While the Court finds that amendment of Plaintiff's wrongful garnishment claim would likely be futile, as the Court is already permitting Plaintiff to amend her FDCPA claim, the Court will permit amendment on both claims.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. The Motion [DE 11] is **GRANTED**.
2. Plaintiff's Complaint if **DISMISSED** without prejudice to Plaintiff filing an amended complaint on or before **July 1, 2021**.
3. All pending motions are **DENIED as moot**.
4. If Plaintiff fails to timely file an amended complaint, the Court will close this case without further notice.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 17th day of June, 2021.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record