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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD L. SHEFFER, :

Plaintiff, : CIVIL ACTION

:

v. :

:

EXPERIAN INFORMATION :

SOLUTIONS, INC., et al., : No. 02-7407

Defendants. :

MEMORANDUM AND ORDER

Schiller, J. July 24, 2003

Plaintiff Richard L. Sheffer commenced this action against Defendants Experian Information Solutions, Inc., Equifax Information Services, LLC ("Equifax"), Trans Union, LLC ("Trans Union"), and Sears Roebuck & Co. ("Sears").⁽¹⁾ Presently before the Court are Trans Union's Motion for Summary

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Judgment, Equifax's Motion for Partial Summary Judgment, and Sears's Joinder to the Motions for Summary Judgment. For the reasons set forth below, Defendants' motions are denied.

• BACKGROUND

Many of the pertinent facts for purposes of ruling on the summary judgment motions are not in dispute. Mr. Sheffer opened a Sears charge account in January 1993. Subsequently, without Plaintiff's consent and unbeknownst to him, Plaintiff's account was merged with that of a former Sears account holder who was deceased. In November 2000, a bank declined to increase Mr. Sheffer's credit line, and he requested a copy of his credit report from Equifax. (Compl., Ex. 1.) He received a report which stated, in connection with the Sears account, "CONSUMER DECEASED." (Pl.'s Resp. to Equifax's Mot. for Part. Summ. J., Ex. A at 2.) The report also indicated that the Sears account had been opened in January 1965, several years prior to Plaintiff's date of birth. (*Id.*) On November 29, 2000, Plaintiff contacted Equifax by telephone to dispute the statement in the report that he was deceased. (Pl.'s Resp. to Equifax's Mot. for Part. Summ. J., Ex. A (Fluellen Dep.) at 127.) In a letter dated December 4, 2000, Equifax informed Plaintiff that it had "reinvestigate[d]" the disputed information and had "verified" that the information regarding the Sears account was correct. (Pl.'s Resp. to Equifax's Mot. for Part. Summ. J, Ex. C.) Plaintiff again called Equifax (Fluellen Dep. at 141), and Equifax informed Mr. Sheffer that it had "deleted" the Sears account from his Equifax credit report. (Pl.'s Resp. to Equifax's Mot. for Part. Summ. J, Ex. D.) Nevertheless, an Equifax credit report dated December 28, 2001 included information about the Sears account, including the "CONSUMER DECEASED" notation. (Pl.'s Resp. to Equifax's Mot. for Part. Summ. J, Ex. E at 5; Fluellen Dep. at 150-51.)

In April 2002, Mr. Sheffer's attorney sent a letter to Trans Union disputing a similar "DECEASED" statement in his Trans Union credit report. (Compl., Ex. 11.) In correspondence dated May 6, 2002, Trans Union informed Plaintiff that the results of its investigation with respect to the Sears account was that information was "verified, no change." (Compl., Ex. 14.) In June 2002, Plaintiff's attorney informed Trans Union that he "disavow[ed] ownership" of the Sears account (Compl., Ex. 15), and thereafter Trans Union deleted the information related to the Sears account from Plaintiff's credit report.

• STANDARD OF REVIEW

Summary judgment is appropriate when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The moving party bears the burden of showing that the record reveals no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 247. Once the moving party has met its burden, the non-moving party must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. "Such affirmative evidence - regardless of whether it is direct or circumstantial - must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams v. Borough of W. Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

• DISCUSSION

A. Applicable Standards Under §§ 1681i and 1681e

As a general matter, Congress enacted the requirements set forth in the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, to "insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. 1681(a)(4)(2003).⁽²⁾ Particularly relevant to the instant action is the FCRA's requirement that credit reporting agencies investigate consumers' disputes about the information in their credit files. Section 1681i provides:

If the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly of such dispute, the agency shall reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file. . . .

15 U.S.C. § 1681i(a)(1)(A). Remarking on the "grave responsibilities" of credit reporting agencies, the Third Circuit has emphasized that such agencies must do more than "merely parrot[] information received from other sources. Therefore, a 'reinvestigation' that merely shifts the burden back to the consumer and the credit grantor cannot fulfill the obligations contemplated by the statute." *Cushman v. Trans Union Corp.*, 114 F.3d 220, 225 (3d Cir. 1997). Similarly, the Third Circuit has held that "in order to fulfill its obligation under § 1681i(a), a credit reporting agency may be required, in certain circumstances, to verify the accuracy of its initial source of information." *Id.* As the Third Circuit has indicated, the scope of an agency's duty to go beyond the original source depends on a number of factors, including: (1) whether the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency knows or should know that the source is unreliable; and (2) the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer. *See id.* "Whatever considerations exist, it is for 'the trier of fact [to] weigh these factors in deciding whether [an agency] violated the provisions of section 1681i.'" *Id.* at 225-26 (*quoting Henson v. CSC Credit Servs.*, 29 F.3d 280, 287 (7th Cir. 1994)).

Section 1681e(b) provides: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). In order to succeed on his § 1681e(b) claim, Mr. Sheffer must establish each of the following of four elements: (1) inaccurate information was included in his credit report; (2) the inaccuracy was due to a Defendant's failure to follow reasonable procedures to assure maximum possible accuracy; (3) he suffered injury; and (4) his injury was caused by the inclusion of the inaccurate entry. *See Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996).

A reasonable jury could find that Trans Union violated either or both of these sections. Regarding Plaintiff's § 1681i claim, the evidence suggests that Trans Union merely parroted information provided by other sources, despite the fact that Plaintiff provided information supporting his

assertion that the "DECEASED" statement was incorrect (Compl., Ex. 10), and, consequently, there is sufficient evidence for the issue of whether Trans Union violated § 1681i to be decided by a jury. *See Cushman*, 227 F.3d at 225. Turning to the § 1681e(b) claim, the Third Circuit has discussed three approaches - without endorsing any of the three - for determining whether a plaintiff has presented sufficient evidence to survive summary judgment. *See Philbin*, 101 F.3d at 964-65. Under the most stringent approach, Mr. Sheffer "must minimally present some evidence from which a trier of fact can infer that the consumer reporting agency failed to follow reasonable procedures in preparing a credit report." *Stewart v. Credit Bureau, Inc.*, 734 F.2d, 47 51 (D.C. Cir. 1984); *see also Philbin*, 101 F.3d at 965 (characterizing *Stewart* approach as "more stringent"); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 368 (5th Cir. 2001) (holding that question of whether agency followed reasonable procedures is typically a fact question reserved for jury) (*citing Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991)). Here, the Trans Union report indicated both that Plaintiff was born in 1969 and that the account was opened in 1965.⁽³⁾ Furthermore, the Sears account was the only account among approximately two dozen that included the "deceased" notation. These inconsistencies provide a basis from which a jury could infer that the procedures were unreasonable.

Trans Union also argues that it is entitled to summary judgment because Plaintiff has not produced any evidence of actual damages. This argument is unpersuasive. At the very least, Plaintiff may be entitled to damages for the emotional distress he may have suffered in connection with his efforts to correct the error in his Trans Union consumer file and in obtaining credit from a jewelry store around the time he was attempting to have the error corrected. *Cf. Philbin*, 101 F.3d at 963 n.3 (noting that plaintiff in FCRA case is not required to produce evidence of emotional damages with high degree of specificity); *Fischl v. Gen. Motors Acceptance Corp.*, 708 F.3d 143, 151 (5th Cir. 1983) ("Even where no pecuniary or out-of-pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress.").

B. Punitive Damages

Under § 1681n, "[a]ny person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . such amount of punitive damages as the court may allow." 15 U.S.C. § 1681n. "To show willful noncompliance with the FCRA, [a plaintiff] must show that defendants 'knowingly and intentionally committed an act in conscious disregard for the rights of others,' but need not show 'malice or evil motive.'" *Philbin*, 101 F.3d at 970 (*quoting Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986)). "[T]o justify an award of punitive damages, a defendant's actions must be on the same order as willful concealments or misrepresentations [such as the adoption of a] reinvestigation policy either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Cushman*, 115 F.3d at 226.

Equifax and Trans Union contend that Plaintiff cannot show "wilfulness" under the FCRA. I disagree with both Defendants. As another court has held, punitive damages may be warranted where the evidence shows that inaccuracies in credit reports arise from something more than "an isolated instance of human error which [the agency] promptly cure[s]." *Boris v. Choicepoint Servs.*, 249 F. Supp. 2d 851, 862 (W.D. Ky. 2003). Here, there is evidence regarding the conduct of Equifax and Trans Union suggesting that the problems that Mr. Sheffer experienced were not the result of mere human error and that the errors were not promptly cured. (Fluellen Dep. at 85-85; 97-99, 150; Pl.'s Resp. to Trans Union's Mot. for Summ. J., Ex. E at 61-64.) On this basis, a jury may be able to find that Defendants acted with conscious or reckless disregard to the rights of

consumers. For these reasons, I reject Defendants' arguments that they are entitled to summary judgment on Plaintiff's punitive damages claims. However, I note that I will be in a better position to assess the merits of these claims when they are put into a fuller context at trial, and, consequently, I deny Defendants' motions without prejudice to their rights to reassert their arguments regarding punitive damages in an appropriate motion under Federal Rule of Civil Procedure 50.

C. Credit Defamation

Defendants Sears, Equifax, and Trans Union argue that they are entitled to the summary judgment on Plaintiff's claims for defamation under Pennsylvania law. Although there is relatively little discussion of defamation claims under Pennsylvania law in cases involving credit reports, precedent suggests that a false statement in a credit report may qualify as defamatory if it tends to deter third persons from dealing with the plaintiff. *See McCain v. Pennbank*, 549 A.2d 1311, 1314 (Pa. Super. Ct. 1988). Moreover, because the parties have not addressed the defamation claims in detail and such claims are preempted by the FCRA absent a showing of malice or willfulness, 15 U.S.C. § 1681h(e), I will deny Defendants' motions with respect to the defamation claims without prejudice to their rights to raise their arguments again at trial.

• CONCLUSION

Accordingly, I deny Defendants' motions for summary judgment. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD SHEFFER, :

Plaintiff, : CIVIL ACTION

:

v. :

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EXPERIAN INFORMATION :

SOLUTIONS, INC., et al., : No. 02-7407

Defendants. :

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ORDER

AND NOW, this 24th day of July, 2003, upon consideration of Trans Union, LLC's Motion for Summary Judgment, Equifax Information Services, LLC's Motion for Partial Summary Judgment, Plaintiff Richard L. Sheffer's responses thereto, and Defendant Sears Roebuck & Co.'s Joinder to Motions for Summary Judgment, and for the foregoing reasons, it is hereby ORDERED that:

- 1. By agreement of the parties, Equifax, Inc. is DISMISSED as a Defendant in this action.**
- 2. Trans Union, LLC's Motion for Summary Judgment (Document No. 37) is DENIED.**
- 3. Equifax Information Services, LLC's Motion for Partial Summary Judgment (Document No. 38) is DENIED.**
- 4. Defendant Sears Roebuck & Co.'s Joinder to Motions for Summary Judgment (Document No. 44) is DENIED.**

BY THE COURT:

Berle M. Schiller, J.

- 1. Plaintiff also named Equifax, Inc. as a Defendant. The parties agree that Equifax should be dismissed from this action.**
- 2. Equifax does not contend that it is entitled to summary judgment on Plaintiff's claims under §§ 1681e and 1681i, except to the extent that Plaintiff seeks punitive damages.**
- 3. Trans Union takes the position that this inconsistency does not show that its procedures were unreasonable because in the case of jointly-held accounts the date an account is opened may precede the consumer's date of birth. However, in the instant case it is disputed whether there was a reasonable basis for not acting on this inconsistency, i.e., whether one could have reasonably believed that Plaintiff's account was actually a joint account, and, as such, summary judgment is inappropriate.**

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