

IN THE UNITED STATES BANKRUPTCY COURT FOR  
THE DISTRICT OF PUERTO RICO

IN RE:

MIGUEL ANGEL RIVERA ALMODOVAR

CASE NO. 09-07002 BKT

MARILEN DE LOS ANGELES MARTINEZ  
GARCIA

Debtors

Chapter 13

MIGUEL ANGEL RIVERA ALMODOVAR

ADVERSARY NO. 09-0251

Plaintiff

v.

P.V. COLLECTION SERVICES INC.

FILED & ENTERED ON 02/03/2011

Defendant

**OPINION AND ORDER**

This proceeding is before the Court upon the Plaintiff's motion for partial summary judgment [Dkt. No. 25], the Defendant's opposition to the Plaintiff's motion for partial summary judgment [Dkt. No. 28], the Defendant's motion for summary judgment [Dkt. No. 29], the Plaintiff's opposition to the Defendant's motion for summary judgment [Dkt. No. 30], and the Defendant's reply to the Plaintiff's opposition to the Defendant's motion for summary judgment [Dkt. No. 31]. For the reasons set forth below, the Plaintiff's motion for partial summary judgment is GRANTED.

**I. SUMMARY JUDGMENT STANDARD:**

Under Federal Rule of Civil Procedure 56(c), made applicable in bankruptcy by Federal Rule

1 of Bankruptcy Procedure 7056, summary judgment is available if the pleadings, depositions, answers  
2 to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
3 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of  
4 law. Fed. R. Civ. P. 56(c); Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 4 (1st Cir. 2010).  
5 As to issues on which the movant, at trial, would be compelled to carry the burden of proof, it must  
6 identify those portions of the pleadings which it believes demonstrates that there is no genuine issue  
7 of material fact. In re Edgardo Ryan Rijos & Julia E. Cruz Nieves v. Banco Bilbao Vizcaya &  
8 Citibank (In re Rijos), 263 B.R. 382, 388 (B.A.P. 1st Cir. 2001). ). A fact is deemed "material" if it  
9 potentially could affect the outcome of the suit. Borges at 5. Moreover, there will only be a  
10 "genuine" or "trial worthy" issue as to such a "material fact," "if a reasonable fact-finder, examining  
11 the evidence and drawing all reasonable inferences helpful to the party resisting summary judgment,  
12 could resolve the dispute in that party's favor." Id. at 4. The Court must view the evidence in a light  
13 most favorable to the nonmoving party. Alt. Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 26  
14 (1st Cir. 2004). Therefore, summary judgment is "inappropriate if inferences are necessary for the  
15 judgment and those inferences are not mandated by the record." Rijos at 388.

## 21 II. FACTUAL BACKGROUND:

22 The Plaintiff Debtor filed the present adversary proceeding alleging that the Defendant  
23 collection agency violated the Fair Debt Collection Practices Act (hereinafter "FDCPA"), 15 U.S.C.  
24 § 1692, *et seq.* There is no dispute that Plaintiff is a consumer debtor and that Defendant is a debt  
25 collector. Hence the provisions of this law apply to the facts before us. Specifically, the Plaintiff  
alleges that the Defendant's collection letter (1) insisted that the Plaintiff contact the Defendant  
collection agency within five (5) days of receipt of the letter; (2) failed to contain a statement

1 indicating that, if the Plaintiff did not dispute the validity of the debt, or any portion thereof, within  
2 thirty (30) days of receipt of the letter, the debt will be assumed to be valid by the debt collector; (3)  
3 failed to contain a statement that, upon the Plaintiff's written request within the thirty-day period, the  
4 debt collector will provide the Plaintiff with the name and address of the original creditor; and (4)  
5 failed to advise the Plaintiff that he had the option of disputing the debt orally. The Defendant's own  
6 translation of the collection letter in question confirms the veracity of each allegation outlined above  
7 [Dkt. No. 29], thus there are no material facts in dispute and summary judgment is appropriate. The  
8 matter is submitted.

### 9 III. LEGAL ANALYSIS AND DISCUSSION:

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11 In evaluating whether communications or conduct violates the FDCPA, courts utilize the so-  
12 called "least sophisticated debtor" standard. Taylor v. Perrin, Landry, de Launay & Durand, 103 F.3d  
13 1232, 1236 (5th Cir.1997); Clomon v. Jackson, 988 F.2d 1314, 1318-19 (2d Cir.1993); Smith v.  
14 Transworld Systems, Inc., 953 F.2d 1025, 1028-29 (6th Cir.1992); see also Gammon v. GC Services  
15 L.P., 27 F.3d 1254 (7th Cir.1994) ("unsophisticated consumer" standard). The phrase least  
16 sophisticated (or unsophisticated) debtor/consumer is used "to describe the hypothetical consumer  
17 whose reasonable perceptions will be used to determine if collection messages are deceptive or  
18 misleading," while at the same time the reasonableness element "shields complying debt collectors  
19 from liability for unrealistic or peculiar interpretations of collection letters." Gammon at 1257. The  
20 Seventh Circuit has stated that "[a]nyway it's viewed, the standard is low." Avila v. Rubin, 84 F.3d  
21 222, 226 (7th Cir.1996).

22 Defendant's violation of the FDCPA must be evaluated from the standpoint of the least  
23 sophisticated consumer, with a strict liability analysis.

1 The FDCPA requires:

2 (a) Within five days after the initial communication with a consumer in connection with the  
3 collection of any debt, a debt collector shall, unless the following information is contained in  
4 the initial communication or the consumer has paid the debt, send the consumer a written  
5 notice containing—

6 (1) the amount of the debt;

7 (2) the name of the creditor to whom the debt is owed;

8 (3) a statement that unless the consumer, within thirty days after receipt of  
9 the notice, disputes the validity of the debt, or any portion thereof, the debt  
10 will be assumed to be valid by the debt collector;

11 (4) a statement that if the consumer notifies the debt collector *in writing*  
12 within the thirty-day period that the debt, or any portion thereof, is  
13 disputed, the debt collector will obtain verification of the debt or a copy of  
14 a judgment against the consumer and a copy of such verification or  
judgment will be mailed to the consumer by the debt collector; and

15 (5) a statement that, upon the consumer's *written request* within the thirty-day period,  
16 the debt collector will provide the consumer with the name and address of the  
17 original creditor, if different from the current creditor. (Emphasis added).

18 15 U.S.C. § 1692g(a). Reading the collection letter sent to Plaintiff, submitted as part of Defendant's  
19 Motion for Summary Judgment [Dkt. No. 29], from the perspective of the least sophisticated  
20 consumer, the statement “it is extremely important that you contact our office within the next five (5)  
21 days” suggests that, if the reader does not contact the collection agency within five days, there may  
22 be adverse consequences. This language fails to convey the reasons for, or consequences of, this  
23 demand, and is exactly what Congress intended to prevent when it enacted the FDCPA. The FDCPA  
24 requires that collection letters indicate that consumers have thirty days after receipt of the letter to  
25 dispute the debt stated therein, and collection notices suggesting a shorter time period may confuse  
unsophisticated consumers into misunderstanding their statutory rights. Similarly, because the letter  
does not include a statement indicating that the collection agency may assume the debt to be valid

1 unless disputed within thirty days, it also fails to notify the consumer of the collection agency's right  
2 to change its treatment of the debt based upon whether or not a consumer responds to a collection  
3 request. Furthermore, the letter's failure to contain a statement that, upon the Plaintiff's written  
4 request within the thirty-day period, the debt collector will provide the consumer with the name and  
5 address of the original creditor, if different from the current creditor, is also a clear violation of the  
6 statute.  
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9 The final question to be resolved, whether the letter failed to advise the Plaintiff that he had a  
10 statutory right to dispute the debt orally, has produced a split between two Courts of Appeals. Both  
11 Courts agreed this is a question of statutory construction; whether section 1692g(a)(3) of the FDCPA  
12 requires the consumer to dispute the validity of a debt in writing, even though from its face such a  
13 requirement is not imposed. The Third Circuit has held that the rights enumerated by 15 U.S.C. §  
14 1692g(a)(3) may only be invoked in writing because a literal reading of the statute would result in an  
15 incoherent debt collection scheme. Graziano v. Harrison, 950 F.2d 107, 112 (3rd Cir. 1991).  
16 Contrarily, the Ninth Circuit maintains that consumers may dispute debts either in writing *or* orally,  
17 as indicated by the omission of a writing requirement from 15 U.S.C. § 1692g(a)(3). Camacho v.  
18 Bridgeport Financial, Inc., 430 F.3d 1078, 1081 (9th Cir. 2005). This Court agrees that the absence  
19 of a writing requirement in 15 U.S.C. § 1692g(a)(3), and the presence of a writing requirement in the  
20 two subsequent subsections, indicates that Congress intended to give consumers the right to dispute  
21 debts orally. Such a scheme seems not only coherent, but progressive, and perhaps intended to  
22 benefit undereducated or handicapped consumers who are unable to communicate in writing. For  
23 these reasons, and the other reasons enunciated by the court in Camacho, this Court concurs with the  
24 Ninth Circuit and holds that debtors can trigger the rights under 15 U.S.C. § 1692g(a)(3) either orally  
25

1 or in writing. Accordingly, the collection letter sent by the Defendant to the Plaintiff misstated the  
2 rights available to him under 15 U.S.C. § 1692g(a)(3).  
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4 **WHEREFORE, IT IS ORDERED** that the Plaintiff's motion for partial summary judgment  
5 shall be, and hereby is, GRANTED. The Clerk's Office will schedule a status conference forthwith  
6 to consider the procedures for resolving the awarding of damages and attorney's fees. Judgment will  
7 be entered accordingly.  
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9 **IT IS SO ORDERED.**

10 San Juan, Puerto Rico, this 3<sup>rd</sup> day of February, 2011.  
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14 **Brian K. Tester**  
15 **U.S. Bankruptcy Judge**  
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