UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Federal Trade Commission,

Plaintiff,

v.

Case No. 3:08-cv-1001

MEMORANDUM AND ORDER

Latrese & Kevin Enterprises, Inc., doing business as Hargrave & Associates Financial Solutions, Latrese Hargrave, individually and as an officer of Latrese & Kevin Enterprises Inc., Kevin Hargrave, Sr., individually and as an officer of Latrese & Kevin Enterprises Inc., and Kevin Edward Wade, individually and as an officer of Latrese & Kevin Enterprises Inc.,

Defendants.

This matter is before the Court on Plaintiff's Motion for Summary Judgment and on Defendants' Motion for Contempt and Sanctions against the Court-appointed Receiver. For the reasons that follow, the Motion for Summary Judgment is granted and the Motion for Contempt and Sanctions is denied.

BACKGROUND

The Federal Trade Commission ("FTC") brought this civil enforcement action under the authority of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a), the Credit

Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 et seq., and the FTC's Telemarketing Sales Rules ("TSR"), 16 C.F.R. part 310. The FTC asks that the Court permanently enjoin Defendants from deceptively selling credit-repair services, credit cards, or any other credit-related product or service, find Defendants liable for violating federal law, and order more than $7 million in restitution payments to Defendants' customers.

According to the FTC, Defendant Latrese Hargrave, also known as Latrese V. Williams, and Defendant Kevin Hargrave, Sr., also known as Kevin Edward Wade, ran a business called Hargrave & Associates Financial Solutions ("H&A"). H&A did business as Defendant Latrese & Kevin Enterprises, Inc. The FTC alleges that H&A marketed its services to customers throughout the United States from 2003 until October 2008, when the FTC filed this lawsuit and obtained a temporary restraining order ("TRO") which closed the business. H&A's "services" included credit repair and credit cards, and were marketed on the internet, on the radio, and in poster advertisements.

H&A's advertisements promised that H&A would "ERASE BAD CREDIT" for a $250 fee. One ad stated that H&A would remove items such as tax liens, foreclosures, repossessions, bankruptcies, and judgments from a customer's credit report. H&A's website was "helpmycreditnow.com." The company required its customers to pay all or part of the fee up front, before any services were rendered. And, in fact, no services were rendered. The FTC has a dozen affidavits from customers of H&A averring that H&A did nothing to change their credit reports. This is not a surprise, as the Fair Credit Reporting Act provides that all adverse credit information may remain on an individual's credit report for up to ten

years.

In addition, H&A marketed an advance-fee credit card. H&A promised customers that they would receive a credit card with a credit limit of at least $500 for an advance fee of $100. (H&A's advertisement actually promised a credit card with a limit of $500 to $10,000.) Customers who paid the advance fee did not receive a credit card, however. Rather, they received an invitation to apply for a credit card to pay off their debt to H&A, for an additional $59 fee.

DISCUSSION

A. Summary Judgment

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. O'Ferrell v. United States, 253 F.3d 1257, 1265 (11th Cir. 2001). When opposing a motion for summary judgment, the nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials and must do more than simply show that there is some metaphysical

doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). It is not the Court's responsibility to comb through the factual record, searching for material factual disputes. See Rodgers v. City of Des Moines, 435 F.3d 904, 908 (8th Cir. 2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments"); Nicholas Acoustics & Specialty Co. v. H & M Constr. Co., Inc., 695 F.2d 839, 846-47 (5th Cir. 1983) ("Judges are not ferrets!").

Defendants make the frivolous argument that the FTC is not entitled to summary judgment because it did not attach any affidavits to its Motion. The FTC has cited in detail to the voluminous evidentiary record in this case, a record that has been on file with the Clerk's Office since shortly after the FTC initiated the lawsuit. There is no requirement that the FTC use an affidavit to bring that record before the Court in supporting its Motion for Summary Judgment. Indeed, the Rules specifically provide that a party may move, "with or without supporting affidavits" for summary judgment. Fed. R. Civ. P. 56(a). The provision on which Defendants rely, Rule 56(f), requires that a party seeking to avoid summary judgment on the grounds that the factual record is not fully developed supply the Court with an affidavit detailing why summary judgment is premature and what discovery remains. That situation does not pertain here. Discovery has closed, and the FTC has submitted evidence to support its Motion. Defendants' argument on this point is without merit.

1. Federal Trade Commission Act

The FTCA makes unlawful "deceptive trade acts or practices in or affecting

commerce." 15 U.S.C. § 45(a). "To establish that an act or practice is deceptive, the FTC must show that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material." F.T.C. v. Peoples Credit First, LLC, 244 F. App'x. 942, 944 (11th Cir. 2007).

Defendants do not appear to dispute that they violated the FTCA. Rather, they contend that genuine issues of material fact exist as to the proper remedy for the violations of the FTCA. Their brief is, however, sorely lacking. The only legal argument made in the brief is as follows: "Defendants have filed affidavits in opposition to the motion for summary judgment as well as specifically identified various documents from discovery which demonstrated genuine issues of material fact that justify a trial on all the issues of the case, specifically damages." (Defs.' Opp'n Mem. at 4.) The brief does not, however, specifically identify anything. Attached to the brief are the affidavits of the individual Defendants, citing portions of the record that ostensibly create issues of fact and make summary judgment inappropriate.

An affidavit is not the proper place for legal argument. Defendants should have outlined the evidence and the import of that evidence in the memorandum itself, not in the affidavits. Worse, the affidavits do not say what the evidence is, but rather cite pages from depositions or other documents from the record. For example, paragraph 3 of Kevin Hargrave's affidavit reads:

I further offer as proof of my denial of the allegations and legal conclusions set

> forth in the memorandum of law supporting plaintiff's motion for summary judgment the following excerpts from the deposition of Latrese Hargrave taken on May 13, 2009, Exhibit 72: Page 12, Lines 8 through 12.

(K. Hargrave Aff. ¶ 3.) The affidavit does not set forth what those lines of Latrese Hargrave's deposition say, or which part of the Motion the deposition is intended to counter.[1] The rest of the affidavit is the same, citing deposition pages without describing what those pages say. The Court cannot determine from Defendants' brief what the supposed genuine issues of fact are, and it cannot determine what those issues are from the "evidence" attached to the brief. This brief is not a "properly supported" opposition to a summary judgment motion. See Fed. R. Civ. P. 56(e) (stating that an adverse party "must set forth specific facts showing that there is a genuine issue for trial").

As the FTC states, the evidence in this case is overwhelming. It may be that Defendants did operate some legitimate businesses and that some of the damages the FTC claims could be tied to those legitimate businesses. Defendants have not established that any portion of their business was legitimate, however. They have come forward with no evidence that their revenue was generated from anything other than the illegal credit-repair and advance-fee credit card schemes. The Motion for Summary Judgment on this point is granted.

---

[1] In this part of her deposition, Latrese Hargrave testified that she had no authority at H&A but rather that Kevin Hargrave ran the business. However, a few lines later, she testified that she knew that she was the company's president and treasurer. (Pl.'s Supp. Mem. Ex. 72 (L. Hargrave Dep.) at 12.)

2. Credit Repair Organizations Act

The CROA prohibits a credit repair organization such as H&A from "mak[ing] or us[ing] any untrue or misleading representation of the services of the credit repair organization." 15 U.S.C. § 1679b(a)(3). The FTC has amassed significant evidence that H&A did just this in the marketing of its credit-repair services. Among other things, H&A promised that it would remove bad credit history from a customer's credit history, regardless of the veracity of that bad credit history. However, the FCRA provides that accurate bad credit history can remain on a person's credit report for up to ten years. 15 U.S.C. § 1681c(a) (listing information excluded from credit history, such as bankruptcies more than ten years old, and judgments, tax liens, and collections more than seven years old). Thus, H&A's statements were misleading and untrue, and were a violation of the CROA.

Again, Defendants offer nothing more than a treasure hunt in opposition to the FTC's Motion. For example, Latrese Hargreve's Affidavit denies that H&A made any untrue or misleading representations in marketing the credit-repair services. (L. Hargrave Aff. ¶ 7.) She cites to several pages of Kevin Hargrave's deposition in support of this denial. (Id., citing K. Hargrave Dep. at pp. 121, 127, 129, 133, 132, and 173.) However, none of the cited pages contains any denial whatsoever. Defendants have failed to come forward with a genuine issue of material fact on the CROA claim, and the FTC's Motion on this point is granted.

3. Telemarketing Sales Rules

The regulations provide that it is illegal for a telemarketer to "[r]equest[] or receive[e]

payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit . . . ." 16 C.F.R. § 310.4(a)(4). There is no dispute that H&A charged its customers $100, promising them that they would receive a credit card. This is precisely the conduct the regulations prohibit. There is also little dispute that the customers did not receive a credit card, but rather some received an offer to apply for a credit card for an additional fee. Kevin Hargrave asserted in his deposition that people did receive a credit card eventually (Pl.'s Supp. Mem. Ex. 71 (Hargrave Dep.) at 125), but whether customers did or did not receive a card is beside the point. Regardless of whether the customers received credit cards, the company violated the TSR by charging them $100 for that card. The FTC's Motion is granted on this issue.

4. Individual Liability

The FTC seeks to hold Latrese and Kevin Hargrave individually liable for the legal violations of their corporations. The FTC's evidence shows that Latrese and Kevin Hargrave controlled the Defendant corporations, ran the day-to-day operations of those corporations, and were responsible for the misleading advertising and marketing practices of the Defendant corporations. Defendants make no argument in their memorandum regarding individual liability. The affidavits attached to the memorandum purport to deny individual liability, but only on the ground that the corporations themselves did not violate federal law. Defendants argued at the hearing that they should not be individually liable, but having failed to make this argument in their brief, they waived it. See McFarlin v. Conseco Servs., LLC, 381 F.3d

1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review."); Marek v. Singletary, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) ("Issues not clearly raised in the briefs are considered abandoned."). In any event, however, there is no genuine issue of material fact as to whether Defendants can be individually liable. The evidence is clear that each Defendant had a position of responsibility in H&A and thus is presumed in control of that business. See F.T.C. v. Windward Mktg., Inc., 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997) ("An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation.") Moreover, given that Defendants have failed to present any evidence that any portion of H&A's business was engaged in legal enterprise, it is clear that the individual Defendants had "an awareness of a high probability of fraud along with an intentional avoidance of the truth." F.T.C. v. Global Mktg. Group, Inc., 594 F. Supp. 2d 1281, 1289 (M.D. Fla. 2008) (quoting F.T.C. v. Bay Area Bus. Council, Inc., 423 F.3d 627, 636 (7th Cir. 2005)). Individual liability is appropriate.

5. Remedy

The FTC has requested broad injunctive relief and damages in the amount of $7,443,732.00. Defendants have utterly failed to establish either that injunctive relief is not warranted or that the FTC's damages calculations are wrong. It is Defendants' burden to rebut the FTC's request for relief. They have failed to do so. The Court will issue the injunction the FTC seeks and order the monetary relief the FTC requests.

B. Defendants' Motion for Contempt

Defendants ask the Court to hold the Temporary Receiver in contempt and sanction him. This Motion is complicated by the fact that the Receiver is now in bankruptcy and a receiver has been appointed for the Receiver in state court.

According to Defendants, the Receiver mishandled some of the Defendant corporation's money and discharged Defendants' attorney without any cause to do so. Under the terms of the TRO, the Receiver is not personally liable for any acts he took as Receiver. Thus, Defendants' Motion fails. Even if the Receiver could be liable, however, the evidence shows that the Receiver made one mistaken payment to his own accounting firm and then directed his firm to hold that payment in trust until the Court otherwise directs. Although the firm is now in receivership, the Court is confident that the fees owed the Receiver will exceed the amount mistakenly paid out by the Receiver. There is no merit to Defendants' Motion and it is denied.

CONCLUSION

The FTC is entitled to summary judgment on its claims against Defendants. Defendants' Motion for Contempt is denied.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Docket No. 125) is **GRANTED**;
2. Defendants' Motion for Contempt and Sanctions (Docket No. 104) is **DENIED**;
3. The Initial Fee Application and Motion for Attorney's Fees (Docket Nos. 39, 111) are **REFERRED** to the Magistrate Judge; and
4. Contemporaneously with the filing of this Order, the Court will enter an order for permanent injunction and other equitable relief substantially in the form requested by the FTC.

The Clerk shall enter judgment accordingly, terminate all remaining deadlines as moot, and close the file.

Dated: January 27, 2010

s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge