

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

BROOKE PERSINGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:19-cv-00853-RLY-MJD
	)	
SOUTHWEST CREDIT SYSTEMS, LP,	)	
	)	
Defendant.	)	

**ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Brooke Persinger filed this action under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.* She alleges that Southwest Credit Systems, LP improperly accessed her credit report after she had filed for bankruptcy. The parties filed cross-motions for summary judgment. For the reasons that follow, Persinger's motion is **DENIED** and Southwest's motion is **GRANTED**.

**I. Background**

**A. Factual Background**

Brooke Persinger and her husband, Lionel Persinger, jointly filed for bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana on June 20, 2017. (Filing No. 70-1, Persinger Bankruptcy Petition at 1). One of the debts listed on the bankruptcy schedule was a debt owed to AT&T in the amount of \$453, which had been referred to Southwest for collection. (*Id.* at 3). The schedule listed that debt as being owed individually by Lionel Persinger. (*Id.*). At the time she filed her bankruptcy petition, Brooke Persinger did not owe any other debts that had been referred to

Southwest, and she did not have any other accounts with Southwest. (Filing No. 1, Complaint, ¶¶ 12, 13). The Bankruptcy Court entered an order discharging Persinger's debts on October 11, 2017. (*Id.*, ¶ 14; Filing No. 70-3, Bankruptcy Court Docket). On October 13, 2017, the Bankruptcy Court served notice on Southwest of the discharge of the debt owed by Lionel Persinger and Brooke Persinger. (Complaint, ¶ 15; Filing No. 101-5, Bankruptcy Discharge Notice).

Throughout her life, Persinger has had five different surnames, and the notice of discharge listed each of Brooke's names as having received a discharge of debt. (Filing No. 101-1, Deposition of Brooke Persinger ("Persinger Dep.") at 14-15). Relevant here, her name was Brooke Casey from approximately 2005 until 2015. (*Id.*). Her name has been Brooke Persinger from 2017 until present. (*Id.*).

On January 3, 2018, Southwest received an account in the name of Brooke Casey, reflecting a debt owed to Viasat Residential. (Filing No. 101-7, Persinger Viasat Account). That account had a delinquency date of March 17, 2014. (Filing No. 70-7, Viasat Account Information).

When Southwest receives a new account, it enters the account information into its computer system. (Filing Nos. 70-8 and 101-3, Deposition of Jeff Hazzard ("Hazzard Dep.") at 72). Southwest then sends that information to LexisNexis, a third-party vendor, to conduct a "scrub"—a process to identify whether any of the accounts are subject to bankruptcy. (*Id.* at 74). If Southwest has a consumer account in its system and receives a notice of bankruptcy, a bankruptcy notice is applied to that account and the account is either closed or moved to bankruptcy status. (*Id.* at 142). After an account is moved to

bankruptcy status, no additional activity takes place on that account. (*Id.* at 143). As a matter of policy, Southwest does not obtain a propensity to pay score of an account holder after receiving notice of a bankruptcy.<sup>1</sup> (*Id.* at 143-44).

Southwest submitted the Viasat account to LexisNexis for a bankruptcy scrub on January 4, 2018. (*Id.* at 187; Persinger Viasat Account). That same day, Southwest obtained a propensity to pay score from TransUnion. (Hazzard Dep. at 187).

Persinger's account with Southwest shows the LexisNexis scrub returned a bankruptcy hit on May 22, 2018. (Persinger Viasat Account). The bankruptcy scrub revealed Persinger's 2017 bankruptcy, so Southwest shut down the account. (Filing No. 101-4, Hazzard February Affidavit, ¶ 11). At least six months later, Persinger checked her credit report which showed Southwest had made an inquiry into her credit. (Persinger Dep. at 31-32; *id.* at 63-64). Additional facts will be discussed as necessary below.

## **B. Statutory Background**

The FCRA protects consumers' privacy in their credit information. *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 875 (7th Cir. 2020). One provision of the FCRA, 15 U.S.C. § 1681b, governs who may access consumer report information from credit reporting agencies and for what purpose. A consumer reporting agency may provide a consumer report to a person who will use the information to collect a debt. 15 U.S.C. § 1681b(a)(3)(A). The statute further provides that a person "shall not use or

---

<sup>1</sup> Southwest uses the propensity to pay score to develop a collection and contact strategy. (Hazzard Dep. at 65).

obtain a consumer report for any purpose unless the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section . . . ." *Id.* § 1681b(f). The FCRA authorizes statutory penalties for any person who willfully violates the statute. *Id.* § 1681n. These statutory penalties range between \$100 and \$1,000. *Id.*

Persinger brings this action under these "permissible purpose" provisions of the FCRA. She also seeks statutory damages for Southwest's willful violation of the statute.

## **II. Legal Standard**

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Daugherty v. Harrington*, 906 F.3d 606, 609 (7th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To survive summary judgment, "the nonmoving party must establish some genuine issue for trial such that a reasonable jury could return a verdict in her favor." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 950 (7th Cir. 2013) (quoting *Gordon v. FedEx Freight, Inc.*, 674 F.3d 769, 773 (7th Cir. 2012)). Where, as here, the court considers cross-motions for summary judgment, the court views the facts and inferences in the light most favorable to the nonmoving party on each motion. *Lalowski v. City of Des Plaines*, 789 F.3d 784, 787 (7th Cir. 2015).

## **III. Analysis**

As the parties agree, to support a claim for civil liability under 15 U.S.C. § 1681b, Persinger must prove that Southwest accessed her credit information without a permissible purpose, and that the violation was willful or negligent. *See Kodrick v. Ferguson*, 54 F. Supp. 2d 788, 796 (N.D. Ill. 1999).

In the context of the FCRA, willfulness extends to acts known to violate the statute, or acts done in reckless disregard for the statute's requirements. *Safeco Ins. Co. of Am. V. Burr*, 551 U.S. 47, 57 (2000). An action is reckless if it entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco*, 551 U.S. at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). A company does not act in reckless disregard of the FCRA "unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. *See also Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726-27 (7th Cir. 2008) (explaining that recklessness under the FCRA requires substantially more than "ordinary carelessness."). "Mistake is not actionable under the willful or reckless FCRA culpability standards." *Daniel v. Goodyear Tire/CBSD*, No. 15-11479, 2017 WL 9472892, at \*4 (E.D. Mich. July 27, 2017).

After reviewing the record, the court cannot conclude that there is a genuine issue of material fact over whether Southwest committed a willful violation of the FCRA. It did not. The evidence in this case demonstrates that Southwest has a reasonable procedure to comply with the FCRA's requirements. That procedure may have failed in

Persinger's case, but the court cannot conclude that the evidence shows it was due to Southwest's willfulness, recklessness, or even negligence.

Persinger claims Southwest willfully violated the FCRA when it purchased her propensity to pay score, knowing that her debt had been discharged in bankruptcy. She says Southwest received notice of her bankruptcy discharge on October 13, 2017 but ignored it. For support, she cites to the deposition testimony of Jeff Hazzard, Southwest's Chief Information Officer, in which he says that "Southwest would have ignored that notice if there was no accounts [sic] able to be found within the system for that particular notification." (Hazzard Dep. at 180).

As the evidence demonstrates, Brooke Persinger did not owe any debt to Southwest. The only account listed on the bankruptcy discharge that involved Southwest was the AT&T debt owed by Lionel Persinger, Brooke's husband. (Persinger Bankruptcy Petition at 3). There is no evidence in the record that Brooke Persinger owed a debt that had been referred to Southwest, other than the Viasat debt at issue here. (*Id.*). Hazzard testified that when Southwest receives a notice of bankruptcy, it is processed by a specific team of employees. (*Id.* at 141-42). "If there was an account that was open for Ms. Persinger, that notice would have been attached to the account, and the account would have been actioned at that point."<sup>2</sup> (Hazzard Dep. at 142). But there was no account open for Brooke Persinger. Persinger is correct that the notice of discharge that Southwest received listed Brooke Persinger and her various aliases, (Bankruptcy

---

<sup>2</sup> Hazzard explained that when an account is actioned, it is either moved to a bankruptcy status or closed. (Hazzard Dep. at 142).

Discharge Notice), but as discussed above Southwest did not have any account open for her, and therefore could not designate any account as being in bankruptcy. It is not reasonable to expect Southwest, which handles millions of accounts each year, (Hazzard February Affidavit, ¶ 2), to keep a running list of every discharge notice it receives, regardless of whether Southwest has an account connected to the discharge. At the very least, Southwest's failure to maintain such a list does not qualify as willful or reckless disregard of the FCRA's requirements. And as Hazzard testified, Southwest does attempt to minimize the risk of violating the FCRA by running a bankruptcy scrub for every account it receives. (*Id.*, ¶ 8).

Moreover, the Viasat account that Southwest received was owned by Brooke Casey, which was Plaintiff's name from 2005 until 2015. (Persinger Viasat Account). The Viasat account did not list any spousal information, so Southwest did not have any indication that the Viasat account was in any way connected to the Lionel Persinger account that had been discharged in bankruptcy. Viewing the evidence in the light most favorable to Persinger, the court cannot conclude as a matter of law that Southwest willfully or negligently violated the FCRA by disregarding the bankruptcy notification.

Persinger next claims that Southwest either intentionally ignored the bankruptcy scrub response from LexisNexis or recklessly procured her propensity to pay score before receiving the scrub response. This argument is without merit.

The evidence before the court demonstrates that Southwest reasonably relied on a procedure to minimize the risk of improperly accessing a consumer's credit report. Southwest conducts a bankruptcy scrub for every new account it receives. (Hazzard

February Affidavit, ¶ 8). Persinger points to the deposition testimony of Katie Zugsay, Southwest's Chief Compliance Officer, regarding her understanding of Southwest's bankruptcy scrub procedure:

A. My understanding is the way that the bankruptcy—it's a bankruptcy scrub. And so the way that it works is we send the information we received from the client to LexisNexis who compares it against their bankruptcy information, and they let us know—they return the information bank and let us know whether or not it matches a bankruptcy that's been filed.

Q. Okay. And is there an indication on the account notes as to when that bankruptcy and deceased information was returned from LexisNexis to Southwest Credit?

A. May 22nd, 2018; however, I believe they return it back before then, it just doesn't appear on the account notes. But I believe before collection activities begin, we receive, basically, a "yes" or a "no" with regard to whether a bankruptcy has occurred. So in order for collection activities to begin, we would have to have a received a "no," is my understanding. "No, it was not included in a bankruptcy."

Q. Well that may—that's the policy of Southwest Credit, correct?

A. Yes.

Q. So the policy of Southwest Credit is to not collect on debts unless and until you have received information back from a bankruptcy scrub, correct?

A. And that Bankruptcy scrub comes back negative, yes.

(Filing Nos. 70-6 and 101-13, Deposition of Katie Zugsay ("Zugsay Dep.") at 59).

However, there are several problems with this testimony. First, Zugsay did not work for Southwest in January 2018 when Persinger's account was referred to Southwest and Southwest conducted a bankruptcy scrub. (Filing No. 101-12, Zugsay Affidavit, ¶ 2). Zugsay did not begin working for Southwest until October of 2018. (*Id.*). Zugsay stated that she had no personal knowledge of the policies and procedures in place at the



time of the conduct giving rise to Persinger's lawsuit. (*Id.*, ¶ 4). To survive summary judgment or carry her own burden for summary judgment, Persinger must have admissible evidence. *See Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 460 (7th Cir. 2014) ("Evidence supporting or opposing summary judgment must be admissible if offered at trial, except that affidavits, depositions, and other written forms of testimony can substitute for live testimony."). But Persinger must comply with Federal Rule of Civil Procedure 56(e) and Federal Rule of Evidence 602, both of which require that testimony must be based on personal knowledge. *Id.* Because Zugsay lacks the personal knowledge required to testify at trial about Southwest's procedures at the relevant time, the court may not consider her testimony on this issue at summary judgment.

For its part, Southwest directs the court to the testimony and affidavit of Hazzard, Southwest's 30(b)(6) witness, that explained the complete bankruptcy scrub process and timeline. Southwest was assigned Persinger's Viasat account on January 3, 2018. (Hazzard February Affidavit, ¶ 6). Southwest ordered a bankruptcy scrub on January 4, 2018. (*Id.*, ¶ 7). Hazzard explained that the bankruptcy scrub conducted on Persinger's account did not return a bankruptcy notification due to an error with LexisNexis. (*Id.*, ¶ 9). According to Southwest's account notes, the bankruptcy scrub returned a bankruptcy notification on May 22, 2018. (*Id.*, ¶ 11; Persinger Viasat Account). Hazzard explained that he knew this to be true because that information is automatically populated in Southwest's system when LexisNexis returns bankruptcy data. (Filing No. 101-11, Jeff Hazzard April Affidavit ("Hazzard April Aff."), ¶ 10).

Persinger argues the evidence shows that Southwest received the bankruptcy scrub much earlier than May 22, 2018. But even viewing the evidence in a light most favorable to Persinger, the record does not support her claim. There is nothing on Brooke Persinger's bankruptcy scrub data that shows when Southwest received the data from LexisNexis. (Filing 70-9, Brooke Persinger Bankruptcy Scrub Data; Hazzard Dep. at 111; Hazzard April Aff., ¶ 6). The date and time on that document shows when Southwest *requested* the scrub. (Hazzard April Aff., ¶ 8). Persinger's account notes show LexisNexis returned a bankruptcy hit on May 22, 2018. Nothing in the record indicates it was returned on any date other than May 22, 2018, and the court is unable to even draw such a reasonable inference.<sup>3</sup> The court cannot conclude as a matter of law that Southwest willfully or negligently violated the FCRA.


---

<sup>3</sup> Persinger also refers to Lionel Persinger's account notes to demonstrate that Southwest does annotate its account notes to reflect a "no hit" result from LexisNexis. (Filing No. 101-6, Lionel Persinger Account Notes) The problem is that this document does not show that. The entry that Persinger directs the court to makes no reference to LexisNexis. Instead, the entry reads, "Account sent to FDCPA Litigation no hit." When Southwest notes a bankruptcy scrub return on an account, that entry appears to read, "LexisNexis Bankruptcy and Deceased returned." Lionel's report contains that entry elsewhere on the document. Brooke's report contains that entry, as well—on May 22, 2018.

**IV. Conclusion**

For the foregoing reasons, the Brooke Persinger's Motion for Summary Judgment (Filing No. 82) is **DENIED** and Southwest Credit Systems, LP's Motion for Summary Judgment (Filing No. 91) is **GRANTED**. Accordingly, Plaintiff's Motion for Class Certification (Filing No. 69) is **DENIED as MOOT**.

**SO ORDERED** this 8th day of December 2020.

  
RICHARD L. YOUNG, JUDGE  
United States District Court  
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.