Recent Case Summaries

By Cynthia A. Norton
U.S. Bankruptcy Judge, W.D. MO
Brown Bag, March 28, 2022

Judgment Creditor's Garnishment Lien Avoided When It Attached to Wages Earned Within the 90-day Period Even Though the Total Garnished Funds Paid to the Creditor Were Less Than $600. *In re Smith*, 635 B.R. 784 (Bankr. E.D. Mo. 2022) (Surratt-States, C.J.)

In the 90 days before the Debtor filed bankruptcy on August 27, 2021, the judgment creditor garnished the Debtor's wages and received the following amounts:

Pay period from 7/11/21 to 7/24/21	$189.87
Pay period from 7/25/21 to 8/7/21	$222.21
Pay period from 8/8/21 to 8/21/21	$179.73
Total:	$591.81

For the pay period from 8/22/21 through 9/4/21, straddling the bankruptcy filing on 8/27, the expected garnishment would have been $118.82 (for a total garnishment of $710.63). However, Debtor's lawyer faxed a letter to the sheriff and the employer stating that the garnishment should cease as of 8/27, when the bankruptcy was to be filed. So, when the Debtor received her postpetition check, the $118.82 had not been withheld. The Debtor then filed a complaint to avoid the garnishment as a preference and to compel turnover under 11 U.S.C. §§ 522(g), 522(h). The judgment creditor moved to dismiss the complaint, arguing that because it had only received transfers of less than $600, the defense of § 547(c)(8) applied to prevent the Debtor's avoidance of the transfer.

Judge Surratt-States disagreed. Section 547(c)(8) provides a defense to a preference action "if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes *or is affected by* such transfer is less than $600." (emphasis added). The term "transfer" is broadly defined in § 101(54) to include the creation of a lien and every mode of transfer, whether direct or indirect. Judge Surratt-States explained that the court does not look to when the judgment creditor receives the payments but rather the date the debtor earns the wages. Because the final payment of $118.82 was earned and fell within the preference period, it was affected by the garnishment and thus the total prepetition preference was $710.63. She thus denied the creditor's motion to dismiss and entered judgment avoiding a preferential transfer in the amount of $710.63 and ordering the creditor to turnover $591.81.

Alleged "Negative Emotions" Arising from a Debt Collector's Direct Contact with a Consumer Represented by an Attorney Held Insufficient to Constitute a Concrete Injury For Purposes of Standing to Sue Under the FDCPA. *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457 (8th Cir. 2022)

A Minnesota judgment creditor, through its counsel, garnished the Minnesota judgment debtor's bank account following Minnesota garnishment procedures. Minnesota law requires the creditor to mail copies of the garnishment summons and related paperwork directly to the debtor. The judgment creditor law firm knew, however, that the debtor, an individual consumer, was represented by an attorney but nevertheless sent the documents to the debtor. The debtor sued the creditor's law firm for violation of § 1692c(a)(2) of the FDCPA (title 15). That section prohibits a debt collector from communicating with a consumer in the collection of any debt when the debt collector knows the consumer is represented by an attorney. The debtor sought statutory damages plus attorney's fees, alleging that he had been injured by his "fear of answering the telephone, nervousness, restlessness, irritability, amongst other negative emotions." The District Court entered judgment for the debtor, and the judgment creditor appealed.

The Eighth Circuit noted a split of authority under Minnesota law about whether the FDCPA pre-empts Minnesota garnishment law requirements related to mailing copies to a debtor who is represented by counsel. The Court did not reach the merits, however, instead finding that the debtor lacked standing to sue. The debtor has the burden of proving Article III standing by showing (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief, citing *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Under these cases, Article III standing requires a concrete injury even in the context of a statutory violation. The Eighth Circuit concluded that the debtor's intangible injuries related to his negative emotions were insufficient to establish a concrete injury in fact; direct receipt of the garnishment summons did not cause him to act to his detriment or to fail to protect his interests, since he promptly turned the documents over to his attorney. In fact, said the Circuit, the direct mailing of the garnishment papers to the debtor actually benefitted him. Here, said the Court, the debtor, who had avoided paying the debt for more than ten years, had made no showing that his alleged "negative emotions" were caused by the law firm's commencement of a lawful garnishment proceeding.

District Court Dismisses Debtor From Personal Injury Suit After His Chapter 7 Discharge After Claimants Fail to Take Any Action For Relief from Stay or to Modify the Discharge Injunction in the Bankruptcy Case. *Saulsbery v. Mark Twain Water Zone, LLC,* 2022 WL 463805 (E.D. Mo. Feb. 15, 2022)

Plaintiff Saulsbery sued numerous defendants, including Nimsgern, after she was injured when Nimsgern collided with her on a water slide at a water park in Missouri. Sometime after the personal injury case was filed and removed to federal district court on diversity jurisdiction, Nimsgern filed an individual chapter 7 case. The U.S. District Court stayed the case while the bankruptcy was pending, but after Nimsgern received his discharge, the Court reopened the case and asked the parties to proceed. Nimsgern's attorney then moved to dismiss him, arguing that his personal liability to Saulsbery and his co-defendants had been discharged in the bankruptcy. Plaintiff and the co-defendants, who had cross-claimed against Nimsgern, argued that notwithstanding the discharge, Nimsgern needed to remain in the case for purposes of determining his comparative fault. The Court granted Nimsgern's motion to dismiss.

The Court noted that neither Saulsbery, as plaintiff, nor the co-defendants, as cross-claimants, had requested relief from the stay or modification of the discharge injunction from the bankruptcy court while the bankruptcy case was pending. The Court pointed out that Nimsgard had no insurance and was solely responsible for his own defense and that it would be unjust to keep Nimsgard in the case for that reason. In addition, since he was no longer a proper party, the Court ruled that Missouri law prohibited Nimsgard from being included on the jury verdict form for purposes of assessing fault, since fault of nonparties and settling tortfeasors may not be compared to the fault of the parties remaining in the case under Missouri law.

When Debtor Valued Personal Property at Only $9,000 in Bankruptcy and Claimed Value of $475,000 Four-And-A-Half Years Later After House Burned Down, Summary Judgment Properly Granted in Favor of the Insurance Company Finding the Debtor Had Lied About the Value, Voiding the Policy. *Merechka v. Vigilant Insurance Co.,* 26 F.4th 776 (8th Cir. 2022)

Merechka filed a chapter 7 bankruptcy case in Arkansas, scheduling that he owned personal property valued at around $9,000. Four and half years later, Merechka's house burned to the ground, and he submitted claims to his insurance company of $634,000 for the house and $475,000 for the contents. The insurance company denied his claim on the grounds of insurance fraud.

The insurance company refused to believe Merechka's story that he had acquired the bulk of the expensive personal property after his bankruptcy case, noting that his meager income from working for his brother and his social security benefits were insufficient to allow him to purchase almost a half million dollars' of personal property. Merechka sued the insurance company, and the insurance company counterclaimed for reimbursement of the $400,000 it had advanced against the policy to pay off Merechka's mortgage on the house. The District Court granted summary judgment, finding that neither party owed each other anything. Both Merechka and the insurance company appealed.

On appeal, the Eighth Circuit had no difficulty concluding that Merechka had lied, based on the paltry values he listed in the bankruptcy case. The Court noted that it had faced similar scenarios in two previous cases, *Neidenbach v. Amica Mut. Ins. Co.*, 842 F.3d 560 (8th Cir. 2016) and *Liberty Mutual Fire Ins. Co. v. Scott*, 486 F.3d 418 (8th Cir. 2007). In *Neidenbach*, the difference between the scheduled values in the bankruptcy case and the amount claimed against the policy a year later was $255,500. In *Scott*, it was $100,000 over a similar timeframe. The Eighth Circuit observed that although Merechka had more time to acquire property than the plaintiffs in *Neidenbach* and *Scott*, no reasonable juror could believe that Merechka acquired so much property in such a short time on his modest income, such that the only reasonable inference was that he lied. Finding no material disputed facts about whether the lie about the value of his property was intentional and material, the Court affirmed the District Court's ruling that Merechka's misrepresentations had voided his policy. The Court reversed and remanded on the insurance company's cross-appeal, finding that the District Court had procedurally erred when it granted partial summary judgment against the insurance company on its counterclaim.

2022 WL 272664
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
E.D. Missouri, Eastern Division.

IN RE: Sharda R. SMITH, Debtor.
Sharda R. Smith, Plaintiff,
v.
Brother Loan & Finance Co., Defendant.

Case No. 21-43213-169
|
Adversary No. 21-4063-659
|
Signed January 28, 2022

Synopsis

Background: Chapter 7 debtor filed adversary complaint against judgment creditor, seeking to avoid alleged preference and compel turnover of property with respect to garnished wages. The case proceeded to trial.

Holdings: The Bankruptcy Court, Kathy Surratt-States, Chief Judge, held that:

debtor had standing to bring avoidance proceeding;

final payment for garnishment of wages was earned and fell within preference period, and thus was included in calculating total preference amount, even though it was not remitted to judgment creditor; and

garnishment of debtor's wages of $710.63 earned during preference period would be avoided as a preferential transfer and funds turned over to debtor.

Transfer avoided.

Procedural Posture(s): Motion For Turnover.

Attorneys and Law Firms

Ross H. Briggs, St. Louis, MO, for Plaintiff.

John H. Soeder, III, Sher & Shabsin, PC, St. Louis, MO, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KATHY A. SURRATT-STATES Chief United States Bankruptcy Judge

***1** The matter before the Court is Debtor(s) [sic] First Amended Complaint to Avoid Preference and Compel Turnover of Property; Defendant Brother Loan & Finance Co.'s Answer to Debtor's Complaint to Set Aside Preference and Compel Turnover of Property; Defendant Brother Loan & Finance Co.'s Trial Brief; Trial Brief of Plaintiff Sharda Smith; and Stipulation of Uncontested Facts for Use at Trial. The trial was set for December 14, 2021 at which both parties appeared by counsel and presented oral argument. Upon consideration of the record, the Court makes the following **FINDINGS OF FACT**:

On February 26, 2018, Brother Loan & Finance Co. (hereinafter "Defendant") obtained a judgment against Sharda Smith (hereinafter "Plaintiff") in the Circuit Court of St. Louis County (hereinafter "State Court"). Stipulation of Uncontested Facts for Use at Trial (hereinafter "Stipulation of Facts") ¶ 3. Subsequently, Defendant caused a wage garnishment to be issued to Plaintiff's employer, DaVita RX, LLC (hereinafter "DaVita"), for $12,215.25. *Id.* at ¶ 4; Ex. 1. Pursuant to the Garnishment Application and Order (hereinafter "Garnishment Order"), DaVita made the following withholdings from Plaintiff's wages and remitted to Defendant:

Table 1

#	Pay Period Begin	Pay Period End	Amount
1	7/11/21	7/24/21	$189.87
2	7/25/21	7/24/21	$222.21
3	8/8/21	8/21/21	$179.73

Stipulation of Facts ¶¶ 5-7.

The projected garnishment amount derived from Plaintiff's August 22, 2021 through September 4, 2021 pay period (hereinafter "Final Payment Period") was $118.82 (hereinafter "Final Payment"). Am. Compl. ¶ 8; Answer ¶ 5; *See* Stipulation of Facts ¶ 8. However, before the Final Payment was remitted to Defendant, counsel for Defendant faxed separate correspondence to DaVita and the Sheriff of Cole County (hereinafter "Sheriff") on August 31, 2021. Stipulation of Facts ¶¶ 9 and 10. In the correspondence to DaVita, Defendant instructed DaVita "to cease withholding the wages of [Plaintiff] ... as of 8/27/2021" and return any funds withheld after that date to Plaintiff. Stipulation of Facts ¶ 9; Ex. 2. Similarly, in the correspondence to the Sheriff, Defendant instructed the Sheriff to release the wage garnishment and to send all funds withheld after August 27, 2021 to DaVita. Stipulation of Facts ¶ 10; Ex. 3. Pursuant to Defendant's instructions, DaVita issued a pay advice on September 10, 2021 to Plaintiff for wages earned during the Final Payment Period. Stipulation of Facts ¶ 11. The pay advice revealed that DaVita did not remit the Final Payment to Defendant nor did DaVita withhold the Final Payment from Plaintiff's wages. *Id.*; Ex. 5.

On August 27, 2021, Plaintiff filed a Voluntary Petition under Chapter 7. On September 30, 2021, Plaintiff filed Debtor(s) [sic] Complaint to Set Aside Preference and Compel Turnover of Property initiating this adversary proceeding against Defendant. On October 3, 2021, Plaintiff filed Debtor(s) [sic] First Amended Complaint to Avoid Preference and Compel Turnover of Property (hereinafter "Amended Complaint"). The Amended Complaint alleges that the amounts from Table 1 above plus the Final Payment totaling $710.63 are a preference and should be avoided pursuant to 11 U.S.C. § 547(b). Am. Compl. ¶ 1.

***2** On November 19, 2021, Defendant filed Defendant Brother Loan & Finance Co.'s Answer to Debtor's Complaint to Set Aside Preference and Compel Turnover of Property (hereinafter "Answer"). Defendant's Answer alleges that Plaintiff does not meet the minimum $600.00 threshold under 11 U.S.C. § 547(c)(8) to avoid a preference, because the Final Payment was not withheld from Plaintiff's wages. Answer ¶ 5. Defendant further argues that because the Final Payment was not withheld from Plaintiff's wages and thus not remitted to Defendant, the total amount of garnished wages is $591.81 and is not avoidable.

On December 7, 2021, Defendant filed Defendant Brother Loan & Finance Co.'s Trial Brief (hereinafter "Defendant's Trial Brief"), and Plaintiff filed Trial Brief of Plaintiff Sharda Smith (hereinafter "Plaintiff's Trial Brief") and Stipulation of Facts.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C § 157(b)(2)(F) and (K) (2021). Venue is proper in this district under 28 U.S.C. § 1408(a) (2021).

CONCLUSIONS OF LAW

The primary issue before the Court is whether the Final Payment is included as a preference satisfying the $600.00 minimum threshold for avoidance under 11 U.S.C. § 547(c)(8).

Generally, a trustee in bankruptcy is authorized to bring forth an action to avoid a pre-petition preferential transfer. 11 U.S.C. § 547(b) (2021); *See In re Wade*, 219 B.R. 815, 818 (B.A.P. 8th Cir. 1998). However, a debtor may pursue avoidance of pre-petition preferential transfers if "(1) the property transferred would have been exempt; (2) the property was not transferred voluntarily; and (3) the trustee has not sought an avoidance action." *In re James*, 257 B.R. 673, 675 (B.A.P. 8th Cir. 2001); *See* 11 U.S.C. § 522(g)-(h) (2021); *See In re Wade*, 219 B.R. 815, 819 (B.A.P. 8th Cir. 1998). The parties here do not dispute Plaintiff's authority to bring forth the avoidance action. The garnished wages in Table 1 plus the Final Payment are exempt, the wages were involuntarily transferred, and the trustee in Plaintiff's Chapter 7 bankruptcy has not brought forth an avoidance action. Therefore, Plaintiff has standing to seek avoidance of the pre-petition transfer.

Debtors with standing to seek avoidance of transfers must do so in accordance with the Bankruptcy Code and procedures. Pursuant to Section 547(b), pre-petition preferences are avoidable if the transfer satisfies five elements:

> [The transfer was made]1) to or for the benefit of a creditor; 2) for or

> on account of antecedent debt; 3) while the debtor was insolvent; 4) to a noninsider on or within ninety days of the filing of the bankruptcy case; and, such transfer must 5) result in the creditor receiving more than the creditor would have received in a hypothetical liquidation in a Chapter 7 case.

In re Wade, 219 B.R. 815, 818-19 (B.A.P. 8th Cir. 1998); *See* 11 U.S.C. § 547(b) (2021).

According to the Bankruptcy Code, a "transfer" is defined as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property." 11 U.S.C. § 101(54)(D) (2021). Where the transferred property is a debtor's wages, the transfer occurs for preference purposes once the wages are earned. *In re Pierce,* 504 B.R. 506, 510 (B.A.P. 8th Cir. 2013) (citing 11 U.S.C. § 547(e)(3)); *See In re Wade*, 219 B.R. 815, 819 (B.A.P. 8th Cir. 1998); *see also In re James*, 257 B.R. 673, 677 (B.A.P. 8th Cir. 2001). However, if "the aggregate value of all property that constitutes or is affected by such transfer is less than $600.00," the pre-petition transfer cannot be avoided. 11 U.S.C. § 547(c)(8).

***3** Here, Plaintiff argues that the Final Payment is a preference because Plaintiff earned the wage to which a lien attached during the preference period. Plaintiff attests that the fact that the funds were not distributed to Defendant does not negate the fact that the lien attached. Defendant argues that the Final Payment should be excluded because it was neither remitted to Defendant nor withheld from Plaintiff's wages. Using the Eighth Circuit's opinion in *In re Pierce*, Defendant contends that the aggregate value transferred during the preference period was less than $600.00 thus making the preference unavoidable. See *In re Pierce*, 779 F.3d 814, 818 (8th Cir. 2015). The Court disagrees.

In re Pierce, although similar factually, is distinguishable from the facts here. The defendant in *Pierce* obtained a state court judgment to garnish the plaintiffs' wages. *In re Pierce*, 779 F.3d 814, 816 (8th Cir. 2015). The plaintiffs' employer sent the state court the garnished wages after each pay period and the state court transferred the funds to the defendant. *Id.* However, despite the total garnished amount during the preference period being $858.98, the plaintiffs sought to avoid $562.78. *Id.* at 816-17. Accordingly, the 8th Circuit held that "[b]ecause 'the aggregate value of all property that constitutes or is affected by [the plaintiff's garnishments was] less than $600,' the section 547(c)(8) defense applies" preventing avoidance. *Id.* at 818.

Here, the 90-day preference period began on May 29, 2021. As Table 1 depicts, Defendant received a total of $591.81 between the three pay periods. Despite Defendant not receiving the Last Payment, the amount accrued and importantly Plaintiff earned the wages to make the payment during the preference period. Though the amount remitted to Defendant was $591.81, this Court does not look to when Defendant received the payment but rather the date Plaintiff earned the wages. *See In re Pierce*, 504 B.R. 506, 510 (B.A.P. 8th Cir. 2013) (citing 11 U.S.C. § 547(e)(3)); *See In re Wade*, 219 B.R. 815, 819 (B.A.P. 8th Cir. 1998); *see also In re James*, 257 B.R. 673, 677 (B.A.P. 8th Cir. 2001). Because the Final Payment was earned and fell within the preference period, the total pre-petition preference amount is $710.63. Therefore, Plaintiff's wages of $710.63 earned during the preference period were a preferential transfer under 11 U.S.C. § 547(b) and should be avoided and funds turned over to Plaintiff.

By separate order, judgment will be entered in favor of Plaintiff.

All Citations

--- B.R. ----, 2022 WL 272664

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26 F.4th 457
United States Court of Appeals, Eighth Circuit.

Benjamin OJOGWU, Plaintiff - Appellee
v.
RODENBURG LAW FIRM, Defendant - Appellant

No. 20-2879
|
Submitted: October 21, 2021
|
Filed: February 14, 2022

Synopsis
Background: Consumer debtor brought action against debt collection law firm for violations of the Fair Debt Collection Practices Act (FDCPA) arising from receipt of copy of garnishment summons that was served on garnishee bank. The United States District Court for the District of Minnesota, Patrick J. Schiltz, J., 2020 WL 4548282, denied law firm's motion for summary judgment and entered judgment in favor of debtor. Law firm appealed.

Holdings: The Court of Appeals, Loken, Circuit Judge, held that:

alleged FDCPA violation was particularized, as required to establish injury in fact necessary for Article III standing; but

debtor's receipt of copy of summons did not constitute tangible injury and, thus, was not concrete injury in fact required for Article III standing; and

alleged intangible injuries from receipt of copy of summons were insufficient to establish concrete injury in fact required for Article III standing.

Vacated and remanded with instructions.

Procedural Posture(s): On Appeal; Other.

***459** Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Blake R. Bauer, Matthew Forsberg, Fields Law Firm, Minnetonka, MN, for Plaintiff-Appellee.

Amanda M. Lee, Clifton Rodenburg, Rodenburg Law Firm, Fargo, ND, for Defendant-Appellant.

Before LOKEN, WOLLMAN, and BENTON, Circuit Judges.

Opinion

LOKEN, Circuit Judge.

Minnesota law provides that garnishment is "an ancillary proceeding to a civil action for the recovery of money," and that a creditor may issue a garnishment summons to any third party "at any time after entry of a money judgment in the civil action." Minn. Stat. § 571.71(3). The statutes further provide that a copy of the garnishment summons, copies of other papers served on the third party garnishee, and the applicable garnishment disclosure form "must be served by mail at the last known mailing address of the debtor not later than five days after the service is made upon the garnishee." § 571.72, subd. 4 and 5.

In this case, a judgment creditor's attorneys, Rodenburg Law Firm ("Rodenburg"), mailed consumer debtor Benjamin Ojogwu a copy of the garnishment summons Rodenburg served on garnishee US Bank, and other state-law-mandated garnishment forms, knowing that Ojogwu had retained counsel after the default judgment was entered and that he "disputes this debt." The district court, expressly disagreeing with an earlier decision of another ***460** District of Minnesota district judge,[1] held that § 571.72, subd. 4, is inconsistent with, and therefore preempted by, the following provision of the federal Fair Debt Collection Practices Act ("FDCPA"): "Without the prior consent of the consumer ... or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with collection of any debt ... if the debt collector knows the consumer is represented by an attorney with respect to such debt." 15 U.S.C. § 1692c(a)(2). After the parties stipulated as to remedy, the court entered final judgment awarding Ojogwu statutory damages plus attorney's and filing fees. Rodenburg appeals.

After careful study, we conclude that we may not resolve the merits of this intradistrict conflict. Rather, applying the Supreme Court's recent decisions in Spokeo, Inc. v. Robins, 578 U.S. 330, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), and TransUnion LLC v. Ramirez, — U.S. —, 141 S. Ct. 2190, 2200, 210 L.Ed.2d 568 (2021) ("No concrete harm, no standing"), we conclude that Ojogwu lacks Article III standing to pursue this claim in federal court because he failed to allege and the record does not show that he suffered concrete injury in fact from Rodenburg's alleged violation of § 1692c(a)(2). Accordingly, we reverse the judgment in favor of Ojogwu and remand with directions to dismiss his Complaint for lack of jurisdiction.

I. Background

Rodenburg is a debt collection law firm and a "debt collector" as defined by a 1986 amendment to the FDCPA. See 15 U.S.C. § 1692a(6); Heintz v. Jenkins, 514 U.S. 291, 294-95, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). In March 2017, Rodenburg, representing creditor Portfolio Recovery Associates, LLC ("Portfolio"), mailed Ojogwu a Notice of Intent to Apply for Default Judgment because Ojogwu did not timely answer the January 2017 lawsuit filed by Portfolio in Hennepin County District Court to collect a $24,172.63 consumer debt Ojogwu initially owed to Citibank. On April 14, the state court entered default judgment in the amount of $36,937.35. On June 3, attorney Blake Bauer sent Rodenburg a letter referencing the state court file number and stating as relevant here:

> Please be advised that I have been retained to represent Benjamin C. Ojogwu regarding the above-referenced matter and for all matters of indebtedness. Please be further advised that my client disputes this debt and requests verification of it. Also, my client was never served with a Summons and Complaint on January 27, 2017 for the above referenced case. I would formally request a copy of the Affidavit of Service for the Summons and Complaint.
>
> Also, under no circumstances should you contact my client directly.

On June 8, Rodenburg acknowledged Bauer's letter and enclosed the following documents: (i) a Hennepin County District Court Notice of Entry and Docketing of Judgment dated January 29, 2007, giving notice that judgment in the amount of $26,518.35 had been entered in the case, *Portfolio Recovery Associates v. Ojogwu,* Court File No. 27-CV-07-773; (ii) a Hennepin County District Court Notice of Entry and Docketing of Judgment dated April 14, 2017, giving notice that judgment in the amount of $36,937.35 had been entered in the case, ***461** Portfolio Recovery Associates v. Ojogwu, Court File No. 27-CV-17-5122;[2] and (iii) two affidavits of service reciting that Ojogwu was personally served with the Summons and Complaint on December 8, 2016, by handing a copy to his roommate at his usual abode, and with the Amended Complaint on January 27, 2017, by leaving it in the front door of his abode when his roommate refused to open the door and accept service.

In July 2017, Rodenburg mailed Ojogwu a letter containing copies of a garnishment summons, notice to debtor, garnishment earnings disclosure worksheet, and garnishment exemption notice that Rodenburg had served on Becho Corp as garnishee. See Minn. Stat. §§ 571.711 and .92 (relating to the garnishment of earnings). Attorney Bauer threatened an FDCPA lawsuit for this direct mailing. The dispute was resolved without litigation. On July 17, 2018, Rodenburg mailed Ojogwu copies of garnishment documents served on US Bank as a financial institution garnishee, see §§ 571.911-.914, including required disclosure and exemption notices. Ojogwu sent the documents to his lawyer. This lawsuit followed.

Ojogwu sued both Rodenburg and Portfolio under 15 U.S.C. § 1692c(a)(2) of the FDCPA. After the district court denied defendants' motion to dismiss, Portfolio settled and was dismissed. The district court then denied Rodenburg's motion for summary judgment and granted Ojogwu judgment in accordance with the parties' damage stipulation, concluding that Rodenburg's compliance with Minnesota law requiring that debtors be directly served did not excuse it from § 1692c(a)(2) liability because state garnishment and default judgment law and rules are not the "express permission of a court of competent jurisdiction," nor was the mailing an "ordinary court-related document" of the kind referred to in Heintz, 514 U.S. at 296, 115 S.Ct. 1489. Thus, the court concluded, the state and federal laws are in direct conflict, and Minn. Stat. § 571.72, subd. 4, is preempted by the FDCPA.

II. The Standing Issue

"Because standing is a threshold inquiry into federal court jurisdiction, we begin -- and end -- our analysis there." Yeransian v. B. Riley FBR, Inc., 984 F.3d 633, 636 (8th Cir. 2021). Although the district court did not address the issue, "[w]e have an obligation to assure ourselves of litigants' standing under Article III." Frank v. Gaos, — U.S. —, 139 S. Ct. 1041, 1046, 203 L.Ed.2d 404 (2019) (remanding for consideration of standing in light of Spokeo) (quotation omitted).

Ojogwu bears the burden of proving Article III standing by showing "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion, 141 S. Ct. at 2203. The "[f]irst and foremost" of these elements is injury in fact, which requires the plaintiff to show that the harm is both "concrete and particularized." Spokeo, 578 U.S. at 338-39, 136 S.Ct. 1540 (citations omitted). "[U]nder Article III, an injury in law is not an injury in fact." TransUnion, 141 S. Ct. at 2205. Thus, a concrete and particularized inquiry is required even when Congress creates a private cause of action, as ***462** it did in the FDCPA. See § 1692k. "For standing purposes ... an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." TransUnion, 141 S. Ct. at 2205.

Rodenburg directly mailed documents to consumer debtor Ojogwu. Thus, the alleged FDCPA violation was particularized, affecting him in a "personal and individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The issue is whether he alleged concrete harm. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." Spokeo, 578 U.S. at 340, 136 S.Ct. 1540 (citation omitted). Rodenburg's alleged violation -- sending Ojogwu a copy of a garnishment summons served on US Bank -- caused Ojogwu no tangible injury, such as physical or monetary harm. The summons imposed tangible compliance obligations on the garnishee, US Bank, but serving a copy of the summons imposed no tangible *obligations* on Ojogwu. Cf. Scheffler v. Messerli & Kramer P.A., 791 F.3d 847, 849 (8th Cir.) (noting that service of a garnishment summons is not an "adverse action" under the Fair Credit Reporting Act), cert. denied, 577 U.S. 1015, 136 S.Ct. 554, 193 L.Ed.2d 443 (2015). Indeed, serving a copy of the third party summons is a *benefit* to the debtor, giving him timely notice and an opportunity to claim an exemption or satisfy the garnishment in a way that does not disturb his relations with the financial institution garnishee. [3] This beneficial notice is hardly evidence of tangible injury in fact.

"Article III standing requires a concrete injury even in the context of a statutory violation." TransUnion, 141 S. Ct. at 2205 (quoting Spokeo, 578 U.S. at 341, 136 S.Ct. 1540). This ruling superseded our prior contrary precedents. See Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 929-30 (8th Cir. 2016). Ojogwu alleges that Rodenburg's direct mailing violation of § 1692c(a)(2) resulted in what Spokeo and TransUnion refer to as intangible injury -- "actual damages in the form of fear of answering the telephone, nervousness, restlessness, irritability, amongst other negative emotions." Complaint ¶ 31. "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." Spokeo, 578 U.S. at 340, 136 S.Ct. 1540.

The historical analysis asks whether the alleged injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." TransUnion, 141 S. Ct. at 2204. Congress plays an important role because, by statute, it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." Spokeo, 578 U.S. at 341, 136 S.Ct. 1540 (quotation omitted). However, Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that ***463** is." TransUnion, 141 S. Ct. at 2205 (quotation omitted).

Applying this analysis, we conclude the intangible injuries alleged in Ojogwu's Complaint are insufficient to establish concrete injury in fact. Direct receipt of a copy of the garnishment summons did not cause Ojogwu to act to his detriment or fail to protect his interests. He promptly turned the documents over to his attorney, previously retained to represent Ojogwu "for all matters of indebtedness." This case is a far cry from Demarais v. Gurstel Chargo, P.A., on which Ojogwu relies, where the debt collector, attempting to collect a debt, violated § 1692e and § 1692f by sending the debtor discovery demands after dismissing its claim with prejudice, a false and deceptive collection action that caused the debtor to retain an attorney and incur litigation expenses. 869 F.3d 685, 693 (8th Cir. 2017). In reversing dismissal of the debtor's FDCPA claims, including claims of mental distress, we noted that the debt collector's improper collection actions bore a close relationship to "common-law unjustifiable-litigation torts." Id. 691-92. Additionally, the FDCPA violations caused the plaintiff tangible harm -- the time and money required to defend against unjustified legal action. Id. at 693.

By contrast, Ojogwu's allegations of intangible injury -- "fear of answering the telephone, nervousness, restlessness, irritability, amongst other negative emotions" -- "fall short of cognizable injury as a matter of general tort law." Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855, 864 (6th Cir. 2020). In Buchholz, the debtor alleged that misrepresentations in a lawyer's letter caused him an "undue sense of anxiety" about potential legal action. Id. at 860. The Sixth Circuit affirmed the dismissal of the § 1692e claim because the debtor failed to allege actionable concrete injury. Because the letter merely informed the plaintiff of his debts and the procedures to pay or challenge them, "[t]he cause of [his] anxiety falls squarely on Buchholz because *he* chose not to pay his debts—and now fears the consequences of his delinquency." Id. at 867, 870 (emphasis in original). Similarly, in Pennell v. Global Trust Management, LLC, 990 F.3d 1041, 1045 (7th Cir. 2021), the debtor asserted § 1692c(a)(2) and § 1692c(c) claims, alleging that a debt collector's dunning letter caused her "stress and confusion." The Seventh Circuit reversed a judgment in favor of the debtor and remanded with instructions to dismiss for lack of Article III standing. "The state of confusion is not itself an injury. Nor does stress by itself with no physical manifestations and no qualified medical diagnosis amount to a concrete harm." Id. (cleaned up). [4]

The reasoning in these cases is even more applicable here, where the direct mailing at issue served the intended purpose of *benefitting* debtor Ojogwu. As garnishment ***464** in Minnesota is an independent action ancillary to the creditor's suit to recover money from the defendant debtor, it is not surprising that the statute requires personal service of the garnishment summons on the debtor. Moreover, to establish Article III standing, Ojogwu has the burden to demonstrate a concrete injury "*caused by* the defendant." TransUnion, 141 S. Ct. at 2203 (emphasis added). Here, Ojogwu, who had avoided paying this debt for more than ten years, made no showing that his alleged "negative emotions" were caused by Rodenburg commencing a lawful garnishment proceeding.

Finally, we think it relevant to the question of concrete injury that attorney Bauer's initial letter advised Rodenburg that Ojogwu "disputes this debt." Ojogwu's Complaint alleged a violation of § 1692c(a)(2). Section 1692c, one part of the Debt Collection Practices in Subchapter V, is entitled, "Communication in connection with debt collection." Subsection 1692c(c)(3) provides that, "[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt ... the debt collector shall not communicate further with the consumer with respect to such debt, except ... to notify the consumer that the debt collector or creditor intends to invoke a specified remedy." The Supreme Court's relevant guidance in Heintz addressed this exception:

> [I]t would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But it is not necessary to read § 1692c that way .... Courts can read these exceptions [in §§ 1692c(c)(2), (3)], plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." ... [This] interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies.

514 U.S. at 296, 115 S.Ct. 1489. This comment is not obviously applicable because Ojogwu (no doubt intentionally) did not assert a violation of § 1692c(c). But bearing in mind that under Minnesota law, garnishment is an independent proceeding ancillary to "an ordinary debt-collecting lawsuit," we think the comment reinforces our conclusion that Ojogwu failed to allege concrete injury in fact. Rodenburg Law Firm argues that the district court's narrow interpretation of the § 1692c exceptions and the FDCPA's limited express preemption provision, § 1692n, are inconsistent with Supreme Court guidance favoring FDCPA construction that is "consistent with ... preserving creditors' judicial remedies." We leave that question for another day.

III. Conclusion

The district court lacked Article III jurisdiction because Ojogwu failed to plausibly allege or later show a concrete injury in fact. Accordingly, the judgment of the district court is vacated and the case is remanded with instructions to dismiss the Complaint. We grant Appellant's Motion for Leave to File Supplemental Briefs on the Issue of Article III Standing.

All Citations

26 F.4th 457

Footnotes

1 Resler v. Messerli & Kramer, PA, No. Civ. 02-2510, 2003 WL 193498 (D. Minn. Jan. 23, 2003).

2 Minnesota law provides that a judgment creditor, or its assignee, may enforce the judgment "at any time within ten years after the entry thereof." Minn. Stat. § 550.01. Thus, the record reflects that Ojogwu has been a judgment debtor for fifteen years, which refutes his belated claim on appeal that continuing *lawful* efforts to collect the judgment are an invasion of his legitimate privacy interests.

3 The Supreme Court of Minnesota in construing a prior garnishment statute recognized that requiring service of a copy of the garnishment summons benefits the debtor: "There is excellent reason why [the debtor] should have an opportunity to be present and protect his property interests." Webster Mfg. Co. v. Penrod (Trolander, Garnishee), 103 Minn. 69, 114 N.W. 257, 258 (1907). The FDCPA's express preemption provision, § 1692n, provides that "a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter."

4 Most circuits to consider the issue have concluded that a consumer debtor has Article III standing to assert an FDCPA claim that a debt collector's harassing calls or letters invaded a privacy interest protected by the well-established tort of "intrusion upon seclusion." See Restatement (Second) of Torts § 652B; Lupia v. Medicredit, Inc., 8 F.4th 1184, 1191 (10th Cir. 2021); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 461-63 (7th Cir. 2020) (Barrett, J.), cert. denied, — U.S. ——, 141 S. Ct. 2552, 209 L.Ed.2d 568 (2021). We agree that many alleged § 1692c(a)(2) violations will satisfy the Article III requirement of concrete injury in fact; after all, the FDCPA's purpose was "to eliminate abusive debt collection practices." § 1692(e). But the concrete harm inquiry is fact specific. Directly providing a debtor with a required notice that the creditor is seeking an ancillary remedy in a long-standing debt collection action is not an invasion of the defendant's privacy.

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2022 WL 463805
Only the Westlaw citation is currently available.
United States District Court, E.D. Missouri, Northern Division.

Melissa SAULSBERY, Plaintiff,
v.
MARK TWAIN WATER ZONE, LLC, Collin Nimsgern, Bryant Friendswood Management Company, and Bruce Bryant d/b/a Legacy RV Resorts, Defendants.
Mark Twain Water Zone, LLC, Bryant Friendswood Management Company, and Bruce Bryant d/b/a Legacy RV Resorts, Cross Claimants,
v.
Collin Nimsgern, Cross Defendant.

Case No. 2:19-CV-00074 NCC
|
Signed 02/15/2022

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MEMORANDUM AND ORDER

NOELLE C. COLLINS, UNITED STATES MAGISTRATE JUDGE

*1 This matter is before the Court on Defendant and Cross Defendant Collin Nimsgern's Motion to Dismiss Due to Bankruptcy (Doc. 86). After being directed to do so, Defendants and Cross Claimants Mark Twain Water Zone, LLC, Bryant Friendswood Management Company, and Bruce Bryant d/b/a Legacy RV Resorts filed a Response (Doc. 88). Collin Nimsgern subsequently filed a reply (Doc. 89). Thus, the motion is fully briefed and ready for disposition. The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c) (Doc. 64). For the following reasons, Collin Nimsgern's Motion will be **GRANTED**.

I. Background

Plaintiff Melissa Saulsbery ("Plaintiff") filed this action in the Circuit Court of Ralls County, Missouri on August 6, 2019, alleging negligence against Defendants Mark Twain Water Zone ("MTWZ") (Count I) and Collin Nimsgern ("Nimsgern") (Count II) (Doc. 5). Plaintiff alleges that on July 25, 2015, she was injured on a water slide at Defendant MTWZ's water park when Defendant Nimsgern collided with her. Defendant MTWZ removed the action to this Court on the basis of diversity jurisdiction on September 3, 2019 (Doc. 1). The Court subsequently permitted Plaintiff to amend her complaint to add as Defendants Bryant Friendswood Management Company, Defendant Legacy Resort Communities, LLC d/b/a Legacy RV Resorts, and Bruce Bryant d/b/a Legacy RV Resorts (Doc. 36). Plaintiff voluntarily dismissed Defendant Legacy Resort Communities, LLC d/b/a Legacy RV Resorts on November 12, 2020 (Doc. 57). Defendants MTWZ, Bryant Friendswood Management Company, and Bruce Bryant d/b/a Legacy RV Resorts (hereinafter collectively, "Cross Claimants") filed crossclaims against Nimsgern, seeking an allocation of comparative fault among the parties (Docs. 59, 62, 63).

On May 5, 2021, Nimsgern filed for bankruptcy pursuant to 11 U.S.C. Chapter 7 in the United States Bankruptcy Court for the Eastern District of Wisconsin (the "Bankruptcy Court") and, accordingly, this court ordered a stay of the instant case (Docs. 77-80). On August 4, 2021, the Bankruptcy Court entered an order of discharge and subsequently closed Nimsgern's case (Doc. 81). On August 27, 2021, this Court reopened the present action (Doc. 83). Thereafter, Nimsgern moved to dismiss the claims asserted against him by Plaintiff and Cross Claimants (Doc. 86). Nimsgern argues that he should be dismissed from this action because he has been discharged in bankruptcy from any personal liability to Plaintiff or to the Cross Claimants and there are no grounds for allowing this action to continue against him (Doc. 86 at 3). In response, Cross Claimants request Nimsgern remain in the case for the purpose of fully allocating his percentage of comparative fault (Doc. 88 at 2). In the alternative, if the Court dismisses Nimsgern, Cross Claimants request the trier of fact determine his percentage of comparative fault (*Id.*).

II. Analysis

Under 11 U.S.C. § 524, a discharge in bankruptcy operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset such debt as a personal liability of the debtor. The parties do not dispute that neither Plaintiff nor Cross Claimants sought relief from the bankruptcy stay or sought to modify the injunction provisions of the discharge of Nimsgern. Cross Claimants assert that although Nimsgern was discharged in Chapter 7 bankruptcy and has no personal liability, this action may continue for the purpose of fully determining Nimsgern's comparative fault. In support of their assertion, Cross Claimants cite to *In re Christian,* 180 B.R. 548 (E.D. Mo. Bnkr. 1995) and *In re Jet Florida Systems, Inc.*, 883 F.2d. 970 (11th Cir. 1989). However, these cases are inapplicable in the current action; in both actions, the relevant court found that a plaintiff may commence or continue an action against a discharged defendant to determine liability in order to collect from the debtor's insurer. *In re Christian,* 180 B.R. at 550; *In re Jet Florida Systems, Inc.*, 883 F.2d at 973. *See also Green v. Welsh,* 956 F.2d. 30, 35 (2d Cir. 1992) (finding that section 524 "permits a plaintiff to proceed against a discharged debtor solely to recover from the debtor's insurer."). Here, Nimsgern is not covered by any applicable liability insurance and any requirement that he remain in the case would be unjust as Nimsgern would be solely responsible for the additional costs of his defense (Doc. 86 at 3; Doc. 89-1 at 1-2). Therefore, the Court will dismiss Nimsgern from this action.

***2** In the alternative, Cross Claimants request that the Court allow for the allocation of comparative fault to Nimsgern based on his percentage of fault in this matter by including him on the jury verdict form. The law of Missouri, the forum state, governs this diversity action. *Heatherly v. Alexander*, 421 F.3d 638, 641 (8th Cir. 2005). "Under Missouri law, [ ] 'fault is only apportioned among those at trial.' " *Millentree v. Tent Restaurant Operations, Inc.*, 618 F. Supp. 2d. 1072, 1074 (W.D. Mo. 2009) (quoting *Kansas City Power & Light Co. v. Bibb & Associates, Inc.*, 197 S.W.3d 147, 159–60 (Mo. App. 2006)). *See also* Mo. Rev. Stat. § 537.060 (indicating that when two or more persons are liable in tort for the same injury, a tortfeasor who reaches a settlement agreement with the injured party in good faith is discharged from any and all liability for "contribution or non-contractual indemnity to any other tortfeasor." Instead, the settlement "shall reduce the claim by the stipulated amount of the agreement, or the consideration paid, whichever is greater."). Indeed, Missouri Approved Jury Instructions expressly prohibit a defendant from seeking an instruction that the sole cause of the occurrence giving rise to the action was the conduct of someone other than the defendant. Mo. Approved Jury Instr. (Civil) 1.03 (8th ed). Similarly, as to comparative fault specifically, Missouri Approved Jury Instructions indicate "the verdict form should not contain a space for the assessment of fault to a nonparty or settling tortfeasor." Mo. Approved Jury Instr. (Civil) 37.00(K) (8th ed). Thus, the Court will not permit Nimsgern to be included on the jury verdict form.

III. Conclusion

Accordingly,

IT IS HEREBY ORDERED that Defendant and Cross Defendant Collin Nimsgern's Motion to Dismiss Due to Bankruptcy (Doc. 86) is **GRANTED**. Defendant and Cross Defendant Collin Nimsgern is **DISMISSED, with prejudice**, from this action. As such, Defendants and Cross Claimants Mark Twain Water Zone, LLC, Bryant Friendswood Management Company, and Bruce Bryant d/b/a Legacy RV Resorts' Crossclaims (Docs. 59, 62, 63) are also **DISMISSED, with prejudice**. A partial order of dismissal will accompany this order.

All Citations

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26 F.4th 776
United States Court of Appeals, Eighth Circuit.

Rick MERECHKA, Plaintiff - Appellant
v.
VIGILANT INSURANCE COMPANY, a foreign corporation, Defendant - Appellee
Rick Merechka, Plaintiff - Appellee
v.
Vigilant Insurance Company, a foreign corporation, Defendant - Appellant

No. 19-3427, No. 19-3497
|
Submitted: January 14, 2021
|
Filed: February 16, 2022

Synopsis
Background: Insured filed state court action challenging insurer's denial of his claim under his homeowner's insurance policy. After removal, insurer filed counterclaim seeking reimbursement for funds it had already paid. The United States District Court for the Western District of Arkansas, P. K. Holmes, Chief Judge, 2019 WL 13139486, denied both parties' motions for summary judgment, and they appealed.

Holdings: The Court of Appeals, Stras, Circuit Judge, held that:

insured misrepresented nature and extent of losses;

insured's misrepresentation was material;

policy provision barring coverage for material misrepresentations was not ambiguous;

insurer's failure to provide insured with proof-of-loss forms within 20 days, as required by statute, did not preclude it from denying coverage;

statute requiring insurer to make full-policy-limit payout for dwelling did not preclude it from voiding policy based on insured's misrepresentation;

insured's misrepresentation as to value of personal property loss precluded him from recovering value of his dwelling;

district court's failure to give notice of its intent to enter partial summary judgment on counterclaim sua sponte required remand; and

district court did not abuse its discretion in failing to impose sanctions based on insurer's failure to timely turn over videos during discovery.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Appeals from United States District Court for the Western District of Arkansas - Ft. Smith

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Before GRUENDER, BENTON, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

After Rick Merechka's home burned to the ground, he sought benefits under his homeowner's policy. Following an investigation, his insurer, Vigilant Insurance Company, denied the claim because it concluded that he had lied about the amount of personal property he owned. Merechka wants his claim paid in full, and Vigilant seeks reimbursement for the money it had already paid to his mortgage lender. On cross-motions for summary judgment, the district court concluded that neither side owed the other anything. We affirm in part, reverse in part, and remand for further proceedings.

I.

In some ways, this case is a typical insurance dispute. After a fire destroyed his home, Merechka filed a claim for over $1 million with Vigilant—$634,000 for the dwelling itself and $475,500 for its contents. Vigilant denied the claim.

What makes this case unusual is the reason why. During its investigation, Vigilant discovered that Merechka had filed for bankruptcy just four-and-a-half years earlier. *See In re Rick J. Merechka & Peggy A. Orr*, No. 2:10-bk-76454 (Bankr. W.D. Ark. Mar. 28, 2011). According to his bankruptcy petition, he had around $9,000 in personal property—well short of the more than $600,000 (or $325,825, according to a third-party appraiser) that he reported to Vigilant. Without an explanation for the discrepancy, Vigilant suspected insurance fraud.

Merechka had an answer. He assured Vigilant that he had acquired nearly all of his personal property after the bankruptcy using several sources of income: $700 a week he received for working for his brother, a $1,300 monthly social-security payment, and periodic payments from an investment account.

The numbers did not add up, so Vigilant denied coverage under the policy's concealment-or-fraud provision. In its view, Merechka had "intentionally ... misrepresented [a] material fact relating to [his] policy:" the "acquisition and possession of the claimed personal property" since his bankruptcy. At no point, however, did Vigilant accuse him of starting the fire or committing any other type of misconduct.

Following the denial, Merechka sued in Arkansas state court. Vigilant filed a counterclaim of its own after it removed the case to federal court. Merechka sought the more than $1 million he thought he was owed under the policy, and Vigilant demanded reimbursement for the nearly $400,000 it had paid to Merechka's mortgage lender.

The case ended at summary judgment. Applying Arkansas law, the district court determined that neither side owed anything. Unhappy with the result, both sides have appealed.

II.

We review the district court's decision to grant summary judgment de novo. *Braun v. Burke*, 983 F.3d 999, 1002 (8th Cir. 2020). "Summary judgment [was] appropriate [if] the evidence, viewed in [the] light most favorable to the nonmoving party, shows no genuine issue of material fact exists and the moving party [was] entitled to judgment as a matter of law." *Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008) (quotation marks omitted).

A.

Merechka takes aim at the district court's conclusion that there was no genuine issue of material fact on his claim for benefits. Given that Merechka continues to stick by the much lower figure in his bankruptcy petition, the district court reasoned that no reasonable juror could possibly conclude that Merechka did anything other than lie on his proof-of-loss forms, which reported at least $325,825.67 in personal property just a few years later.

In reaching its conclusion, the district court applied Arkansas's two-step framework for resolving coverage disputes. At step one, Merechka had to "establish[ ] a prima[-]facie case for recovery," *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 341 Ark. 105, 14 S.W.3d 512, 517 (2000), meaning that the "damage [was] apparently within a policy of insurance," *S. Farm Bureau Cas. Ins. Co. v. Reed*, 231 Ark. 759, 332 S.W.2d 615, 618 (1960) (quotation marks omitted). The court concluded, and no one disputes, that Merechka's homeowner's policy generally covers fire damage, which is all that is required at step one. *See id.*

Step two, which is the focus of the parties' dispute, places the burden on the insurer to prove "that the damages claimed were not covered under the policy." *Foote*, 14 S.W.3d at 517; *accord Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799, 803 (1993) ("[I]f an insurer claims damages are excluded under its policy, it has the burden of so proving ...."). The concealment-or-fraud provision, which "void[ed]" the policy if Merechka "intentionally concealed or misrepresented any material fact relating to this policy before or after the loss," takes center stage at this step. *See Foote*, 14 S.W.3d at 517–18 (treating a dispute over a fraudulent representation this way). The district court concluded that the evidence pointed in only one direction: Merechka intentionally lied about the amount of personal property he owned, a "material fact" that "void[ed]" the policy.

1.

Leaving no stone unturned, Merechka disagrees with every step of the district court's analysis. He says that he did not misrepresent the amount of personal property he owned, and that, even if he did, the lies were neither intentional nor material. In the alternative, even if he did intentionally lie, it makes no difference because the concealment-or-fraud provision is limited to statements made during the application process. Unfortunately for him, none of these arguments are convincing.

a.

Among the least persuasive is Merechka's claim that he never lied. Recall that the total value of his personal property at bankruptcy was, by his own account, around $9,000. Fast forward four-and-a-half years, and his personal property was worth at least $325,000, even by the most conservative estimate.

The difference is striking, which is bad news for Merechka unless he can explain it. *See Gilkerson v. Neb. Colocation Ctrs., LLC*, 859 F.3d 1115, 1118 (8th Cir. 2017) (explaining that "[t]he moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact" (internal quotation marks and brackets omitted)). He claims to have made plenty of money after the bankruptcy, which he then used to amass his allegedly vast collection of personal property. For support, he points to $4,300 in monthly income, split between earnings from working for his brother and social-security benefits. He also claims that he received periodic payments from an investment account that his brother controlled.

But to accumulate more than $325,000 in personal property over a four-and-a-half-year period, Merechka's spending would have needed to exceed an average of $6,000 per month. The problem for him is obvious: he made only $4,300 per month and had a $1,750-a-month mortgage payment and other bills. Even if he spent every remaining penny assembling a collection of personal property, it would not have been enough.

What about those periodic investment-account payments? Despite having years to substantiate them, nothing in the record, not even a canceled check or a statement, shows that the account even exists, much less that he has received payments from it. Even his brother, who supposedly controlled the account, was unaware that it existed and tried to invoke his right against self-incrimination to avoid answering further questions about it. In short, this evidence comes nowhere close to allowing "a reasonable jury [to] return a verdict" in his favor. [1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

There is more. Despite the sheer number of purchases he would have needed to make in the four-and-a-half years before the fire, Merechka has no proof—not even a single receipt or canceled check—for *any* of them. *See Neidenbach v. Amica Mut. Ins. Co.*, 842 F.3d 560, 564–65 (8th Cir. 2016) (relying on the fact that the policyholder had not provided evidence to explain the disparity in value between the bankruptcy estate and what was reported in a proof-of-loss form). He suggests that the property's replacement value is greater than the amount he paid for it, but "the vast difference" between the bankruptcy estate and his later claims "is still too great to be reconciled." *Liberty Mut. Fire Ins. Co. v. Scott*, 486 F.3d 418, 423 (8th Cir. 2007).

To be sure, as Merechka points out, photographs show the home with various items of personal property inside. And witnesses identified some of it, including televisions and furniture. But it is not clear how much he purchased after the bankruptcy, let alone how it adds up to at least $325,000 in value. At best, it just invites the jury to speculate. *See Neidenbach*, 842 F.3d at 564; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("When the moving party has carried its burden ..., its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

Indeed, we have faced a similar scenario before, not once, but twice. In *Neidenbach*, 842 F.3d at 562, the difference between the bankruptcy estate and the amount claimed a year later was $255,500. And in *Scott*, the difference approached $100,000 over a similar timeframe. 486 F.3d at 420. Both times, we held that there was no genuine issue of material fact for the jury to decide. *Id.* at 422–23; *Neidenbach*, 842 F.3d at 567.

The same is true here. Although Merechka had more time to acquire property than the plaintiffs in *Neidenbach* and *Scott*, no reasonable juror could believe that Merechka acquired so much property in such a short time on his modest income. The only "reasonable inference[ ]," in other words, is that Merechka lied. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

b.

We reach the same conclusion about whether Merechka's lies were intentional. For the concealment-or-fraud provision to apply, the "covered person" must have "intentionally concealed or misrepresented" a fact. As is often the case, intent may be "inferred from the circumstances." *Willis v. State Farm Fire & Cas. Co.*, 219 F.3d 715, 719 (8th Cir. 2000) (quoting *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690, 693 (2000)).

The circumstances here show that Merechka intentionally overstated the value of his personal property to get a bigger payout from Vigilant. With no plausible explanation for how he earned enough to cover the difference, the change between the value of his property at the time of the fire and the amount he reported just a few years earlier is, quite simply, "inconsistent with honest intent." *Stine v. Sanders*, 66 Ark. App. 49, 987 S.W.2d 289, 293 n.3 (1999). So just like in *Neidenbach*, "the only reasonable inference from the record before us is that" he must have intentionally misrepresented its value. *Neidenbach*, 842 F.3d at 565; *see also Stine*, 987 S.W.2d at 293 n.3 ("Circumstantial evidence can provide a basis for the jury to infer fraud ....").

We are also not persuaded that Merechka's claimed memory issues—from a head injury suffered years earlier—change anything. First, his own responses at an examination under oath show a remarkable clarity of memory, at least when it comes to facts that helped his case. So, if anything, his alleged memory "loss" caused him to *remember* property he did *not* own, rather than forget what he did own. Second, even assuming the memory issues exist, they would not have prevented him from documenting his purchases with receipts, account statements, or other evidence—something he did not do for anything he supposedly bought. Under these circumstances, we conclude that his self-professed memory issues do not defeat summary judgment. *See Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

c.

Nor is there a genuine issue of material fact about the materiality of Merechka's misrepresentations. Under the concealment-or-fraud provision, the lies must not only be intentional, they must also be about "a material fact." We agree with the district court that there is "little doubt" that Merechka's misrepresentations "touch[ed] on information material to Vigilant's decision." *See Motors Ins. Corp. v. Tinkle*, 253 Ark. 620, 488 S.W.2d 23, 27 (1972) (discussing materiality).

"[A] fact or circumstance is material" under Arkansas law if it was "reasonably relevant to the insurer's investigation at the time." *Willis*, 219 F.3d at 718 (quotation marks omitted). In *Willis*, for example, the fact that a husband saw his wife "moving personal items out of the house shortly before the fire started" was the type of information that was "relevant to the insurance company's investigation." *Id.* at 717–18.

The same is true here. *See Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829, 833 (1969) (observing that materiality "is a question of law ... when [it is] so obvious that a contrary inference is not permissible"). An accurate inventory of the property destroyed was not just relevant, it was "necessary" for Vigilant "to make a coverage determination." *Neidenbach*, 842 F.3d at 565.

d.

Merechka's final argument about the concealment-or-fraud provision is different. Now he suggests it is ambiguous, meaning that it must be construed "liberally in [his] favor ... and strictly against the insurer." *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242, 246 (2000).

Merechka's argument hinges on the use of the present-perfect verb tense in the phrase, "*has* intentionally *concealed* or *misrepresented* any material fact relating to this policy before or after a loss." (Emphases added). From the use of the present-perfect tense, he infers that the only misrepresentations that matter are those made during the application process. *The American Heritage Dictionary of the English Language* 1394 (5th ed. 2016) (defining "present perfect" as "expressing action completed at the present time").

There are at least two problems with this argument. First, according to the plain language, the relevant timing for the false statement is "before or after a loss"—*not* when the policy was written. Had Vigilant wanted to limit the concealment-or-fraud provision in the way Merechka suggests, presumably it would have said so by referencing the application or the pre-policy period somewhere. *See RAD-Razorback Ltd. v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462, 465 (1986) (recognizing *expressio unius est exclusio alterius* as a rule of contract interpretation); *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532, 535 (1974) ("The intention of the parties must be gathered from the four corners of the instrument itself.").

Second, under Merechka's reading, the words "after the loss" become meaningless. *See Wintermute v. Kan. Bankers Sur. Co.*, 630 F.3d 1063, 1068 (8th Cir. 2011) ("A basic tenet of [Arkansas] contract law is that each word in the agreement should be interpreted to have a meaning, rather than to be redundant and superfluous." (quotation marks and brackets omitted)); *St. Paul Fire & Marine Ins. Co. v. Kell*, 231 Ark. 193, 328 S.W.2d 510, 512 (1959) ("The law does not permit the [c]ourts to ... subtract from ... the language employed in the policy."). If the concealment-or-fraud provision covers only misrepresentations during the application process, which always occur "before ... the loss," then what could ever come "after"? The fact that Merechka has no answer to this basic question is reason enough to reject his argument. There is, in short, no ambiguity. *See Scottsdale Ins. Co. v. Morrowland Valley Co.*, 2012 Ark. 247, 411 S.W.3d 184, 191 (2012) ("Language is ambiguous when there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation.").

2.

Merechka's next set of arguments stretches beyond the policy itself to two Arkansas statutes, one of which sets a 20-day limit for insurers to send proof-of-loss forms to their policyholders, Ark. Code Ann. § 23-79-126, and the other requires a full-policy-limit payout for the dwelling when there is a total loss, *id.* § 23-88-101(a)(1). Neither, however, excuses Merechka's intentional and material misrepresentations about the extent of his loss.

a.

We begin with the proof-of-loss statute. The parties agree that Vigilant had a statutory obligation to "furnish ... forms of proof of loss ... within twenty (20) days after [the] loss [was] reported." *Id.* § 23-79-126(a). They also agree that Vigilant did not meet this deadline. Their disagreement is about what happens next.

Fortunately, the statute itself provides the answer. When an insurer fails to provide proof-of-loss forms within 20 days, it "constitute[s] a waiver of [the] proof of loss requirements, and the insurer may not thereafter require" them. *Id.* § 23-79-126(b).

Although the Arkansas Supreme Court has never interpreted this language, we assume it means what it says: an insurer who does not deliver the proof-of-loss forms in time cannot insist that the policyholder submit them. *See Chew v. Am. Greetings Corp.*, 754 F.3d 632, 635 (8th Cir. 2014) (requiring us to take our best guess at predicting in a diversity case how the state's highest court would rule on an issue like this one). But the statute does not say, despite what Merechka now argues, that the policyholder can then lie on any forms he submits voluntarily. Under the concealment-or-fraud provision, Merechka still had an obligation to respond truthfully.

Our conclusion is consistent with how the claims process works. The purpose of requiring proof of loss, as we have explained, is to "advise[ ] the insurer of the 'nature and extent of the loss,' " which enables "the company to focus its investigation[ ] and protect itself against fraud." *Clark v. Mass. Mut. Life Ins. Co.*, 749 F.2d 504, 506 (8th Cir. 1984) (quoting *Haskins v. Occidental Life Ins. Co.*, 349 F. Supp. 1192, 1196 (E.D. Ark. 1972) (applying Arkansas law)); *see also* 13 Steven Plitt et al., Couch on Insurance § 186:22 (2021) (observing that "the purpose of a proof of loss is," among other things, "*to prevent fraud*" (emphasis added)).

Even if the proof-of-loss statute means an insurer sometimes loses the policyholder's assistance, it can still investigate the claim on its own; determine coverage; and deny the claim on some other basis, including fraud. [2] A waiver of one defense does not waive them all, *cf. Com. Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S.W. 445, 447 (1913) (holding that even though insurer waived the proof-of-loss requirement, it still prevailed on its defense that it had canceled the policy);

13A Couch on Insurance § 196:1 n.3 (explaining that the "obligation to permit examination of the insured's ... records is independent of the obligations to furnish a proof of loss"), and nothing in the proof-of-loss statute immunizes Merechka from the consequences of his own lies.

b.

Arkansas's valued-policy law does not help Merechka either. Like most states, Arkansas has a statute that allows policyholders to make "a liquidated demand ... for the full amount stated in the property insurance policy" after "a total loss by fire." Ark. Code Ann. § 23-88-101(a)(1). Deemed a part of every homeowner's policy, the law prevents insurers "from receiving premiums on overvaluations, and thereafter repudiating their contracts as soon as it [is in] their interest to do so." *Tedford v. Sec. State Fire Ins. Co.*, 224 Ark. 1047, 278 S.W.2d 89, 91 (1955) (quotation marks omitted).

The problem for Merechka is that the valued-policy law does not shield fraud. To put it in the Arkansas Supreme Court's words, "the beneficent effects of the statutory valued[-]policy provision ... [cannot] be converted into a camouflage to conceal and protect fraud and crime," *Garmon v. Home Ins. Co. of N.Y.*, 197 Ark. 1102, 126 S.W.2d 621, 625 (1939), meaning that "the valuation in the policy is conclusive upon the parties" only "*in the absence* of a showing of fraud[ ] or misrepresentation," *Tedford*, 278 S.W.2d at 92 (emphasis added). Once Merechka lied on his proof-of-loss forms, it voided the policy altogether, making this a case "about whether there was any insurance at all," rather than "the amount of [the] insurance." *Garmon*, 126 S.W.2d at 625 (explaining that the valued-policy law addresses only the latter question).

Relying on the valued-policy law, he further argues that he is entitled to a full payout for his dwelling even if he lied about its contents. The assumption underlying his argument is that the insurance policy is divisible: one policy for the dwelling and a separate one for its contents. *See Globe & Rutgers Fire Ins. Co. v. Chisenhall*, 162 Ark. 231, 258 S.W. 135, 136 (1924) (describing divisibility as having "two contracts of insurance embraced in one paper"). If the policy is divisible, voiding one has no effect on the other. *See id.*

Whether an insurance policy is divisible depends on whether the premiums are paid in a single "specified sum." *Phoenix Ins. Co. of Brooklyn v. Pub. Parks Amusement Co.*, 63 Ark. 187, 37 S.W. 959, 963 (1896). Here, Merechka paid a flat annual fee of $2,375 to insure both his dwelling and its contents, making the contract "entire" rather than divisible, even if the policy itself "apportioned" the premium among "distinct items." *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S.W. 498, 499 (1889); *see also Pub. Parks Amusement Co.*, 37 S.W. at 963 (determining that a policy was indivisible even though "separate amounts of insurance were apportioned to separate items or classes of property").

The policy's plain language leads to the same conclusion. *See Firemen's Ins. Co. v. Larey*, 125 Ark. 93, 188 S.W. 7, 8 (1916) (looking to "the intention of the parties as gathered from the language of the contract" in determining whether an insurance contract was divisible). First, the word "policy" is defined in the singular as the "entire ... policy," not multiple policies. Second, there are numerous singular references to "this policy" throughout, including in the concealment-or-fraud provision. Finally, and perhaps most importantly, as a "[g]eneral condition[ ]," the concealment-or-fraud provision "appl[ies] to [Merechka's] policy in general, and to each coverage in it." *See Neidenbach*, 842 F.3d at 567 ("[T]he fact that the policy might, in some circumstances, be regarded as severable ... does not change [the policy's] plain meaning.").

All signs, in other words, point to indivisibility. "The consideration ... was not divisible," *McQueeney*, 12 S.W. at 500, and "the language of the contract" specifies just a single policy, *Larey*, 188 S.W. at 8. In short, Merechka's misrepresentations voided the whole policy, not just a part of it. *See Pub. Parks Amusement Co.*, 37 S.W. at 963.[3]

B.

With Merechka's appeal in the rearview mirror, we turn to Vigilant's cross-appeal. Once the case was in federal court, Vigilant filed a counterclaim to recover the $380,001 it had paid to Merechka's mortgage lender while its investigation was ongoing.

What is important is why. Merechka's policy had what is called a standard mortgage clause, which requires insurers to pay mortgage lenders and other "loss payee[s] ... as interests appear." Under this provision, even if the policyholder's claim is denied, "that denial will not apply" to the mortgage lender if it has a "valid claim." Once the insurer pays the lender, it then becomes "subrogated to" the lender's rights, which means it stands in the lender's shoes and can seek reimbursement from the policyholder. *See Williams v. Globe Indem. Co.*, 507 F.2d 837, 839 (8th Cir. 1974) (applying Arkansas law and explaining that "[t]he theory of subrogation is that the subrogee steps into the shoes of his subrogor"). In Vigilant's view, this clause allowed it to pay the lender immediately and, if problems arose during the investigation, pursue Merechka on the back end. *See Nationwide Mut. Fire Ins. Co. v. Citizens Bank & Tr. Co.*, 2014 Ark. 20, 431 S.W.3d 292, 297 (2014) (observing that, under a standard mortgage clause, an insured's "fraudulent acts and the [resulting] rescission of the policy have no effect on the [insurance company's] independent contract with the mortgagee").

The district court, however, cut off this possibility by granting partial summary judgment to Merechka, even though no one had briefed the issue. We do not question the district court's authority to do exactly what it did here: enter summary judgment on its own motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). But it must follow the right procedure, which is to first "giv[e] notice and a reasonable time to respond" before it "grants summary judgment on grounds not raised by a party." Fed. R. Civ. P. 56(f)(1), (2); *see also Montgomery v. City of Ames*, 749 F.3d 689, 697 (8th Cir. 2014) (recognizing that the district court cannot "grant[ ] summary judgment on an issue not raised or discussed by the parties if the losing party did not have notice and an opportunity to respond").

To be sure, Merechka sought partial summary judgment on a different ground, and the district court asked two general questions about Vigilant's counterclaim at the summary-judgment hearing. But that is not enough. *See Walker v. Mo. Dep't of Corr.*, 138 F.3d 740, 742 (8th Cir. 1998) (per curiam) (reversing a sua-sponte grant of summary judgment based on the plaintiff's failure to meet one element of her prima-facie case, because the summary-judgment papers focused exclusively on another element). Neither side was "warn[ed]" that the court "was considering granting [partial] summary judgment" on another basis—one that presents a different question under Arkansas law. *Simpson v. Merchs. Recovery Bureau, Inc.*, 171 F.3d 546, 550 (7th Cir. 1999); *cf. Hubbard v. Parker*, 994 F.2d 529, 531 (8th Cir. 1993) (concluding that there was adequate notice when the court told the parties that it had "serious doubts that this case should go forward on any ground" but that it "could be persuaded to turn around on any of the issues" (quotation marks and brackets omitted)).

For that reason, we cannot say that the procedural error was harmless. *See Kaestel v. Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984) (per curiam) (concluding that "the district court's failure to give notice" may be "harmless error" if the "appellant [is] not prejudiced"). As Vigilant now argues, it would have drawn the district court's attention to cases allowing insurers to pursue their policyholders after paying off a mortgage lender. *See Hill v. Mass. Fire & Marine Ins. Co.*, 195 Ark. 602, 113 S.W.2d 104, 105 (1938) (allowing a mortgage lender to "subrogate[ ] [its] rights [to]" the insurer "as against the [policyholder] to the extent of the amount so paid" (quotation marks omitted)); *see also Garrison v. Great Sw. Ins. Co.*, 809 F.2d 500, 501 (8th Cir. 1987) (explaining that "the rule in Arkansas" is that "when the insurer pays the mortgagee for its loss, the insurer becomes subrogated to the rights of the mortgagee to the extent that the insurer has paid the debt," and "the mortgagor" is "not discharge[d] ... from his obligation"). To be clear, we are not saying that this line of cases necessarily applies here. Just that a remand is necessary to allow the district court to consider whether it does. [4] *Montgomery*, 749 F.3d at 697 ("Even if the factual record has been fully developed on those claims, [the losing party] had no opportunity to make legal arguments in support of [its] position.").

III.

One loose end remains. Merechka complains that the district court did not do enough when Vigilant failed to turn over three videos in a timely fashion during discovery. The first two showed the home as it burned. The third was surveillance footage that allegedly depicted Merechka's home, including the driveway and road leading up to it. Although Merechka brought the potential violations to the district court's attention, it refused to impose sanctions.

Even without "a discovery request," a party must provide its opponent with, among other things, "a copy ... of all ... electronically stored information ... that the disclosing party has in its possession, custody, or control [that it] may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii). A failure to do so can result in sanctions, although they are not "mandatory." *Davis v. U.S. Bancorp*, 383 F.3d 761, 765 (8th Cir. 2004). And when the district court refuses to impose them, we review the decision for "an abuse of discretion." *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 912 F.3d 1106, 1112 (8th Cir. 2019) (quotation marks omitted).

There was no abuse of discretion here. The first two videos were handed over once Vigilant discovered that the fire investigator had mistakenly failed to send them. Turning them over earlier would not have made a difference because no one argues that the fire was anything other than an accident, so they would not have supported any "claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii); *see Davis*, 383 F.3d at 765 (affirming the denial of sanctions when the movant "failed to explain how an earlier disclosure of [the] testimony would have enabled her to avoid summary judgment" (internal quotation marks omitted)). As for the third video, it was never produced, but the record does not establish that Vigilant ever had it "in its possession, custody, or control." Fed. R. Civ. P. 26(a)(1)(A)(ii).

IV.

We accordingly affirm in part, reverse in part, and remand for further proceedings.

All Citations

26 F.4th 776

Footnotes

1 Merechka points to two other sources of income, but neither gets him very far. The first, his ex-wife's alleged income, was never brought to the district court's attention. *See* Fed. R. Civ. P. 56(c)(1)(A); *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1085 (8th Cir. 1999) (explaining that "a district court is not obligated to wade through and search the entire record for some specific facts which might support the nonmoving party's claim" (internal quotation marks omitted)). The second, his claimed casino winnings, was mentioned for the first time in his reply brief. *See Berg v. Norand Corp.*, 169 F.3d 1140, 1146 (8th Cir. 1999) ("refus[ing] to entertain [a] new argument" that was "first" mentioned "in [the] reply brief").

2 Merechka cites several Arkansas waiver cases, but none are on point. *Farmers Union Mutual Insurance Co. v. Denniston*, for example, does not involve the submission of proof-of-loss forms containing material falsehoods. 237 Ark. 768, 376 S.W.2d 252, 254–56 (1964). And in *German Insurance Co. v. Gibson*, the insurer failed to act despite knowing that the policyholder had lied. 53 Ark. 494, 14 S.W. 672, 673–74 (1890). There is no comparable allegation here.

3 We do not read *Public Parks Amusement Co.* as creating a separate *requirement* that the insured property be "all exposed to one risk" for a policy to be indivisible. 37 S.W. at 963. But even if it does, the property here was "exposed to one risk," *id.*, because it was "necessarily subject to destruction by the same conflagration," which in this case was a fire, *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N.E. 99, 99 (1890); *see also Pub. Parks Amusement Co.*, 37 S.W. at 963 (citing *Geiss* approvingly); *Jackson v. Grange Mut. Fire Ins. Co.*, 107 W.Va. 304, 148 S.E. 125, 126 (1929) ("[A]ll the property covered by the policy was exposed to the same risk and was destroyed by the same fire.").

4 Vigilant's briefs do not explain why dismissing the portion of the counterclaim seeking reimbursement for advance payments to *Merechka* was erroneous. So on that narrow issue, we leave the district court's grant of partial summary judgment in place. *See Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 341 (8th Cir. 2018) ("Since they do not develop their argument beyond [a] single sentence, we hold that they have forfeited it.").

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