2018 WL 7144330
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

ROBERT D. FLOYD, Plaintiff,
v.
SALLIE MAE, INC., et al., Defendants.

Case No. 12-22649-Civ-COOKE/LOUIS
|
Entered on FLSD Docket 12/27/2018

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MARCIA G. COOKE United States District Judge

***1** For many, a sense of dread inevitably accompanies unwanted phone calls. *See, e.g.*, Drake, *Hotline Bling* (2015), available at: https://www.youtube.com/watch?v=uxpDa-c-4Mc (last visited Dec. 6 2018) ("I know when that hotline bling, that can only mean one thing"). In seeming recognition of this sentiment, Congress passed the Telephone Consumer Protection Act, which limits a business's ability to make unsolicited phone calls. 47 U.S.C. § 227(b)(1). When businesses run afoul of the TCPA, consumers can recover $500 for each violation, and triple that if the business acted willfully or knowingly. 47 U.S.C. § 227(b)(3(B). Plaintiff Robert Floyd seeks this remedy here for Defendants' supposedly-willful violations of the TCPA. *See generally* Complaint, ECF No. 1. Floyd filed his Complaint against Sallie Mae, Inc., and unknown accomplices in 2012. *Id.* Six years and a name change [1] later, Defendants moved for summary judgment, arguing the record establishes the number of violations and precludes a finding of willful intent. The Court agrees and, for the reasons detailed below, **GRANTS** Defendants' Motion for Summary Judgment.

BACKGROUND

NSL is one of the nation's largest student loan servicers. *See* Motion of Defendant Navient Solutions, LLC, Formerly Known As Sallie Mae, Inc., For Summary Judgment at 3, ECF No. 111-10. NSL uses Dial Now telephone technology to call its customers about their student loan accounts. [2] *See* Def. Navient Solutions, Inc.'s Resp. to Pl.'s Statement of Add. Mat. Facts at ¶¶ 19-20, ECF No. 125-1. On June 15, 2010, a woman (the "Customer") gave a telephone number ending in 9231 to NSL as her primary number (the "Number"). *See* Def. Navient Solutions, Inc.'s Statement of Mat. Facts in Supp. of Mot. Summ. J. at ¶ 3, ECF No. 111-11. Unbeknownst to NSL, the Number was reassigned to Floyd on October 19, 2011. *Id.* at ¶ 4.

NSL regularly called the Number until May 2012 when it discovered the Number no longer belonged to the Customer. *Id.* at ¶¶ 6-9. While Floyd contends NSL called him about 245 times during this stretch, NSL's records indicate only 28 calls. *See* Pl.'s Resp. to Def.'s Statement of Mat. Facts at ¶ 6, ECF No. 123.

One month after filing this TCPA action, Floyd recycled the phone on which he received the calls. *Id.* at ¶ 7. He did not record its call log. *Id.* Later, Floyd sought phone records from his service provider, MetroPCS. *See* Simonetti Decl. ¶ 3, ECF No. 111-1. But Floyd received no records from MetroPCS because they keep phone records for only six months, and Floyd's subpoena arrived outside of that window. *Id.*

SUMMARY JUDGMENT STANDARD

***2** Summary judgment "shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642 (11th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)) (internal quotations omitted); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). Thus, the entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Id.*

Rule 56 "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Thus, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks omitted).

"A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Damon*, 196 F.3d at 1358. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Abbes v. Embraer Servs., Inc.*, 195 F. App'x 898, 899-900 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

When deciding whether summary judgment is appropriate, "the evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party." *Bush v. Houston County Commission*, 414 F. App'x 264, 266 (11th Cir. 2011).

DISCUSSION

As relevant here, the TCPA forbids people from making any call "using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to a...cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). This means that a plaintiff can recover under the TCPA if she can show three elements: "1) a call was made to a cell or wireless phone, 2) by the use of an automatic dialing system or an artificial or prerecorded voice, and 3) without prior express consent of the called party." *Gulisano v. J.A. Cambece Law Office, PC*, No. 15-81378, 2016 WL 7536097, at *4 (S.D. Fla. Aug. 8, 2016). What's more, the TCPA allows plaintiffs to recover up to "three times the amount" where "the defendant acted willfully or knowingly." 47 U.S.C. § 227(b)(3).

Here, the parties agree all three elements are met. *First*, NSL called Floyd's MetroPCS issued cell phone number. *See* Simonetti Decl. ¶ 3. *Second*, NSL's Dial Now technology qualifies as an automatic dialing system for purposes of this case. *See* Peterson Dep. 43:8-14; *see also* Order, ECF No. 118. *And third*, Floyd did not consent to these calls.

***3** Given the above, the Court concludes NSL has violated the TCPA and Floyd may recover $500 for each of those violations. The Court now turns to the number of violations before considering whether Floyd can recover treble damages.

A. The Record Establishes That NSL Placed 28 calls To Floyd.

NSL's phone records show 28 calls to the Number during the relevant period. *See* Def.'s Facts at ¶ 6. Similarly, NSL's telephone service provider—CenturyLink—confirms this number of calls. *See* Frontino. Decl. ¶ 5 (filed under seal). Floyd attempts to counter this evidence with two arguments. But as explained below, both lack merit.

First, Floyd argues that he is the only one with personal knowledge of the phone calls and a jury could believe his assertions over NSL's record evidence. The Court finds as a matter of law no reasonable jury could find NSL made more than 28 calls to Floyd. *See* *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990) (finding "a mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party"). The Court reaches this conclusion without drawing an adverse inference against Floyd for recycling his phone. With or without an adverse inference, the record indicates that NSL made only 28 calls to Floyd while the Number was assigned to him. And the Court will not allow Floyd's "conclusory allegations without specific supporting facts" to defeat summary judgment here. *See* *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).

Second, Floyd attaches two depositions from another case to suggest NSL may have routed its calls to Floyd through an affiliated third-party. In *Sclafani v. Navient Sols., LLC and Student Assistance Corp.*, Sclafani alleged NSL and its affiliate Student Assistance Corporation ("SAC") placed calls to him in violation of the TCPA. *See* Pl.'s Resp. to Def.'s Mot. Summ. J., ECF No. 122; *see also* Notice of Filing Disc. In Opp. to Def.'s Mot. Summ. J., ECF No. 124. Depositions of SAC's President and an NSL executive suggest SAC may have called Sclafani up to 300 times on NSL's behalf. *See* ECF Nos. 124-1 and 124-2. Floyd argues that NSL could have employed a similar strategy here. *See* Pl.'s Resp. at 2.

This argument fails because the Court cannot—and will not—consider inadmissible evidence. *See Home Depot U.S.A., Inc. v. U.S. Fire Ins. Co.*, 299 F. App'x 892, 895 (11th Cir. 2008) (noting a plaintiff "cannot rely on this inadmissible evidence in its opposition to [Defendant]'s motion for summary judgment"). At best, this testimony is merely irrelevant. At worst, it is also barred by the rules against hearsay and character evidence. In any event, the Court knows of no way to reduce these outside depositions to an admissible form and Floyd proffers no explanation of his own. Floyd could have properly submitted this evidence by amending his complaint, adding SAC as a party, and deposing the executives mentioned above. He did not. The Court will not excuse Floyd's neglect by considering these depositions now.

And so the Court finds that Floyd may recover for only the 28 calls supported by the documentary evidence.

B. The Record Is Devoid Of Facts Suggesting NSL Acted Willfully Or Knowingly.

***4** Floyd cannot show NSL acted willfully or knowingly. Instead, the record evidence suggests that NSL called Floyd mistakenly. The parties agree that: 1) the Customer once used the number, 2) she provided the Number to NSL, 3) MetroPCS later transferred that number to Floyd, and 4) NSL stopped calling the Number when it discovered the Customer no longer used it. *See* Def.'s Facts at ¶¶ 3-5. Moreover, Floyd himself acknowledges NSL lacked knowing intent, stating "I believe they were calling to collect a debt from the person that they named, but I believe it was a mistake." Floyd Dep. 38:11-13, ECF No. 111-7.

While Floyd argues that NSL continued to call him after he informed NSL that the Customer no longer used the number in December 2011, he has no evidence to support this contention. And without specific supporting facts, Floyd cannot survive summary judgment. The evidence suggests NSL unknowingly called Floyd and stopped calling him when it discovered its error. In consequence, the Court concludes Floyd cannot recover treble damages.

CONCLUSION

In light of the foregoing, it is hereby **ORDERED and ADJUDGED** that the Court **GRANTS** Defendant's Motion for Summary Judgment. The Court will separately issue a final judgment.

DONE and ORDERED in Chambers, in Miami, Florida, this 27th day of December 2018.

All Citations

Slip Copy, 2018 WL 7144330

Footnotes

1 Due to corporate reorganization, Salle Mae, Inc. changed its name to Navient Solutions, Inc. in 2014. *See* Notice of Name Change, ECF No. 84. The Court refers to Defendants as "NSL" throughout this Order.

2 This technology falls within the TCPA's definition of a telephone dialing system. *See* Peterson Dep. 43:8-14, ECF No. 111-8 ("For purposes of this case, we are not contesting that the calls were made through an automated telephone dialing system"); *see also* Order, ECF No. 118 (precluding NSL from contesting whether the calls were made through an automated telephone dialing system).