IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JEREMY REED	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:18-cv-03377-K
	§	
QUICKEN LOANS INC.	§	
	§	
Defendant	§	

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, Jeremy Reed, and files this his Response to Defendant Quicken Loans Inc.'s Motion to Dismiss, and in support of his Response would show unto the Court as follows:

1.
GENERAL FACTUAL BACKGROUND

1. Plaintiff would show that his action was instituted by the filing of a Petition filed in the 116th Judicial District Court of Texas, on or about November 28, 2018, Defendant removed this matter to the Federal Court on or about December 21, 2018 (Doc. 1), and Defendant then filed it's Motion to Dismiss on or about January 9, 2019 (Doc. 8). No discovery has taken place nor has there been a reasonable amount of time within which to take discovery.

2. Reed registered his cell phone with the Federal Trade Commission's National Do Not Call Registry (NFNCR) on December 29, 2011. (para. 8). Between July, 2018 and September, 2018, Quicken Loan "sent unsolicited text messages, phone calls and voice mail messages to Mr. Reed's personal cell phone for the purpose of marketing real estate services. The text message

communications were made without the express invitation, permission, or consent of Mr. Reed. (para. 9). Defendant sent a total of six (6) unsolicited text messages and eight (8) unsolicited phone calls resulting in voice-mail messages to Reed's cell phone.

3. Quicken Loans called Reed on his cell phone every day from July 28, 2018 to August 2, 2018, leaving a voice mail message lasting from eleven (11) to twenty-six (26) seconds. See Exhibit B to Complaint.

4. The text messages had the ability for the recipient to opt-out of the communications and Reed responded to the incoming July 31, 2018 text message by sending the message "Stop." However, Defendant made a further unsolicited call to Reed on July 31, 2018 a call/voice message after the Stop message. Then Defendant made an August 1, 2018 call/voice message to which Reed again responded "Stop." Despite all of the above, Defendant, on August 14, 2018 and September 13, 2018, again sent unsolicited text messages to Reed. (para. 11)

2.
ARGUMENT AND AUTHORITIES

A. STANDARD FOR JUDGING MOTIONS TO DISMISS

5. A motion to dismiss under Rule 12 (b)(6) should be granted only if it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 335 U.S. 41, 48 (1957); Fed. R. Civ. P. 12 (b)(6); Bell Atlantic Corp. v. Twombly, 550 U.S. 540, 570 (2007). A Rule 12(b)(6) motion merely test the legal sufficiency of a complaint, requiring the court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff. Twombly, 550 U.S. at 556-57. A complaint should never be dismissed because the court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. Id. A Rule 12 (b)(6) motion does not raise the pleading standard to the level required to survive a motion for summary judgment or

to prevail at trial, or prove all material issues of plaintiff's cause; instead, plaintiff need only set forth the particular facts supporting his claim which must be accepted as true to survive the motion to dismiss. Williams v. Chase Home Finance No. 3:09-cv-0061 (N.D. Tex. 2014). The complaint should be liberally construed in favor of the plaintiff. Blanks v. United Aerospace Workers Union, 837 F. Supp. 2d 609 (N.D. Tex. 2011).

B. REED HAS PLEAD FACTS GIVING RISE TO A PLAUSIBLE CLAIM UNDER TCPA

6. The TCPA provides for several types of conduct that violate its provisions: (1) calls made with any automatic telephone dialing system or an artificial or prerecorded voice, 47 U.S.C. §227 (b)(I)(A)(iii) and (2) 47 C.F.R. § 64.1200(c)(2) prohibits a "telephone solicitation" to a person whose number appears on the national do-not-call registry soliciting calls made to a party on a do not call registry. 47 C.F.R. § 64.1200(c)(2). The TCPA was enacted to prevent repeated, unwanted telemarketing by honoring the do-not-call requests." Mattson v. Quicken Loans No. 3:17-cv-01840 (D. Oregon May 28, 2018).

7. Quicken Loan's Motion to Dismiss is primarily based on its assertion that Reed's Complaint that Quicken Loan's messages sent by "automated" texts (Compl ¶17) is insufficient to plausibly state a TCPA claim, and that the Complaint must contain allegations that the message were "placed with an ATDS that randomly or sequentially generated his number." (Def. Motion p. 4). While use of the term "automated " may not describe the particular ATDS used, courts do recognize that words like "automated" are sufficient in a complaint "to describe in layman terms the facts about the calls or the circumstances surrounding the calls that make it plausible that they were made using an ATDS." Baranski v. NCO Fin. Sys. Inc., No. 13 CV 6349, 2014 WL 1155340, at *6 (E.D. N.Y. Mar. 21, 2014). (emphasis supplied)

8. It is unreasonable to require a Plaintiff in a TCPA action, who has not had the benefit of discovery, to elaborate on the specific technical detail of the Defendant's alleged ATDS. Courts have specifically acknowledged "the difficulty a plaintiff faces in knowing the type of calling system used without the benefit of discovery" and relied on details about the call to infer the use of an ATDS. Cunningham v. Techstorm LLC, No. 3:16-CV-2879 (N.D. Tex. Feb. 23, 2017); Torres v. Nat'l Enter. Sys, Inc. No. 12C2267, 2012 U.S. Dist. LEXIS 110514, at *10 (N.D. Ill. Aug 7, 2012). ("(I)t would be virtually impossible, absent discovery, for any plaintiff to gather evidence regarding the type of machine used for a communication left on a plaintiff's voice mail.); Hickey v. Voxernet LLC, 887 F. Supp. 2d 1125 (W.D. Wash. 2012). ("(C)ourts have noted 'the difficulty a plaintiff faces in knowing the type of calling system used without the benefit of discovery' and can infer the use of an ATDS.).

1. TCPA CLAIM SHOWN FROM GENERAL FACTS AND INFERENCES

9. Because of the difficulty of describing a defendant's ATDS system or usage, courts have held that a general description of the nature of the ATDS described in a TCPA pleading is not an improper legal conclusion, and they have accepted more general pleadings, Johansen v. Viant, Inc. No. 12C7159 (N.D. Ill. Dec. 18, 2012) ("Use of an ATDS and the pre-ordered nature of the messages are not legal conclusions, they are facts."), and recognized that a TCPA violation can be shown by inferences drawn from the facts plead even in a general manner. Such interpretation of the pleading requirements of an ATDS use is appropriate since from the Complaint Quicken Loans "is on notice that Plaintiff will seek to prove both that Defendant delivered a pre-recorded message to Plaintiff's cellular one and the it delivered that pre-recorded message using an ATDS. Defendant is on notice that it will have to defend against both propositions." Johansen, supra. Further, "Defendant has sufficient notice in regard to the dates of

the allegedly offending messages to begin investigating and crafting a defense. ---(I)t is not unduly burdensome for Defendant to check its own database for the existence, or lack thereof, of calls made to Plaintiff." Id.

2. QUICKEN LOANS' MESSAGES ARE SO NONDESCRIPT AND IMPERSONAL AS TO BE APPLICABLE TO ANYONE AN INDICIA OF ATDS USE

10. Reed has not only plead and set forth that Defendant sent a total of six (6) unsolicited text messages and eight (8) unsolicited phone calls resulting in voice-mail messages to Reed's cell phone, Reed has further plead that "Defendant's numerous automated text messages to Plaintiff's private cell phone" (para. 17). In addition Reed attached Exhibit B to his Complaint which contains the actual text messages. "(P)leadings" for purposes of a motion to dismiss include attachments to the complaint. See In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007).

11. A review of the Quicken Loan text messages shows that each text message is basically the same with a soliciting message for a Quicken loan, with only slight differences in their content. Each message relates to an unsolicited loan, not identified as to any terms (amount, charges, interest etc.), to an unidentified party (Reed is not named), from an unidentified individual (only Quicken Loans is named). The text messages possess attributes typical of generic ATDS communications. The messages: a) do not reflect the name of the party they are addressed to; b) do not reflect the name of an individual sending the message (only the corporate sender); c) do not give the name of an individual that can be contacted; d) although referring to a loan/mortgage, do not identify a property to serve as security; e) do not reflect a named addressee and there is no indication who the loan will be offered to; f) do not reflect what supporting documentation will be required of the recipient; g) do not reflect why or how the recipient was selected to be contacted;

h) do not reflect what the terms of any proposed loan will be and i) do not reference any prior communications from Reed.[1] The messages are not individualized and are totally generic. They are mechanical in nature and are totally devoid of any personalized information and thus just as well have been addressed to anyone. Because the messages are so generic they could be directed to anyone and used over and over. These are attributes commonly found in and indicative of ATDS communications. The eight unsolicited phone calls resulting in voice-mail messages to Reed's cell phone had an average time of 14.57 seconds. The extremely brief length of the messages is a further indication of a recorded or automated message rather than one made by an in person caller.

12. Construing Reed's Complaint liberally in his favor, Blanks v. United Aerospace Workers Union, supra, accepting the factual allegations of the complaint as true, viewing them in a light most favorable to the plaintiff, and further drawing all reasonable inferences in the plaintiff's favor, Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001), cert. denied. sub nom. Cloud v. United States, 122 S.Ct. 2665 (2002), clearly demonstrates that Reed's Complaint shows plausible TCPA actions, and the Complaint should not be dismissed.

3. COMPLAINT NEED NOT ALLEGE ELEMENTS OF CAUSE OF ACTION

13. Defendant contention that the Complaint does not plead the elements of the cause of action is not controlling. "A complaint need not outline all elements of a claim." Youngblood Group v. Lufkin Fed. Sav. and Loan Assoc., 932 F. Supp. 859 (E.D. Tex. 1996). Even in the absence of a specific identification of an element the pleadings as a whole may establish a reasonable inference that the element exist. Sullivan v. Bank of America, supra. Reed's pleadings show a plausible claim.

[1] Two messages did acknowledge Reed's demand that Quicken Loans not send messages (July 31, 2018 and Aug 9, 2018) but in both instances further text messages were released to Reed's cell phone. See Exhibit B to Complaint.

4. REED NEED NOT PLEAD DETAILS OF ALL FOURTEEN INSTANCES OF UNSOLICTED CALLS TO SHOW PLAUSIBLE CLAIM

14. Reed has plead fourteen instances of unsolicited calls. The fourteen instances are but evidentiary support for his claim of a violation of TCPA. A detail pleading on all Quicken Loan messages asserted in the Complaint to violate the TCPA is not required nor determinative of the Motion to Dismiss. Although Reed sets forth eight (8) voicemail messages and six (6) text messages as violating the TCPA, it is not necessary for Reed to plead in detail the existence of all fourteen unsolicited Quicken Loan communications in order to state a plausible claim under TCPA. *See* Johansen v. Vivant Inc., No. 12C 7159 (N.D. Ill. Dec. 18, 2012) ("Any one call made using an ATDS or any one pre-corded message violates TCPA if made to a cellular phone."). The term "call" in the statute includes text messages as well as voice mail messages. Lozano v. Twentieth Century Fox Film Corp 702 F. Supp. 2d 999, 1010 (N.D. Ill 2010).

5. QUICKEN LOAN'S UNSUPPORT CLAIM IT DOES NOT USE ATDS

15. In Quicken Loans' Motion to Dismiss in footnote 3 Quicken claims it "does not use an ATDS to make calls or texts to prospective clients." Such unsupported statement is of course improper on a Motion to Dismiss, and if matters outside of the pleadings are presented with a Rule 12(b)(6) motion to dismiss they should be excluded from the evidence for purposes of determining the motion. Gen. Retail Servs. Inc. v. Wireless Toyz Franchise, LLC, 255 F. App'x 775, 783 (5th Cir. 2007).

C. REED'S COUNT 2 DOES NOT ASSERT A STAND ALONE CLAIM EXEMPLARY DAMAGES

16. Count 2 is labeled "Exemplary Damages" but it is not a standalone claim for damages. Labels or headings on assertions of causes of action have no significance and are not controlling on a Motion to Dismiss. *See* Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995) ("Even

where such a label reflects a flat misapprehension by counsel respecting a claim's legal basis, dismissal on that ground alone is not warranted so long as need correction of legal the theory will not prejudice the opposing party."); Minger v. Green, 239 F. 3d 793 (6th Cir. 2001) (courts should not rely on labels in a complaint, but examine the substance of the complaint)

17. Count 2 is not as Defendant asserts, plead as a stand-alone claim. Count 2 in paragraph 21 clearly incorporates "all of the foregoing allegations" and thus restates the factual allegations that Quicken Loans after Reed had made a No Call registration made unsolicited contacts, even after Quicken Loans had acknowledge that Reed had placed STOP notifications with Quicken Loans. In its attack of Count 2 Quicken does not attack the factual allegations incorporated into Count 2.

18. Since 1973, Texas has recognized an independent cause of action for the invasion of privacy. Billings v. Atkinson, 489 S.W. 2d 858 (Tex. 1973) ("the right of privacy constitutes a legal injury for which a remedy will be granted."). Cunningham v. Nationwide Security Solutions, Inc., No. 3:17-cv-337 (N.D. Tex. 8/31/2018) (recognizing a right of privacy cause of action). Invasive and unsolicited telephone calls are recognized to be an invasion of privacy.

19. In addition Texas has enacted provisions under the Texas Bus. & Com. Code making it both a civil and penal act to make a telephone call or use an automatic dial announcing device to make a call for purposes of making a sale if the called person has not consented to the making of such a call. Sec. 305.001 and 305.052.

20. Labels or headings, such as Exemplary Damages, on the factual statements of a causes of action are not controlling on a Motion to Dismiss. *See* Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995) ("Even where such a label reflects a flat misapprehension by counsel respecting a claim's legal basis, dismissal on that ground alone is not warranted so long as need correction of

legal the theory will not prejudice the opposing party."); Minger v. Green, 239 F. 3d 793 (6th Cir. 2001) (courts should not rely on labels in a complaint, but examine the substance of the complaint)

21. Under the Texas Damages Act a Plaintiff may recover exemplary damages on showing that the Defendant caused the injury by aggravated conduct which may be supported by showing gross negligence or malice defined to be an intent to cause substantial injury or harm to the Plaintiff. Tex. Civ. Prac. & Rem. Code §41.003. Substantial injury is defined as an injury that is real (rather than just perceived) and significant (rather than trivial). Benett v. Reynold, 242 W.W. 3d 866 (Tex. App. Austin 2007). The injury from unsolicited calls was real and significant enough to bring about federal legislation "enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls." Statterfield v Simon & Schuster, Inc., 569 F. 3d 946 (9th Cir. 2009).

22. Reed's pleading of Quicken Loans' violation is the claim of an intentional invasion of a right of privacy and a recognized tort. Reed's pleading that Quicken Loans direction of its messages to him after he had filed on December 29, 2011, with the No Call Registry[2] is an intentional act, and Quicken Loan even continued to message him after Quicken Loans acknowledged that Reed had notified it to stop its communications.[3] These allegations constitute clear and affirmative facts that meet the plausibility standard of pleadings. *See* authorities cited earliest in this brief. If Quicken Loans did not check the National Do Not Call Registry prior to directing it steam of calls to Reed that is evidence of negligence. When Quicken Loans continued to direct its calls to Reed after he twice notified it to STOP that is evidence that supports gross negligence. If Quicken Loans did check the National Do Not Call Registry and knew of Reed's

[2] See Exhibit A to Complaint

[3] See Exhibit B and in particular Quicken Loans text messages of July 31, 2018 and August 9, 2018.

election that is evidence of an intentional violation, and Quicken Loans continued calls after receiving Reed's STOP notification is evidence of an intentional act of malice.

WHEREFORE, premises considered, Plaintiff prays that Quicken Loans' Motion to Dismiss be in all things denied, and for such other and further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 23, 2019 a true and correct copy of Plaintiff's Response to Defendant's Motion to Dismiss was served on all counsel of record electronically through the electronic filing manager as follows:

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