

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JUSTIN ELLINGTON,

Plaintiff,

v.

FIRST PREMIER BANK,

Defendant.

CIVIL ACTION

CASE NO. 3:17-cv-00403

Judge Trauger

Magistrate Judge Frensley

FIRST PREMIER BANK,

Third-Party Plaintiff,

v.

CASSANDRA WHITAKER,

Third-Party Defendant.

JURY DEMAND

THIRD-PARTY COMPLAINT AND DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 14(a)(1), Defendant/Third-Party Plaintiff First Premier Bank (“First Premier”) files its Third-Party Complaint against Third-Party Defendant, Cassandra Whitaker (“Ms. Whitaker”), and alleges as follows:

PARTIES

1. First Premier is a South Dakota limited liability company with its principal place of business in South Dakota. First Premier is a citizen of South Dakota.

2. Upon information and belief, Ms. Whitaker is an individual residing in Montgomery County within this judicial district, and is a citizen of the state of Tennessee.

JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction over First Premier's third-party claims for common law indemnification, breach of contract, negligent misrepresentation, and fraudulent misrepresentation pursuant to 28 U.S.C. § 1332 because First Premier is diverse in citizenship from Ms. Whitaker and more than \$75,000, exclusive of interest and costs, is in controversy because Plaintiff Ellington seeks in excess of \$75,000, exclusive of interest and costs, from First Premier. This Court also has supplemental jurisdiction over First Premier's third-party claims pursuant to 28 U.S.C. § 1367(a) because the claims are based on the same nucleus of operative facts as Plaintiff's claims.

4. Upon information and belief, Ms. Whitaker is a Tennessee resident and thus is subject to the general personal jurisdiction of this Court.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district and Ms. Whitaker is subject to personal jurisdiction in this district.

FACTUAL ALLEGATIONS

6. On or about August 18, 2016, Ms. Whitaker submitted an online application to obtain a credit card from First Premier.

7. As part of the Application, Ms. Whitaker provided the telephone number ending in 5616 (the "Number"). Ms. Whitaker represented that this was her work telephone number. Ms. Whitaker also represented that First Premier could lawfully call the Number to discuss her account, including for purposes of seeking collection of past due amounts.

8. Specifically, Ms. Whitaker represented that First Premier could call any telephone number she provided to First Premier through the use of an automatic telephonic dialing system ("ATDS"), including the Number.

9. On September 17, 2016, as a direct result of Ms. Whitaker's Application, Ms. Whitaker and First Premier entered into a credit card agreement (the "Agreement"). A true and correct copy of the Agreement is attached as Exhibit A.

10. In the Agreement, Ms. Whitaker expressly agreed that First Premier "may call or contact [her] at any cellular, mobile, home, work, or other telephone number . . . you provide or use to contact us . . . [through] an automatic telephone dialing system, artificial voice or pre-recorded message, or any other technology, even if you incur a cost when we contact you."

11. On or around November 12, 2016, Ms. Whitaker defaulted on her payments due under the Agreement. This necessitated First Premier to undertake efforts to collect the amounts Ms. Whitaker owed First Premier under the Agreement.

12. As of this date, Ms. Whitaker has an outstanding balance of \$431.62 that she owes to First Premier under the Agreement.

13. First Premier made telephone calls to Ms. Whitaker to seek repayment of the money owed under the Agreement. Plaintiff alleges that some of those calls were made to the Number, which Ms. Whitaker represented as her work telephone number and represented that the Number was one First Premier could lawfully call using an ATDS.

14. Plaintiff filed a complaint against First Premier, alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, for calls placed to the Number.

15. Plaintiff alleges that First Premier made calls to his cellular telephone, allegedly in violation of the TCPA.

16. Specifically, Plaintiff alleges that the Number Ms. Whitaker represented as her own and a number that First Premier could call in fact belongs to Plaintiff. Thus, it is the

alleged calls to Ms. Whitaker, made pursuant to her representations and consent, upon which Plaintiff bases his claim.

17. Upon information and belief, the Number belongs to Plaintiff, not Ms. Whitaker.

18. Upon information and belief, Plaintiff and Ms. Whitaker have a relationship.

19. Plaintiff now claims that the Number was his own and seeks to hold First Premier liable under the TCPA for alleged calls to a number Ms. Whitaker represented as her own and to which First Premier had consent to call Ms. Whitaker.

20. The subject calls were made for the purpose of collecting a valid debt by First Premier from its customer, Ms. Whitaker, with whom First Premier had an existing business relationship.

21. To the extent Plaintiff seeks to hold First Premier liable under the TCPA, First Premier seeks common law indemnification from Ms. Whitaker, as any calls were made in a valid effort to collect an existing business debt from an individual with whom First Premier had an established business relationship. The calls were made to the Number because Ms. Whitaker represented that the Number was her number and that First Premier could lawfully call the Number.

22. First Premier also seeks to hold Ms. Whitaker liable for breach of contract, negligent misrepresentation, and fraudulent misrepresentation for the amount of any judgment Plaintiff obtains against First Premier because Ms. Whitaker represented to First Premier that the Number belonged to her and that First Premier was authorized to call her on that Number through an ATDS to discuss matters relating to the Agreement.

23. First Premier also seeks repayment of the amount that Ms. Whitaker owes under her Agreement with First Premier.

24. All conditions precedent to bringing this action have been satisfied by First Premier or been waived by Ms. Whitaker.

25. First Premier has retained the undersigned attorneys to represent it in this action and has agreed to pay its attorneys a reasonable fee for their services.

COUNT I
(COMMON LAW INDEMNIFICATION)

26. First Premier re-alleges the allegations set forth in paragraphs 1 through 25 above, as if fully set forth herein.

27. The Agreement between First Premier and Ms. Whitaker formed a legal and special relationship between those two parties that existed prior to any of the calls alleged in Plaintiff's Complaint.

28. This is a special relationship that gives rise to a duty for Ms. Whitaker to indemnify and hold harmless First Premier for any damages that First Premier may suffer in connection with entering the Agreement with Ms. Whitaker and seeking collection of past due amounts as allowed by the Agreement.

29. Plaintiff alleges that he was damaged when he allegedly received calls from First Premier without prior express consent.

30. First Premier called the Number because Ms. Whitaker: (1) refused to honor her contractual obligations under the Agreement; (2) provided the Number to First Premier; (3) misrepresented that the Number belonged to her; and (4) provided First Premier consent to call the Number through an ATDS.

31. First Premier's alleged liability to Plaintiff is solely derivative of Ms. Whitaker's actions in allowing herself to become indebted to First Premier, not making her payments under the Agreement on time, representing the Number as her own, and representing to First Premier that it had consent to call the Number using an ATDS.

32. The damages Plaintiff alleges in his complaint, if any, are a direct result of Ms. Whitaker's acts or omissions.

33. First Premier is without fault in causing Plaintiff's alleged damages.

34. The relationship between First Premier and Ms. Whitaker establishes a right of indemnity in First Premier against Ms. Whitaker regarding the allegations in Plaintiff's complaint.

35. Should Plaintiff be awarded any sums, including any damages, costs, or attorneys' fees against First Premier, any such liability on the part of First Premier results from the acts or omissions of Ms. Whitaker.

36. Accordingly, Ms. Whitaker should indemnify First Premier for all amounts for which First Premier may be liable to Plaintiff, including any damages, costs, attorneys' fees, or any other sums assessed against First Premier.

WHEREFORE, Third-Party Plaintiff, First Premier, prays that, in the event judgment is entered against First Premier and in favor of Plaintiff, judgment be entered in favor of Third-Party Plaintiff, First Premier, and against Third-Party Defendant, Ms. Whitaker, in the amount of any judgment entered against First Premier, and that First Premier be awarded its attorneys' fees, interest, the cost of this suit, and any other relief the Court finds just and proper.

COUNT II
(BREACH OF CONTRACT)

37. First Premier re-alleges the allegations set forth in paragraphs 1 through 25 above, as if fully set forth herein.

38. First Premier and Ms. Whitaker entered into a valid and binding contract; namely, the Agreement.

39. In the Application, Ms. Whitaker provided to First Premier the Number as her own, represented that the Number belonged to her, and represented that First Premier could lawfully call her on that Number using an ATDS to discuss the Agreement.

40. First Premier performed its obligations under the Agreement.

41. Specifically, First Premier extended credit to Ms. Whitaker pursuant to the Agreement.

42. If Plaintiff's allegations are true, specifically that he owns the Number and First Premier's calls to the Number were unauthorized and unlawful, Ms. Whitaker breached the terms of her Agreement with First Premier by misrepresenting that the Number belonged to her and First Premier could call the Number using an ATDS to discuss the Agreement.

43. Ms. Whitaker further breached the Agreement by not timely paying the amounts of money that she owes pursuant to the Agreement.

44. As a result of Ms. Whitaker's breaches of the Agreement, First Premier suffered damages, including: (a) damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs; and (b) the amount owed by Ms. Whitaker to First Premier under the Agreement, plus interest, penalties, attorneys' fees, and costs.

WHEREFORE, Third-Party Plaintiff, First Premier, demands judgment in its favor and against Third-Party Defendant, Ms. Whitaker, for damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs, the amount owed by Ms. Whitaker under the Agreement, and interest, penalties, attorneys' fees, costs, and such further relief as this Court deems just and proper.

COUNT III
(NEGLIGENT MISREPRESENTATION)

45. First Premier re-alleges the allegations set forth in paragraphs 1 through 25 above, as if fully set forth herein.

46. Ms. Whitaker induced First Premier to enter into the Agreement by representing to First Premier that the Number belonged to her and that First Premier could lawfully call her on that Number using an ATDS with regard to the Agreement.

47. If Plaintiff's allegations in this case are determined to be true, Ms. Whitaker's representations to First Premier were false.

48. Upon information and belief, Ms. Whitaker was located in Montgomery County, Tennessee when she represented to First Premier, through the Application, that the Number belonged to her and that First Premier could lawfully call her at that Number using an ATDS to try to collect amounts due and owing on the Agreement.

49. Ms. Whitaker's representations to First Premier were made on or about August 18, 2016.

50. Ms. Whitaker's representations to First Premier were made in writing through the Application.

51. If Ms. Whitaker's representations were false, she either knew or should have known that they were false; thus, Ms. Whitaker was at least negligent in making the representations to First Premier.

52. In making the representations, Ms. Whitaker knew or should have known that the representations would induce First Premier to act by extending credit pursuant to the Agreement and calling her on the Number using an ATDS in an attempt to collect the amount owed.

53. First Premier was, in fact, induced to enter into the Agreement with Ms. Whitaker as a result of her misrepresentation regarding the Number.

54. First Premier suffered damages as a result of its reasonable and justifiable reliance on Ms. Whitaker's representations. Such damages may include: (a) damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs; and (b) the amount owed by Ms. Whitaker to First Premier under the Agreement, plus interest, penalties, attorneys' fees and costs, and such further relief as this Court deems just and proper.

WHEREFORE, Third-Party Plaintiff, First Premier, demands judgment in its favor and against Third-Party Defendant, Ms. Whitaker, for damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs, the amount owed by Ms. Whitaker under the Agreement, and interest, penalties, attorneys' fees, costs, and such further relief as this Court deems just and proper.

COUNT IV
(FRAUDULENT MISREPRESENTATION)

55. First Premier re-alleges the allegations set forth in paragraphs 1 through 25 above, as if fully set forth herein.

56. Ms. Whitaker's representations to First Premier in her Application that the Number belonged to her and that First Premier could lawfully call her on that Number using an ATDS with regard to the Agreement were false.

57. Ms. Whitaker's representations to First Premier were made on or about August 18, 2016.

58. Ms. Whitaker's representations to First Premier were made in writing through the Application.

59. Ms. Whitaker knew that the representations that she made to First Premier were false when she made them.

60. Ms. Whitaker induced First Premier to enter into the Agreement by representing to First Premier in the Application that the Number belonged to her and that First Premier could lawfully call her on that Number using an ATDS with regard to the Agreement.

61. Upon information and belief, Ms. Whitaker was located in Montgomery County, Tennessee when she represented to First Premier, through the Application, that the Number belonged to her and that First Premier could lawfully call her at that Number using an ATDA to try to collect amounts due and owing on the Agreement.

62. In making the representations, Ms. Whitaker knew or should have known that the representations would induce First Premier to act by extending credit to her pursuant to the Agreement and calling her on the Number, which she represented to First Premier was her own, if it needed to discuss any issues regarding the Agreement.

63. First Premier suffered damages as a result of its reasonable and justifiable reliance on Ms. Whitaker's representations. Such damages may include: (a) damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs; and (b) the amount owed by Ms. Whitaker to First Premier under the Agreement, plus interest, penalties, attorneys' fees, costs, and such further relief as this Court deems just and proper.

WHEREFORE, Third-Party Plaintiff, First Premier, demands judgment in its favor and against Third-Party Defendant, Ms. Whitaker, for damages incurred as a result of Plaintiff's lawsuit, including the amount of any judgment entered in favor of Plaintiff against First Premier, as well as First Premier's own attorneys' fees and costs, the amount owed by Ms. Whitaker under the Agreement, and interest, penalties, attorneys' fees, costs, and such further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Third-Party Plaintiff, First Premier, hereby demands a trial by jury on all issues so triable.

Dated: April 20, 2017

/s/ Patrick W. Merkel
Patrick W. Merkel, Bar No. 22191
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Counsel for Defendant First Premier Bank

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Third Party Complaint and Demand for Jury Trial was electronically filed on the 20th day of April. Notice of this filing was sent by operation of the United States District Court's CM/ECF System electronic filing system to Alex Simanovsky, 2300 Henderson Mill Road, Suite 300, Atlanta, GA 30345; and Patrick B. Newsom, 40 Music Square East, Nashville, TN 37203.

Dated: April 20, 2017

/s/ Patrick W. Merkel

Patrick W. Merkel

Bar No. 22191

Counsel for Defendant First Premier Bank