IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2023-015782-CA-01
SECTION: CA32
JUDGE: Ariana Fajardo Orshan

Melissa Fiallo

Plaintiff(s)

vs.

EL Car Wash, LLC

Defendant(s)

_____/

ORDER DENYING MOTION TO DISMISS

THIS CAUSE came before the Court on September 27, 2023, for hearing on the Defendant El Car Wash, LLC's Motion to Dismiss or Strike as a Sham Class Action Complaint filed on August 4, 2023. The Court having considered Defendant's Motion, Plaintiff's Response in Opposition, Defendant's Reply, and the arguments presented at the hearing, the Court finds and orders as follows:

1. The Court declines to grant the defendant's Motion to Dismiss for lack of standing at this stage, finding the issue is more properly examined at the class certification or summary judgment stage. Florida state courts have required a "concrete injury" or injury-in-fact for standing in federal consumer protection causes of action. *See Pet Supermarket Inc. v. Eldridge*, 360 So.3d 1201 (Fla. 3d DCA 2023). *Eldridge* concerned claims under the federal Telephone Consumer Protection Act 42 U.S.C. §227(b) ("TCPA") and standing was resolved on summary judgment. However, the more recent opinion on standing based on the Florida Telephone Solicitation Act ("FTSA") is *Muccio v. Glob. Motivation, Inc.*, No. 23-10081, 2023 WL 5499968, at *1 (11th Cir. Aug. 25, 2023), in which the federal court stated that the

receipt of an unwanted text caused a concrete injury. Before the *Muccio* opinion was issued, the Eleventh Circuit revisited standing for a TCPA cause of action. The issue of standing in TCPA cases was clarified by the Eleventh Circuit in its *en banc* opinion in *Drazen v. Pinto*, 74 F.4th 1336 (11th Cir. 2023) ("*Drazen II*"), which was issued *after* the Third District's opinion in *Pet Supermarket Inc. v. Eldridge*. In *Drazen II*, the Eleventh Circuit held that consumers who received a single unwanted, illegal telemarketing text message suffered a concrete injury in fact, as required to have standing.

2. The Court also declines to dismiss this case based on the retroactive application of the May 2023 FTSA amendment to this case, which was filed before the legislation was enacted.

3. With respect to the Defendant's second ground for its Motion to Dismiss, Section 501.059(10)(c) of the Florida Statutes, as amended in May 2023, provides:

> Before commencement of any action for damages under this section for text message solicitations, the called party must notify the telephone solicitor that the called party does not wish to receive text messages from the telephone solicitor by replying "STOP" to the number from which the called party received text messages from the telephone solicitor. Within 15 days after receipt of such notice, the telephone solicitor shall cease sending text message solicitations to the called party and may not send text messages to the called party thereafter, except that the telephone solicitor may send the called party a text message to confirm receipt of the notice. The called party may bring an action under this section only if the called party does not consent to receive text messages from the telephone solicitor and the telephone solicitor continues to send text messages to the called party 15 days after the called party provided notice to the telephone solicitor to cease such text messages.

4. Section 2, of HB 761, provides that "[t]he amendments made by this act apply to any suit filed on or after the effective date of this act and to any putative class action not certified on or before the effective date of this act."

5. Florida courts have addressed other statutory amendments requiring pre-suit notice. In 2021,

the Florida Legislature enacted Section 627.70152 of the Florida Statutes, which added a required pre-suit notice of intent to litigate as a condition precedent to filing suit on a property damage insurance contract. Retroactive application of this statutory requirement was recently addressed in *Cole v. Universal Property & Casualty Ins. Co.*, 363 So. 3d 1089 (Fla. 4th DCA 2023). The court held that even though the policy was issued—and the damage occurred—before the enactment of Section 627.70152, the statute applied retroactively. In *Cole,* the complaint was filed after the effective date of the amended statute.

6. However, in *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (Fla. 2010) the Florida Supreme Court held that an amendment to a statute—like the amendment to the FTSA here—that added a pre-suit notice requirement as a condition to filing suit could not be retroactively applied. 35 So. 3d 873, 879-80 (Fla. 2010). In doing so, the Florida Supreme Court concluded in part that the notice requirement created a "safe harbor"—not unlike the safe harbor provided under amendment here—and was therefore substantive in nature such that retroactive application of the statute would be impermissible because it would impair a vested right. *See id*. at 880.

7. Similarly, in *Am. Optical Corp. v. Spiewak*, the Florida Supreme Court affirmed the Fourth DCA's holding "that retroactive application of the Act to the Appellees, and other claimants who had accrued causes of action for asbestos-related disease pending on the effective date of the Act, is impermissible because it violates the due process clause of the Florida Constitution." 73 So. 3d at 133. The statute at issue in that case, similar to the one here, stated that it applied to "any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act." *Id*. at 131. In refusing to apply the statute retroactively, the Florida Supreme Court reasoned: "[a]pplication of the Act to the Appellees does not merely impair their vested rights-it destroys them. There is no alternative remedy. The vested rights simply vanish." *Id*. at 131.

8. The Court finds it would be improper to apply the recent FTSA amendment to a case filed before the legislation was passed into law. The Court agrees with the reasoning in *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (Fla. 2010) (in which the Florida Supreme Court ruled that the pre-suit notice requirement of Florida's Motor Vehicle No-Fault Law, §627.736(11) (2001), was not procedural but substantive and could not be applied retroactively).

9. Further, the recent amendment to the FTSA now requires prior express written consent be provided only for "unsolicited telephonic sales calls" when utilizing an automated system. The prior version of the FTSA that was in effect when the Plaintiff's Complaint was filed required prior express written consent for "telephonic sales calls." The Plaintiff alleges in her complaint that she did not provide express written consent for the Defendant's "telephonic sales calls". The recent amendment would eliminate Plaintiff's cause of action for her receipt of "telephonic sales calls" without prior express written consent. Therefore, the amendment impairs the Plaintiff's vested rights and creates new affirmative defenses for the Defendant that did not exist at the time Plaintiff's cause of action accrued. "[E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010).

10. Last, the defendant asks this Court to consider documents and materials beyond the pleadings to analyze whether the plaintiff provided express written consent as defined by the FTSA. At this stage, the plaintiff's allegation that "Plaintiff never provided Defendant with express written consent authorizing Defendant to transmit telephonic sales calls to Plaintiff's cellular telephone number utilizing an automated system for the selection or dialing of telephone numbers," Complaint, ¶ 29, must be accepted as true. *See Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So.2d 13, at *15 (Fla. 3d DCA 2002) ("When a trial court rules on a motion to

dismiss, the trial court is confined to the allegations within the four corners of the Complaint, must accept these allegations as true, and may not speculate as to what the true facts may be or what facts may ultimately be proved in the trial of the cause.").

11. The Court declines to look beyond the pleadings here. The plaintiff alleges that she did not provide express written consent, and this must be taken as true at the pleadings stage.

It is, therefore, ORDERED AND ADJUDGED that Defendant's Motion to Dismiss or Strike as a Sham Class Action Complaint is denied. The Defendant shall file a responsive pleading within twenty (20) days of the date of this Order.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 2nd day of November, 2023.

2023-015782-CA-01 11-02-2023 12:55 PM
Hon. Ariana Fajardo Orshan

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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