2024 WL 3342265
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United States District Court, M.D. Florida,
Tampa Division.

William Johnson MOFFET, individually and on behalf of others similarly situated, Plaintiff,
v.
EVERGLADES COLLEGE, INC., Defendant.

Case No: 8:23-cv-1787-KKM-AEP
|
Signed June 5, 2024

Attorneys and Law Firms

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ORDER

Kathryn Kimball Mizelle, United States District Judge

***1** William Moffet sues Everglades College, alleging that it attempted to contact him with a prerecorded message without his consent, in violation of state and federal law. But Moffet does not adequately allege that Everglades's message was prerecorded, and the state statute that Moffet cites does not apply to the educational services that Everglades offers. Thus, I grant Everglades's motion to dismiss.

I. BACKGROUND

Everglades "is a private not-for-profit university in Florida." Am. Compl. (Doc. 24) ¶ 3. In a call on March 31, 2023, Moffet had asked Everglades to stop calling him. *See id.* ¶¶ 39, 41. But on April 27, 2023, Moffet received another call from Everglades. *See id.* ¶ 46. Moffet did not pick up, so Everglades left a voicemail telling Moffet how to enroll in its college classes. *See id.* Moffet alleges—without elaboration—that this voicemail was prerecorded. *See id.*

As it relates to this motion, Moffet's complaint avers that this call was a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b), (TCPA/Count I) and the Florida Telephone Solicitation Act, Florida Statutes § 501.059, (FTSA/Count III) because Everglades used a prerecorded message without his consent. [1] *Id.* ¶¶ 67–74, 82–87; *see also* R&R (Doc. 46) at 2 (explaining that this dispute is solely about the call received on April 27, 2023). Everglades moved to dismiss these counts, arguing that Moffet fails to allege a prerecorded voicemail under the TCPA and FTSA and that the FTSA does not cover communications related to educational services. MTD (Doc. 32) at 9–18. In the alternative to this last argument, Everglades argued that Moffet's request for statutory damages on a "per violation" basis under the FTSA should be stricken because that statute allows statutory damages only on a "per action" basis. MTD at 19–23.

After the motion was briefed, the Magistrate Judge entered a report and recommendation agreeing with the first argument but rejecting the latter two. R&R at 5–18. Everglades objects to the report and recommendation insofar as it rejects its second and

third arguments. Objection (Doc. 47). Moffet responds to Everglades's objection but lodges no objection of his own. Resp. to Objection (Doc. 48).

II. LEGAL STANDARD

A. Report and Recommendation

After conducting a careful and complete review of the findings and recommendations, a district judge "may accept, reject, or modify" a magistrate judge's Report and Recommendation. 28 U.S.C. § 636(b)(1). If a party "files a timely and specific objection to a finding of fact by a magistrate judge, the district court" must conduct a de novo review with respect to that factual issue. *Stokes v. Singletary*, 952 F.2d 1567, 1576 (11th Cir. 1992) (quotations omitted). The district court reviews legal conclusions de novo, even in the absence of an objection. *See Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 604 (11th Cir. 1994); *Ashworth v. Glades Cnty. Bd. of Cnty. Comm'rs*, 379 F. Supp. 3d 1244, 1246 (M.D. Fla. 2019).

B. Motion to Dismiss

***2** A complaint fails "to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure 12(b)(6) if it does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 677– 78 (2009). The complaint must include more than "naked assertion[s]," "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, *555–57* (2007). Instead, the complaint must contain sufficient facts to state a claim that is "plausible on its face." *Ashcroft*, 556 U.S. at 678 (quotations omitted). A claim is facially plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* An inference is reasonable when common sense, considering the surrounding facts, requires the inference be drawn. *Newbauer v. Carnival Corp.*, 26 F.4th 931, 934 (11th Cir. 2022).

At the motion to dismiss stage, a plaintiff's factual allegations—but not its legal conclusions—are assumed true and construed "in the light most favorable to the plaintiff." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). I may not consider evidence outside of "the four corners of the complaint," *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002), which includes "only the complaint itself and any documents referred to in the complaint which are central to the claims," *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009).

III. ANALYSIS

After reviewing the Parties' filings and the report and recommendation, I conclude that Moffet fails to allege a prerecorded voicemail and that the FTSA does not cover communications related to educational services. Therefore, I grant the motion to dismiss in full and adopt the report and recommendation in part.

A. Moffet Fails to Allege a Prerecorded Voicemail

The Magistrate Judge concluded that Moffet did not allege facts to support the claim that the April 27 call used a prerecorded voicemail, and I agree. *See* R&R at 5–8. The relevant portion of the TCPA proscribes the use of a "prerecorded voice," 47 U.S.C. § 227(b)(1)(A); the FTSA proscribes the use of a "recorded message," § 501.059(8)(a), FLA. STAT. Moffet alleges that "Defendant left a prerecorded voice mail on Plaintiff's phone." Am. Compl ¶ 46. That allegation only "recit[es] ... the elements of [the] cause[s] of action"—it does not make the claim "plausible." *Twombly*, 550 U.S. at *555–56*. "[A] plaintiff may not merely recite the statutory element[ ] of the use of ... [a] prerecorded voice without alleging additional facts." *Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1355–56 (S.D. Fla. 2018).

For context, courts have found that the element of a prerecorded voice is adequately alleged where the complaint stated that a call was prerecorded "based on its clarity and cadence, and the absence of anything specific such as the name of the person being called." *Somogyi v. Freedom Mortg. Corp.*, No. 17-cv-6546, 2018 WL 3656158, at *7 (D.N.J. Aug. 2, 2018). A TCPA

claim "merely follow[s] the language of the statute," however, where it "alleges that defendant willfully violated the TCPA ... by using an artificial or prerecorded voice ... [with] [n]o additional allegations." *Speidel v. JP Morgan Chase & Co.*, No. 13-cv-852, 2014 WL 582881, at *2 (M.D. Fla. Feb. 13, 2014) (Steele, J.). The complaint here is barren of any such "additional allegations" related to the April 27 call.

Nor do Moffet's allegations about the March 31 call from Everglades make his claims about the April 27 call plausible. Moffet alleges that on that earlier call there was a "long pause before any person showed up on the line" and Moffet had "difficulty in getting a live person" to speak with him. Am. Compl. ¶ 41. But this allegation does not add plausibility to his claims.He does not allege that the March 31 call used a prerecorded voice, let alone offer additional facts to support that Everglades used a prerecorded voice on that call. And that there was a long pause before Moffet heard a voice on the other end of the line on March 31 does not shed any light on whether Everglades used a prerecorded voicemail on April 27.

***3** In sum, Moffet did not adequately plead the "prerecorded message" element of either his TCPA or FTSA claims. Therefore, Counts I and III must be dismissed. Neither party objected to this aspect of the report and recommendation, and I adopt it.

B. The FTSA Does not Cover Calls Regarding Educational Services

The FTSA regulates "[t]elephonic sales call[s]," a term it defines (as relevant here) as "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services." § 501.059(1)(j), FLA. STAT. The statute defines "[c]onsumer goods or services" as "real property or tangible or intangible personal property that is normally used for personal, family, or household purposes, ... and any services related to such property." *Id.* § 501.059(1)(c). Everglades argues that college classes are not "personal property" or "services related to such property," and thus Moffet's claim under the FTSA must be dismissed. MTD at 12–18; Objection at 4–8. The Magistrate Judge and Moffet disagree, arguing that the consumer protection statutes like the FTSA "should be construed liberally in favor of consumers," *Legg v. Voice Media Grp., Inc.*, 990 F. Supp. 2d 1351, 1354 (S.D. Fla. 2014), and therefore that "personal property" should be defined to include educational services. *See* R&R at 8–12; Resp. (Doc. 34) at 7–10; Resp. to Objection at 2–5.

Everglades is correct. "Absent a legislatively supplied definition," Florida law gives terms in a statute their "plain and ordinary meaning at the time of the statute's enactment." *Tsuji v. Fleet*, 366 So. 3d 1020, 1028 (Fla. 2023) (quotation omitted). To ascertain that meaning, courts often "look to contemporaneous dictionaries for evidence of that meaning." *Id.* Only Everglades has offered a precise definition of "personal property," citing to Black's Law Dictionary, which defines personal property as "[a]ny moveable or intangible thing that is subject to ownership and not classified as real property." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019). But other dictionaries use similar definitions. *See, e.g.*, *Personal Property*, WEX (last updated Jan. 2024) ("Personal property is a type of property that includes any movable object or intangible asset of value that can be owned by a person and is distinct from real property.").

Education is not personal property. *Cf. Williams v. Wendler*, 530 F.3d 584, 589 (7th Cir. 2008) ("A college education—any education—is not 'property' in the usual sense of the word."). Property ownership is accompanied by legal rights to "use, manage, and enjoy" that thing, "including the right to convey it to others." *Ownership*, BLACK'S LAW DICTIONARY (11th ed. 2019). A person's education cannot be conveyed to another person—it is a personal attribute of the individual who possesses it. Even if what Everglades offers is instead characterized as "classes" or a "degree," the same conclusion holds. A person who registers for a college class has a right to participate in the class, but not to manage it or transfer ownership rights to others. Nor can one sell one's educational degree. For these reasons, courts have recognized that education and its appurtenances are not "property" in a variety of contexts. *See, e.g.*, *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1218 (M.D. Fla. 2020) (conversion); *In re Hook*, No. 07-cv-00631, 2008 WL 2856454, at *2 (D. Colo. July 23, 2008) (bankruptcy); *Joachim v. Joachim*, 942 So. 2d 3, 4 (Fla. 5th DCA 2006) (family law).

***4** And although educational services are definitionally "services," they are not services "related to ... property." § 501.059(1)(c), FLA. STAT. In fact, no party has even ventured a theory as to what property Everglades's educational services might "relate[ ] to." *Id.* Moffet cites a case that noted that, in the context of the Fair Debt Collection Practices Act, "courts have concluded that

debt incurred as a result of education services is related to personal, family, or household purposes." *Soto Leigue v. Everglades Coll., Inc.*, No. 22-cv-22307, 2022 WL 11770137, at *3 (S.D. Fla. Oct. 20, 2022); *see also* Resp. at 8–9. Indeed. Educational services "relate to" a "personal" attribute of the recipient, not to property. *Cf. Matter of Prince*, 85 F.3d 314, 323 (7th Cir. 1996) ("[A] professional degree increase[s] the market value of [orthodontic] services, but [it] cannot be sold to another orthodontist; [it] ha[s] value only as [an] attribute[ ] of [the degree-holder].").

Comparing the text of the FTSA to other Florida legislation does not disturb this conclusion. In his response to the motion to dismiss, Moffet argued that "[t]he Florida Legislature has shown that it will explicitly exempt certain types of calls ... if they were intended to be exempted," Resp. at 8 (citing §§ 501.601 *et seq.*, FLA. STAT). According to Moffet's initial argument, the Telemarketing Act has the same definition of "consumer goods or services" as the FTSA, yet only the Telemarketing Act "specifically exempts soliciting for educational purposes." *Id.*; *see also* § 501.604(2), FLA. STAT. (exempting "solicit[ation] for ... educational purposes" from Telemarketing Act provisions). Thus, Moffet concluded, the fact that the FTSA does not contain an exemption for educational services indicates that the Florida Legislature intended the FTSA to apply to such services. Resp. at 8–9.

The problem with Moffet's argument, as he now admits, is that the first premise is false. *See* Resp. to Objection at 4. The Telemarketing Act does not have the same definition of "consumer goods or services" as the FTSA. The former's definition encompasses "real property or any tangible or intangible personal property which is normally used for personal, family, or household purposes *or any property of any nature*." § 501.603(3), FLA. STAT. (emphasis added). The last clause, not present in the FTSA, considerably lengthens the Telemarketing Act's reach. The additional clause also makes comparing the two statutes' exceptions an apples-to-oranges endeavor: It may simply be that the Florida Legislature delineated exceptions to the Telemarketing Act because it is more expansive than the FTSA.

Finally, I cannot stretch the FTSA's reach beyond its textual bounds simply because it is a remedial consumer protection statute. *See Brown v. Care Front Funding*, No. 22-cv-2408, 2023 WL 3098355, at *4 (M.D. Fla. Apr. 6, 2023) ("In analyzing the provisions of the FTSA, the court's inquiry begins with the statutory text, and ends there as well if the text is unambiguous.... Although the FTSA is remedial in nature and should be construed liberally in favor of consumers, courts are not allowed to add words to or rewrite a statute." (cleaned up)). Moffet argues that educational services should fall in the FTSA's ambit because the statute is "remedial in nature, [and thus] should be construed liberally in favor of consumers." Resp. to Objection at 3; *see also Soto Leigue*, 2022 WL 11770137, at *4 (same). But whatever interpretive power that canon of interpretation may have, my first responsibility is to ascertain the "plain and ordinary meaning" of the FTSA under Florida law "at the time of the statute's enactment." *Tsuji*, 366 So. 3d at 1028. Having concluded that the terms "personal property" and "services related to property" cannot bear the meaning that Moffet gives them, my inquiry is at an end.

***5** Because the FTSA does not apply to Everglades's communications, I need not consider the parties' other interpretive dispute —whether the FTSA imposes statutory liability on a "per violation" or "per action" basis.

IV. CONCLUSION

Accordingly, the following is **ORDERED:**

1. Motion to Dismiss (Doc. 32) is **GRANTED**.
2. The Report and Recommendation (Doc. 46) is **ADOPTED in part** and made a part of this Order to the extent described above.
3. Count I is **DISMISSED without prejudice**.
4. Count III is **DISMISSED with prejudice.**

5. Moffet may file a Second Amended Complaint no later than **June 19, 2024**. Because the stipulation to dismiss Count II of the Amended Complaint was ineffective, Moffet must drop that claim in the Second Amended Complaint if he does not wish to proceed on it.

ORDERED in Tampa, Florida, on **June 5, 2024**.

All Citations

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Footnotes

1 The Parties attempted to stipulate to the dismissal of Count II. (Doc. 28). But they cannot dismiss some claims while retaining others. *See Perry v. Schumacher Grp. of La.*, 891 F.3d 954, 958 (11th Cir. 2018) (holding that Rule 41(a)(1) only allows parties to dismiss "an 'action' in its entirety").

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