2018 WL 2327037
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United States District Court,
N.D. Georgia, Atlanta Division.

Bria MADDOX, Plaintiff,
v.
CBE GROUP, INC., Defendant.

CIVIL ACTION NO.
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CV
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Signed 05/22/2018

Attorneys and Law Firms

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ORDER

HONORABLE STEVE C. JONES, UNITED STATES DISTRICT JUDGE

*1 This matter appears before the Court on Defendant's Motion for Summary Judgment. Doc. No. [15]. As an initial matter, Plaintiff filed a Motion to Strike (Doc. No. [18]), seeking the exclusion of an affidavit by Thomas John Lockard. [1] She argues that, because Mr. Lockard "does not claim to have personal knowledge of how business records were kept at the original creditor," his affidavit should be stricken because it references records of Comcast, the original creditor. Doc. No. [18], pp. 1–2. As Defendant notes, the exhibits attached to Mr. Lockard's declaration are not the records of Comcast, but records of Defendant CBE Group, Inc. ("CBE"). Doc. No. [20], pp. 9–12; see also Doc. No. [15-2]. Plaintiff makes no argument that CBE's own business records fail to qualify under Federal Rule of Evidence 803(6), and thus her entire argument for striking the declaration of Mr. Lockard fails. See Doc. No. [18].

I. FACTUAL BACKGROUND

Because Plaintiff failed to respond to Defendant's Statement of Undisputed Facts, the "Court will deem each of the movant's facts as admitted." N.D. Ga. Loc. R. 56.1(B)(2)(a)(2). Additionally, Plaintiff failed to provide a proper "statement of additional facts" in accordance with N.D. Ga. Loc. R. 56.1(B)(2)(b). A portion of her brief is entitled "Statement of Facts," but the Court need not consider any of these "facts" because they are "not supported by a citation to evidence." See Doc. No. [17], pp. 2–4; N.D. Ga. Loc. R. 56.1(B)(1). Even if the Court does consider them, they do not materially alter the analysis below.

In December 2016, Comcast referred Plaintiff's account to CBE for collection, providing CBE with Plaintiff's cellular telephone number. Doc. No. [15-6], p. 3, ¶¶ 8–9. Thereafter, Defendant placed a total of 120 calls to Plaintiff's number between December 22, 2016 and February 24, 2017. Id. pp. 4–5, ¶ 11. The calls to Plaintiff were all made between the hours of 8:30 AM and 8:00 PM. Id. No more than 5 calls were made on any given day, and more than 1.5 hours passed between each call. Id. p. 5, ¶ 12. [2] CBE did not call Plaintiff on more than five consecutive days, and did not leave any message of any kind in its attempts to contact Plaintiff. Id. ¶¶ 13–14.

*2 Plaintiff herself placed three calls to CBE, but each time she hung up before speaking with any CBE employee. Id. ¶¶ 15–16. The only time Plaintiff and CBE spoke was during a call from CBE that Plaintiff answered on January 11, 2017. Id. p. 6, ¶ 17. The call was recorded, and a transcript was provided to the Court. Id. ¶¶ 17–18; see also Doc. No. [15-2], pp. 22–26.

During the call, the CBE agent identified her organization and told Plaintiff the call was "an attempt to collect a debt" owed by Plaintiff to Comcast. Doc. No. [15-2], pp. 23–24. Plaintiff did not dispute the debt or indicate that she could not pay it. See id. pp. 23–25. But when asked how she would like to pay the debt, Plaintiff said she did not "want to pay for it right now," although she was

"probably going to open [her] account again." Id. p. 24. The agent indicated that Plaintiff would need to resolve the past due amount with CBE in order to reopen the Comcast account, and Plaintiff asked for CBE's contact information. Id. pp. 24–25.

On February 28, 2017, Plaintiff sent CBE a "Letter of Intent to Litigate," alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA"). Id. p. 28. In her present suit, Plaintiff indeed brought two claims—one under the TCPA and one under the FDCPA. Doc. No. [4], pp. 7–9. In her letter, she offered to "settle these matters amicably" and provided her phone number, but noted that the "number [was] not to be called ... other than to address the matters at hand." Doc. No. [15-2], p. 28. After receiving the letter, CBE made no further calls to Plaintiff. Doc. No. [15-6], p. 7, ¶ 23.

All of the calls CBE made to Plaintiff were done through CBE's Manual Clicker Application ("MCA"). Id. ¶ 24. The MCA requires human intervention—a manual "click"—to initiate a call. Id. ¶¶ 26–29. When the MCA is used in conjunction with a telecommunications technology provided by a company called LiveVox, a call is placed through LiveVox's separate "automated outbound dialing system." Id. p. 8, ¶¶ 31–32. All calls are initiated by CBE agents, via the MCA, and the system does not use any predictive or statistical algorithm to (1) engage in predictive dialing, (2) minimize the time CBE agents wait between calls, or (3) minimize the occurrence of a consumer answering a call when no CBE agent is available. Id. p. 9, ¶¶ 36–41. The technology used by CBE does not have the capacity to auto-dial or produce numbers to be called using a random or sequential number generator. Id. pp. 9–10, ¶¶ 42–48.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

The moving party bears the initial burden of showing, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986)). The moving party's burden is discharged merely by " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex, 477 U.S. at 325. In determining whether the moving party has met this burden, this Court must consider the facts in the light most favorable to the nonmoving party. See Robinson v. Arrugueta, 415 F.3d 1252, 1257 (11th Cir. 2005).

*3 Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986). There is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. Id.; see also Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1210 (11th Cir. 2006) (the nonmoving party cannot survive summary judgment by pointing to "a mere scintilla of evidence"). If the non-movant only presents evidence that is " 'merely colorable' or 'not significantly probative,' " summary judgment is still appropriate. Stephens v. Mid-Continent Cas. Co., 749 F.3d 1318, 1321 (11th Cir. 2014). All reasonable doubts, however, are resolved in the favor of the nonmoving party. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

III. ANALYSIS

A. The TCPA Claim

The TCPA "provides a damages remedy for cellular-phone subscribers who receive autodialed phone calls without having given prior express consent to receive such calls." Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1246 (11th Cir. 2014). An essential element such a claim is the use of an "automatic telephone dialing system" or ATDS. See 47 U.S.C. § 227(b)(1)(A);[3] see also McGinity

v. Tracfone Wireless, Inc., 5 F. Supp. 3d 1337, 1340 (M.D. Fla. 2014). "The term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

Defendant argues that Plaintiff's TCPA claim fails because there is no evidence that it made calls to Plaintiff using a ATDS. Doc. No. [15-1], pp. 11–17. Because Defendant has pointed out this absence of evidence to support an essential element of Plaintiff's case, Plaintiff bears the burden of coming forward with specific facts showing a genuine dispute. See Celotex, 477 U.S. at 325; Matsushita, 475 U.S. at 587. This she does not do. Instead, she argues that the MCA "is a *modification* of an [ATDS]" and when it is "paired with other parts of the system, the MCA then has the capacity to be an [ATDS]." Doc. No. [17], p. 7 (emphasis in original). The essential facts being undisputed, the question is thus whether Defendant's system qualifies as an ATDS within the meaning of § 227(a)(1).

Ordinarily, statutory interpretation "begins with the statutory text, and ends there as well if the text is unambiguous." BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593, 158 L.Ed. 2d 338 (2004). Looking to the language of § 227(a)(1), it seems the essential feature of an ATDS is that it uses "a random or sequential number generator." 47 U.S.C. § 227(a)(1). Quite obviously, Defendant's system did not generate Plaintiff's 10-digit telephone number using a truly random or sequential number generator. Instead, Defendant's system draws from a set list of actual phone numbers, which is how Defendant knew Plaintiff's phone number was associated with her Comcast debt.

***4** But the Federal Communications Commission ("FCC") has taken a rather different approach to interpreting § 227(a)(1). Making short-shrift of the requirement that an ATDS use "a random or sequential number generator," it held that a system can qualify as an ATDS even if it does not "create and dial 10-digit telephone numbers arbitrarily" but rather "relies on a given set of [phone] numbers." In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14092 (2003). This ruling has the force of law, and the Court is without authority to determine its validity. Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110, 1119–21 (11th Cir. 2014).

But even under the FCC's broad, 2003 interpretation of § 227(a)(1), a system must still have "the *capacity* to dial numbers without human intervention" to qualify as an ATDS. 18 F.C.C. Rcd. at 14092 (emphasis in original). In 2015, the FCC took the position that this interpretation meant a system "need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so." In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 7974 (2015). This 2015 ruling was challenged in various circuits and, pursuant to 28 U.S.C. § 2112(a)(3), the Panel on Multidistrict litigation consolidated the challenges into a single case—ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018).

The ACA Int'l Court held that the FCC's 2015 Order made "the [TCPA's] restrictions on autodialer calls assume an eye-popping sweep." Id. at 697. Because "any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer," the FCC's focus on the potential, future abilities of a device meant "that all smartphones ... meet the statutory definition of an autodialer." Id. at 696–97. The ACA Int'l Court rejected this interpretation of "capacity" as "an unreasonably, and impermissibly, expansive one." Id. at 700.

While ACA Int'l was decided by the D.C. Circuit, the Court is persuaded that the decision is binding in this Circuit as well. See Reyes v. BCA Fin. Servs., Inc., —— F. Supp. 3d ——, 2018 WL 2220417, at *11 (S.D. Fla. May 14, 2018) (recognizing "that ACA International is binding authority, even though it comes from the D.C. Circuit"). Although the issue has not been directly addressed by the Eleventh Circuit, other circuits have held that a decision in a case consolidated under § 2112(a) is binding on courts across the country. Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc., 863 F.3d 460, 467 (6th Cir. 2017), *as corrected on denial of reh'g en banc* (Sept. 1, 2017), *cert. denied*, 138 S. Ct. 1284 (2018); Peck v. Cingular Wireless, LLC, 535 F.3d 1053, 1057 (9th Cir. 2008). Still other circuits have suggested the same. See GTE S., Inc. v. Morrison, 199 F.3d 733, 743 (4th Cir. 1999) (holding that once cases are consolidated pursuant to § 2112(a), the chosen circuit becomes "the sole forum for addressing challenges to the validity of the FCC's rules");

Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Comm'n, 598 F.2d 759, 767 (3d Cir. 1979) (noting that courts rely on § 2112(a) to "prevent unseemly conflicts that could result should sister circuits each take the initiative and issue conflicting decisions") (quoting Abourezk v. F. P. C., 513 F.2d 504, 505 (D.C. Cir. 1975)).

Given the ACA Int'l decision, the Court relies on the FCC's 2003 interpretation of § 227(a)(1) to determine if Defendant's system qualifies as an ATDS. That interpretation focuses on whether a system can "dial numbers without human intervention." See 18 F.C.C. Rcd. at 14092. Here, the undisputed fact is that CBE used a MCA, which requires human intervention to initiate a call. Doc. No. [15-6], p. 7, ¶¶ 24–29. Plaintiff suggests that Defendant's system still qualifies as an ATDS unless agents "manually dial each 10-digit telephone number one digit at a time to initiate a call." Doc. No. [17], p. 7. However, this contention has no basis in law.

***5** The FCC's interpretation requires "human intervention," not that agents dial all ten digits of a phone number manually. See 18 F.C.C. Rcd. at 14092. Under Plaintiff's sweeping interpretation, any phone with a speed-dial feature—*i.e.* nearly all phones—would qualify as an ATDS. This is the very kind of "unreasonably, and impermissibly, expansive" interpretation that led the ACA Int'l Court to overturn the FCC's 2015 Order. See 885 F.3d at 696–700. The focus is on whether the system can *automatically* dial a phone number, not whether the system makes it easier for a person to dial the number. See 18 F.C.C. Rcd. at 14092. Defendant's system requires human intervention. Doc. No. [15-6], p. 7, ¶¶ 24–29. Additionally, the system does not use any kind of predictive or statistical algorithm to engage in predictive dialing or minimize waiting times. Id. p. 9, ¶¶ 36–41. For these reasons, it does not qualify as an ATDS, and Defendant is entitled to summary judgment on Plaintiff's TCPA claim. See Strauss v. CBE Grp., Inc., 173 F. Supp. 3d 1302, 1310–11 (S.D. Fla. 2016); see also Marshall v. CBE Grp., Inc., 2018 WL 1567852, at *5–8 (D. Nev. Mar. 30, 2018).

B. The FDCPA Claim

The FDCPA prohibits debt collectors from "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. The particular violation alleged here is for "[c]ausing a telephone to ring ... repeatedly or continuously with intent to annoy, abuse, or harass." See Doc. No. [4], pp. 8–9, ¶¶ 35–38; see also 15 U.S.C. § 1692d(5). Claims under § 1692d are "viewed from the perspective of a consumer whose circumstances make[ ] him relatively more susceptible to harassment, oppression, or abuse." Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1179 (11th Cir. 1985).

Courts are adrift in a sea of case law interpreting the words annoy, abuse, harass, and oppress with different cases sometimes pulling in completely contradictory directions. In one case, a defendant made 26 or 28 calls over a two-month period with calls sometimes "made on a daily basis," including "three telephone calls being made within five hours on the same day." Akalwadi v. Risk Management Alternatives, Inc., 336 F.Supp.2d 492, 506 (Dist. Md. 2004). The court held that the "reasonableness of this volume of calls and their pattern is a question of fact for the jury." Id. But in another case, the defendant made "149 telephone calls to plaintiff within a two-month period" and the court granted summary judgment to the defendant. Carman v. CBE Grp., Inc., 782 F. Supp. 2d 1223, 1229–32 (D. Kan. 2011).

A court in this circuit granted summary judgment to a defendant who made 57 calls—including seven calls in one day—to a plaintiff. Tucker v. CBE Group, Inc., 710 F.Supp.2d 1301 (M.D. Fla. 2010). But a California court held that 54 calls in six months—including six calls in one day—was, as a matter of law, a violation of § 1692d(5). Sanchez v. Client Servs., Inc., 520 F.Supp.2d 1149, 1160–61 (N.D. Cal. 2007). Given the conflicting body of law, it is nearly impossible to divine whether particular conduct violates § 1692d. Presumably, this is why the Eleventh Circuit has held that, "[o]rdinarily, whether conduct harasses, oppresses, or abuses will be a question for the jury." Jeter, 760 F.2d at 1179.

To be sure, courts consider more than the mere volume of calls in deciding whether a course of conduct violates § 1692d. The timing of calls matters. If a debt collector calls a person back immediately after he hangs up, that can be harassment. See Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 873 (D.N.D. 1981). The FDCPA explicitly provides that communications before 9:00 AM or after 8:00 PM are made at an "unusual time ... which should be known to be inconvenient to the consumer." 15 U.S.C. § 1692c(a)(1). But even when "none of the calls were made either excessively early in the morning or late

in the evening," a reasonable jury may find a violation of the FDCPA. See Akalwadi, 336 F. Supp. 2d at 506.

*6 Courts also consider whether the debt collector spoke with the person being called. Tucker, 710 F. Supp. 2d at 1305. If the person does not request that the debt collector "cease calling her," that indicates further calls were not intended to be harassing. See Arteaga v. Asset Acceptance, LLC, 733 F. Supp. 2d 1218, 1229 (E.D. Cal. 2010). But if a consumer provides written notice "that the consumer wishes the debt collector to cease further communication with the consumer," the debt collector must—subject to limited exceptions—stop contacting the consumer. 15 U.S.C. § 1692c(c).

Here, Plaintiff asserts that "[t]here were many times when [she] answered and hung up the phone." Doc. No. [17], p. 11. In support of this contention, she cites to "exhibit B" but there is no exhibit B attached to her response. See id. Defendant, like the Court, may have had a difficult time understanding what evidence Plaintiff intended to use to support her position, and thus this argument is not addressed in Defendant's reply brief. See Doc. No. [21]. While no exhibit B was attached to Plaintiff's response, there was an exhibit B attached to her Motion to Strike. See Doc. No. [18], pp. 12–14. The Court presumes that this document is what Plaintiff was referring to even though it does not support her assertion that she "answered and hung up the phone" many times. Compare Doc. No. [17], p. 11 with Doc. No. [18], pp. 12–14.

Instead, Plaintiff's exhibit B is an affidavit in which she swears that, on a single occasion, she answered a call from Defendant and said to "stop calling [her] cell phone." Doc. No. [18], p. 13. That call "was disconnected [after 24 seconds] without any live person coming on the line." Id. Assuming it was Plaintiff who "disconnected" the call, this single incidence of her hanging up is not enough, standing alone, to demonstrate that Defendant's conduct violated § 1692d. Notably, Defendant did not call Plaintiff back until the next day. See Doc. No. [15-2], p. 12. The Court is more troubled by Plaintiff's assertion that she told Defendant to "stop calling [her] cell phone." Doc. No. [18], p. 13.[4] But Plaintiff herself acknowledges that she never spoke to a live person. Doc. No. [18], p. 13. Thus, there is no indication Defendant received this request. When Defendant did receive a written request from Plaintiff to stop calling, it did. Doc. No. [15-6], p. 7, ¶ 23.

Defendant correctly notes that it made no more than 5 calls on any given day and that more than 1.5 hours passed between each call. Doc. No. [15-6], p. 5, ¶ 12. Plaintiff disputes this latter assertion, noting that Defendant lists two allegedly outgoing calls that were just over thirty minutes apart. Doc. No. [17], p. 11; see also Doc. No. [15-6], p. 4. As Defendant explains, this was a typographical error and, in reality, at least 1.5 hours passed between each call. Doc. No. [21], pp. 1–4. The actual, undisputed call logs support Defendant's position. See Doc. No. [19-1], pp. 11–12.

Even so, the undisputed facts of this case preclude summary judgment. Given the pattern and sheer volume of calls–120 calls in just over two months—a reasonable jury could decide that Defendant violated § 1692d(5). While all of Defendant's calls were made between 8:30 AM and 8:00 PM, a few of the calls were made at an "unusual time," *i.e.* before 9:00 AM. See 15 U.S.C. § 1692c(a)(1). On several occasions, Defendant called Plaintiff three times in a span of less than five hours, which could lead a reasonable jury to find harassing conduct. Akalwadi, 336 F.Supp.2d at 506. The Court cannot say, as a matter of law, that Defendant did not violate § 1692d(5). The issue of whether Defendant's conduct harassed, oppressed, or abused Plaintiff is a question for the jury. See Jeter, 760 F.2d at 1179.

IV. CONCLUSION

*7 For the foregoing reasons, Plaintiff's Motion to Strike (Doc. No. [18]) is **DENIED**, and Defendant's Motion for Summary Judgment (Doc. No. [15]) is **GRANTED in part and DENIED in part**. Plaintiff's TCPA Claim is **DISMISSED**, but her FDCPA Claim will be allowed to proceed. Pursuant to N.D. Ga. Loc. R. 16.4(A), the parties are to submit a consolidated pretrial order within **30 days** from the date of this order.

IT IS SO ORDERED, this 22nd day of May, 2018.

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Footnotes

1 The Court will only "strike" pleadings as defined by Fed. R. Civ. P. 7(a)—*i.e.* complaints or answers—under the method of Fed. R. Civ. P. 12(f). Several other district courts in the Eleventh Circuit follow the same practice. See, e.g., Corey Airport Servs., Inc. v. City of Atlanta, 632 F. Supp. 2d 1246, 1267–68 (N.D. Ga. 2008) *rev'd on other grounds sub nom.* Corey Airport Servs., Inc. v. Decosta, 587 F.3d 1280 (11th Cir. 2009). In any event, the Court need not consider what relief could be granted, because Plaintiff's motion is due to be denied.

2 In her brief in response to the Motion for Summary Judgment, Plaintiff argues this fact is untrue. See Doc. No. [17], p. 11. Thus, even though she did not properly dispute the fact, the Court discusses her argument below. See N.D. Ga. Loc. R. 56.1(B)(2)(a)(2).

3 Section 227(b)(1)(A) also prohibits the use of "an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). Plaintiff briefly suggests that Defendant violated the TCPA by "using an ATDS and/or an artificial or prerecorded voice," but makes no arguments and offers no facts in support of the latter assertion. See Doc. No. [17], p. 9. The Court will not address an issue raised in such a cursory manner. See Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it.").

4 Because the request was not in writing, Defendant was not necessarily *required* to stop contacting Plaintiff. See 15 U.S.C. § 1692c(c). But the Court does not doubt that a debt collector can violate § 1692d by continuing to call a consumer after an oral request that the debt collector stop calling.

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