UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-80778-CIV-MARRA/REINHART

CHRISTINE SUAREZ, individually,
and CARLOS SUAREZ, individually,

Plaintiffs,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC.,
a foreign limited liability company,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause is before the Court upon Defendant's Renewed Motion for Summary Judgment (DE 110). The Motion is fully briefed and ripe for review. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

I. Background

A. Procedural History

On July 7, 2011, Plaintiffs Christine Suarez and Carlos Suarez (collectively, "Plaintiffs") filed their Complaint against Portfolio Recovery Associates, LLC ("Defendant"), alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. They claim Defendant made telephone calls to their cellular phones using an automatic telephone dialing system ("ATDS") and/or artificial or prerecorded voice without their express written consent. (DE 1.) On March 7, 2012, this matter was transferred by the Judicial Panel on Multidistrict Litigation ("JPML") to the Southern District of California ("MDL Court") for consolidated pretrial proceedings. (DE 26.) On July 5, 2023, the MDL Court granted

Defendant's Motion for Summary Judgment on the issue of whether Defendant used an ATDS. On August 16, 2023, the MDL Court clarified its judgment and noted that "any issues not before the Court were not included in the judgment and should be addressed by the courts handling the member cases upon remand." On January 4, 2023, the MDL Court entered a Conditional Remand Order returning this matter to this Court for further proceedings. This Court entered judgment in favor of Defendant on Plaintiffs' claims arising out of the alleged use of an ATDS. (DE 40.) Plaintiffs then filed an Amended Complaint alleging a violation of the TCPA based on Defendant's alleged use of an artificial or prerecorded voice when calling Plaintiffs' cellular telephone without Plaintiffs' prior express consent. (First. Am. Compl. ¶ ¶ 37-38, DE 44.) The Court previously granted in part Plaintiff Christine Suarez's[1] motion for summary judgment on the elements of consent and called party. The Court, however, denied summary judgment on the issue of whether an artificial or prerecorded voice was used and on the issue of willfulness. (DE 117.) Defendant now seeks summary judgment on those two grounds.

B. Factual Background

The facts, as culled from pleadings, affidavits, declarations, exhibits, and reasonably inferred in the light most favorable for the non-moving party, for the purposes of this motion, are as follows:

Defendant's evidence relies upon its software programs that maintains and tracks customer account information. Its software programs do not reflect that any prerecorded messages were left for Plaintiff. (DE 111.)

Ms. Suarez testified, however, that she received hundreds of calls from Defendant and, each time she answered, she heard a prerecorded message. (DE 114-2.)

[1] The only plaintiff who filed a motion for summary judgment was Christine Suarez.

According to Defendant, the record evidence shows, as a matter of law, that it never used an artificial or prerecorded message to contact Plaintiffs and did not act willfully. Defendant contends that Ms. Suarez's evidence of receiving such messages is speculative and unsubstantiated, making the evidence insufficient to defeat its motion for summary judgment.

Plaintiffs counter that Defendant's evidence is flawed and unreliable. Plaintiffs assert it is undisputed that Defendant made hundreds of telephone calls to Ms. Suarez during which she heard prerecorded messages.

In reply, Defendant states that Plaintiffs have not provided admissible evidence of artificial or prerecorded voice messages, and mere speculation cannot withstand summary judgment. Additionally, Plaintiffs have not effectively challenged Defendant's documents and testimony. Defendant further claims entitlement to summary judgment on willfulness, claiming that it does not bear the burden on this issue, and Plaintiffs have not presented evidence of intent.

II. Summary Judgment Standard

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the

absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325. When the nonmoving party bears the burden of proof on an issue, the moving party may discharge its burden by showing that the materials on file demonstrate that the party bearing the burden of proof at trial will not be able to meet its burden. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991).

After the movant has met its burden under Rule 56(a), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B).

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. 242, 249-50.

III. Discussion

The TCPA prohibits making any call using an artificial or prerecorded voice, except for calls made for an emergency purpose or with the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A). To establish a claim under the TCPA, a plaintiff must demonstrate that "(1) a call was made to a cell or wireless phone, (2) by the use of any automatic dialing system or an artificial or prerecorded voice, and (3) without prior express consent of the called party." *Johnson v. Cap. One Servs., LLC*, No. 18-CV-62058, 2019 WL 4536998, at *3 (S.D. Fla. Sept. 19, 2019) (internal citations omitted). The only remaining issue before the Court is whether Defendant used an artificial or prerecorded voice when calling Plaintiffs.

After careful consideration, the Court denies Defendant's motion for summary judgment. Defendant provides record evidence it claims demonstrates that it never used an artificial or prerecorded message to contact Plaintiffs. On the other hand, Ms. Suarez provides testimony that she received prerecorded messages. This dispute must be decided by a factfinder and is not a matter that can be resolved as a matter of law.

The Court disagrees with Defendant's argument that Ms. Suarez's testimony is inadequate to rebut Defendant's evidence. Federal Rule of Civil Procedure Rule 56(c)(4) provides:

> **Affidavits or Declarations**. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c)(4).

Moreover, "[a] non-conclusory affidavit which complies with Rule 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *United States v. Stein*, 881 F.3d 853, 858 (11th Cir. 2018) (en banc);

Open Sea Distribution Corp. v. Artemis Distribution, LLC, 692 F. Supp. 3d 1151, 1175 (M.D. Fla. 2023) (same). "[E]ven in the absence of collaborative evidence, a plaintiff's own testimony may be sufficient to withstand summary judgment." *Stein*, 881 F.3d at 858. Ms. Suarez's affidavit meets the Rule 56 requirements and serves to create a genuine issue of material fact. The Court rejects Defendant's assertion that the affidavit is based on speculation or conjecture.[2] Nor is the affidavit conclusory. Ms. Suarez testified she received these calls and explained what she heard when she answered the telephone calls.

This case is like *Barlow v. NewRez, LLC*, No. 8:20-CV-2451-KKM-AEP, 2022 WL 1619592 (M.D. Fla. Mar. 7, 2022). There, the plaintiff provided a sworn declaration stating he received hundreds of calls from the defendant, and 14 were made using a prerecorded message. The defendant argued that the plaintiff's statements were unsubstantiated and could not defeat summary judgment. The court held, however, that the sworn declaration of the use of prerecorded calls was enough to allow a reasonable jury to conclude the defendant used prerecorded calls to contact him. *Id.* at 8.

Defendant, however, attempts to distinguish this case on the basis that the *Barlow* defendant did not provide any documentary evidence of the absence of artificial or prerecorded messages. (DE 118 at 3.) [3] Assuming that to be true, it does not change the conclusion by this Court that the sworn declaration submitted here is adequate evidence to defeat summary judgment.[4]

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[2] As such, Defendant's cases that stand for the position that evidence cannot be speculative or conclusory are unpersuasive.

[3] This page number refers to the page number of the brief, and not the page number assigned by CM/ECF.

[4] Defendant relies on several cases that are not analogous: *SEC v. Antar*, 44 F. App'x 548 (3d Cir. 2002) addressed a situation where the nonmoving party tried to defeat summary judgment by asserting that a jury might disbelieve an opponent's affidavit. Here, Plaintiff is not asserting the jury might not believe Defendant's evidence but that there is a conflict between Defendant's evidence and Ms. Suarez's testimony. *Gaskins v. Wal-Mart Stores E., L.P.*, No.

Lastly, regarding the issue of willfulness, unresolved factual questions preclude a determination at the summary judgment stage. *See In re Smith*, 592 B.R. 390, 396 (Bankr. N.D. Ga. 2018) (declining to rule on willfulness under the TCPA at the summary judgment stage when "there has been no determination [the d]efendant violated the TCPA at all").[5]

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Renewed Motion for Summary Judgment (DE 110) is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm BFeach County, Florida, this 8th day of April, 2025.

KENNETH A. MARRA
United States District Judge

1:23-CV-613-MHC, 2024 WL 4005221 (N.D. Ga. July 15, 2024) concerns a personal injury case where the court explained that a plaintiff who seeks to create a question of fact as to the existence of a hazardous condition must offer evidence that the condition of the location where the slip occurred constituted an unreasonable risk of harm. *Id.* at * 4. Essentially, that court directed the plaintiff to provide evidence, which Ms. Suarez's affidavit accomplishes. Likewise, *Endurance Am. Specialty Ins. Co. v. United Constr. Eng'g, Inc.*, 786 F. App'x 195, 198 (11th Cir. 2019), simply states that summary judgment cannot be defeated by merely providing a denial unsupported by record evidence. Next, in *Johnson v. Cap. One Servs., LLC*, No. 18-CV-62058, 2019 WL 4536998 at *4-5 (S.D. Fla. Sept. 19, 2019), the court denied the defendant's motion for summary judgment, even though the defendant had call logs that supported the use of prerecorded messages because the plaintiff's testimony indicated she received at least 36 identical prerecorded messages. Lastly, *Dennis v. Reg'l Adjustment Bureau, Inc.*, No. 09-61494-CIV, 2010 WL 3359369, at * 3 (S.D. Fla. July 7, 2010) rejected the use of a plaintiff's testimony when the plaintiff simply stated that she "believed" a certain fact existed.

[5] Although not relevant for this analysis, Plaintiffs allege that some of Defendant's evidence was not previously disclosed to them. Defendant does not respond to this assertion, and the Court will address this issue at trial, if necessary.