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 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This cause is before the Court upon Plaintiff Christine Suarez's Motion for Summary Judgment (DE 61, 64). 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 ("Plaintiff")[1] 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

[1] Only Christine Suarez has filed this motion for summary judgment. Therefore, the Court will refer to her as "Plaintiff."

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.)

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:

At the time Defendant made the telephone calls, Plaintiff was the subscriber and sole user of the telephone number ***-***-0088, which she had used as her personal cellphone number for years. (Def. Opp.to Pl. SOF at ¶ ¶ 3-4, DE 80.) Defendant is a licensed debt collector in Florida, and regularly conducts collection of consumer debts. (*Id.* at ¶ 5.) Plaintiff neither provided her cellular number ending in -0088 to Defendant or to the original creditor, nor consented to receive prerecorded calls on her cellphone. (*Id.* at ¶ 8.)

When Plaintiff answered Defendant's telephone calls, she identified herself as Christine Suarez. (*Id.* at ¶ 11.) Between May 20, 2008 and September 1, 2011, Defendant placed a total of

344 calls to Plaintiff's cellphone. (*Id.* at ¶ 17.) Plaintiff did not give prior express consent to receive calls with artificial or prerecorded messages. (*Id.* at ¶19.)

Plaintiff moves for summary judgment on the following grounds: (1) Plaintiff is the "called party;" (2) Defendant violated the TCPA by making calls with prerecorded messages to Plaintiff's cellphone without her prior express consent and (3) Plaintiff is entitled to treble statutory damages.

Defendant responds that Plaintiff's unauthenticated audio recordings are inadmissible as evidence for summary judgment. Additionally, Defendant argues that its manuals and annual reports do not prove the use of artificial or prerecorded messages to contact Plaintiff. Lastly, Defendant claims that Plaintiff's Motion fails to address its affirmative defenses.

In reply, Plaintiff asserts that the audio recording can be made admissible at trial. Plaintiff further argues that Defendant's manuals and reports support the claim of Defendant using artificial or prerecorded messages to contact her. Additionally, Plaintiff contends that the affirmative defenses are adequately addressed.

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 Eleventh Circuit uses common law principles to determine whether a party gave or revoked their "prior express consent" to receive calls under the TCPA. *Lucoff v. Navient Sols., LLC*, 981 F.3d 1299, 1304 (11th Cir. 2020) (citing *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014)). Debt collectors must have prior express consent to place prerecorded calls to cellphone numbers.

Plaintiff relies upon actual recordings of voicemail messages allegedly captured on her cellphone. She argues the identical nature of all messages confirms they are prerecorded. (Mot. at 9.) Plaintiff also relies on Defendant's training and instruction manuals, asserting that these documents confirm the use of prerecorded messages. (*Id.* at 10.) Plaintiff further claims that the dialers used by Defendant have the capacity to play a recorded message when voicemail is detected. (*Id.* at 11.) Plaintiff further notes that Defendant's policy of not making daily calls in certain states, where automated messages could not be left, further evidences the use of prerecorded messages. (*Id.*)

The conclusion Plaintiff draws from the evidence upon which she relies is one that must be made by the trier of fact. Different reasonable inferences can drawn from this evidence, rendering the ultimate question inappropriate for summary judgment. Thus, the Court cannot

find, as a matter of law, that Defendant used an artificial or prerecorded voice when calling Plaintiff. Other courts have similarly rejected such evidence at the summary judgment stage. *See Johnson*, 2019 WL 4536998, at * 4 (a plaintiff's statement that there was a noticeable pause before calls connected is insufficient to create a genuine issue of material fact) (quoting *Martin v. Allied Interstate, LLC*, 192 F. Supp. 3d 1296, 1308 (S.D. Fla. 2016) ("Courts have routinely rejected similar claims by plaintiffs who try to maintain a TCPA claim on the belief that a[prerecorded message] was used based on 'clicks,' 'delays,' or 'dead air' on the other end of the line.")); *Brown v. Credit Mgmt., LP*, 131 F. Supp. 3d 1332, 1345 (N.D. Ga. 2015) (denying summary judgment in part when there does not appear to definitive evidence that the defendant used a predictive dialer to place its calls to the plaintiff)

Notably, Defendant has not disputed that Plaintiff did not consent to the alleged calls or that Plaintiff was the "called party." Consequently, the Court will grant summary judgment in favor of Plaintiff on these issues.

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").

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Christine Suarez's Motion for Summary Judgment (DE 61, 64) is **GRANTED IN PART AS TO THE ELEMENTS OF CONSENT AND CALLED PARTY. THE MOTION IS DENIED IN**

ALL OTHER RESPECTS.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 14th day of March, 2025.

KENNETH A. MARRA
United States District Judge