

2021 WL 3088011

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United States District Court, C.D. California.

Jermaine STEWART
v.
NETWORK CAPITAL FUNDING
CORPORATION, et al.

Case No. CV 21-368-MWF (MAAx)

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Filed 07/16/2021

Attorneys and Law Firms

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Proceedings (In Chambers): ORDER RE: MOTION TO DISMISS CASE [16]; DEFENDANT'S EX PARTE APPLICATION FOR LEAVE TO FILE RESPONSE TO PLAINTIFF'S SUPPLEMENTAL DECLARATION [27]

[MICHAEL W. FITZGERALD](#), U.S. District Judge

*1 Before the Court are two requests:

The first is Defendant Network Capital Funding Corporation's ("NCFC") Motion to Dismiss (the "Motion"), filed on May 26, 2021. (Docket No. 16). Plaintiff Jermaine Stewart filed an opposition on June 7, 2021. (Docket No. 18). NCFC filed a reply on June 14, 2021. (Docket No. 19).

The second is NCFC's Ex Parte Application for Leave to File Response to Plaintiff's Supplemental Declaration (the "Application"), filed on July 14, 2021. (Docket No. 27). Plaintiff filed an opposition to the Application on July 15, 2021. (Docket No. 28).

The Court has read and considered the papers filed in connection with the Motion and held a telephonic hearing

on June 28, 2021, pursuant to General Order 21-08 arising from the COVID-19 pandemic. The Court has also read and considered the papers filed in connection with the Application.

For the reasons stated below, the Motion is **GRANTED**. The First Amended Complaint ("FAC") alleges four claims for relief on behalf of a putative class, asserting negligent and willful violations of the Telephone Consumer Protection Act, [47 U.S.C. § 227 et seq.](#) ("TCPA"). Two claims allege that Defendant negligently and willfully violated the TCPA by making unauthorized telemarketing phone calls through the use of an automatic telephone dialing system (the "ATDS" claims). (FAC ¶¶ 37-44). The other two claims allege that Defendant negligently and willfully violated the TCPA's internal do-not-call provisions (the "do-not-call" claims). (*Id.* ¶¶ 45-52).

The do-not-call claims are **DISMISSED without prejudice** for lack of subject matter jurisdiction. Plaintiff lacks standing because he did not clearly express a desire to stop receiving calls from NCFC. As permitted on a jurisdictional challenge, the Court has considered evidence extrinsic to the First Amended Complaint that, in fact, is the entirety of the pertinent evidence. [Fed. R. Civ. P. 12\(b\)\(1\)](#).

The ATDS claims are **DISMISSED** for failure to state a claim. [Fed. R. Civ. P. 12\(b\)\(6\)](#). Plaintiff has failed to allege sufficient facts to state plausible ATDS claims. Plaintiff will have an opportunity to amend his ATDS claims to allege additional facts. However, Plaintiff is warned that any future successful motion to dismiss will be granted **without** leave to amend.

The Court incorporates by reference as if set forth fully herein the background and discussion sections in its prior Order directing Plaintiff to file a supplemental declaration (the "Prior Order"). (Docket No. 25).

I. DISCUSSION

A. Do-Not-Call Claims

In the Prior Order, the Court determined that Plaintiff must have requested to be placed on NCFC's do-not-call list in order to have standing to bring his internal do-not-call claims under the TCPA. (Prior Order at 5). At the hearing, Plaintiff argued that the factual dispute boils down to one recorded phone call ("Exhibit A") between Plaintiff and a NCFC representative, since the rest of the recorded calls went

unanswered or to voicemail. (*Id.* at 7). Because it was unclear to the Court whether Plaintiff was contending that he made his do-not-call request during the Exhibit A call, and at no other time before or after this call, the Court directed Plaintiff to clarify this issue in a supplemental declaration. (*Id.*)

*2 Plaintiff filed his supplemental declaration on July 12, 2021 (“Stewart Decl.”). (Docket No. 26). Plaintiff clarifies that Exhibit A is, in fact, the call in which he purportedly made his do-not-call request to a NCFC representative. (Stewart Decl. ¶¶ 6-9). During the call, the NCFC representative stated: “This is James on a recording line with Network Capital. We’re just reaching out because we’re giving everybody free quotes on their mortgages.” (*Id.* ¶ 7). Plaintiff responded that he did not have a house, and the NCFC representative apologized before ending the call. (*Id.* ¶ 8).

NCFC filed the Application seeking to respond to Plaintiff’s Declaration and provide legal authorities determining that a statement expressing disinterest in a defendant’s services does not suffice as a request to be placed on that defendant’s do-not-call list. (Application at 2-3). The Application is **GRANTED**.

Although it is not a standing case, *Mattson v. Quicken Loans Inc.* is instructive. 3:18-CV-00989-YY, 2019 WL 7630856, at *7 (D. Or. Nov. 7, 2019), report and recommendation adopted, No. 3:18-CV-00989-YY, 2020 WL 6365506 (D. Or. Sept. 2, 2020). In *Mattson*, the plaintiff brought a do-not-call claim alleging that he continued to receive calls from Quicken Loans after telling a Quicken Loans representative that he was “not interested.” *Id.*, at *7. The court determined that the plaintiff’s expression of disinterest “did not ‘clearly express his desire’ not to receive further calls from Quicken Loans.” *Id.* (quoting *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017)). Because there was no evidence that the plaintiff had made “a legally sufficient request not to be called,” his do-not-call claim failed. *Id.* (granting summary judgment in favor of Quicken Loans).

The Court agrees with persuasive reasoning of *Mattson*. Plaintiff’s statement that he did not have a house, at best, expressed disinterest in NCFC’s services; it fell short of “clearly express[ing]” his desire not to receive additional calls from NCFC. Because Plaintiff has failed to establish that he clearly expressed his desire not to receive further calls from NCFC, he lacks standing to bring do-not-call claims under the TPCA.

Counsel also argued that the recording of the call was garbled or indistinct at one point, implicitly arguing that Plaintiff’s statement occurred at that point. Rather, the recording is clear and all of Plaintiff’s comments are intelligible. Based on the recording, the Court **FINDS** that Plaintiff did not make any do-not-call request during the recording call, which admittedly was his only opportunity to do so. Therefore, there is no evidentiary basis whatsoever from which to find standing.

Accordingly, the Motion with respect to Plaintiff’s do-not-call claims is **GRANTED**. The do-not-call claims (the Third and Fourth Claims for Relief) are **DISMISSED without prejudice** for lack of subject matter jurisdiction.

B. ATDS Claims

Plaintiff also alleges that NCFC used an ATDS to call Plaintiff without authorization. (FAC ¶ 9). NCFC asserts that the ATDS claims must be dismissed because the FAC merely recites legal conclusions, pleading no facts plausibly showing that NCFC’s dialing equipment employed or used a random or sequential number generator in placing the complained-of calls. (Motion at 9-13).

The Court agrees. The FAC includes no facts to plausibly establish that NCFC used an ATDS. Plaintiff did not allege indicia of ATDS use by, for example, showing the identical, repetitive, or impersonal nature of the calls. See *Montanez v. Future Vision Brain Bank, LLC*, No. 20-CV-02959-CMA-MEH, — F.Supp.3d —, —, 2021 WL 1697928, at *8 (D. Colo. Apr. 29, 2021) (denying Rule 12(b)(6) motion to dismiss ATDS claim where the plaintiff alleged “no human involvement in Defendant’s use of a system capable of sending thousands of generic and commercial text messages”).

*3 Accordingly, the Motion with respect to the ATDS claims (the First and Second Claims for Relief) is **GRANTED**. Because it is not clear that amendment would be futile, the Motion is granted with *leave to amend*.

II. CONCLUSION

For the reasons stated above, the Application is **GRANTED**.

The Motion is also **GRANTED**. The Motion with respect to the do-not-call claims is **GRANTED without leave to amend**. Plaintiff’s do-not-call claims are **DISMISSED**

without prejudice. The Motion with respect to the ATDS claims is **GRANTED with leave to amend**.

Plaintiff shall file his Second Amended Complaint (“SAC”) on or before **August 9, 2021**. Defendant must respond to the SAC on or before **August 23, 2021**. The SAC shall not include a do-not-call claim, but only amended ATDS claims. Failure to file the SAC on or before August 9, 2021, will result in the dismissal of the action. Plaintiff is warned that any

future successful motion to dismiss will be granted *without* leave to amend.

IT IS SO ORDERED.

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