2023 WL 6053742
Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, El Paso Division.

Erik SALAIZ, Plaintiff,
v.
BEYOND FINANCE, LLC, Defendant.

Cause No. EP-23-CV-6-KC
|
Signed September 18, 2023

**Attorneys and Law Firms**

Erik Salaiz, El Paso, TX, Pro Se.

Eric S. Silvestri, Chapman and Cutler LLP, Chicago, IL, Shelly W. Rivas, Kemp Smith LLP, El Paso, TX, for Defendant.

**ORDER**

Kathleen Cardone, Judge

***1** On this day, the Court considered Defendant's Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss"), ECF No. 12, and Plaintiff's Motion for Leave to Amend the First Amended Complaint ("Motion to Amend"), ECF No. 16. For the reasons discussed herein, Defendant's Motion to Dismiss is **DENIED**, and Plaintiff's Motion to Amend is **GRANTED**.

## I. BACKGROUND [1]

This case concerns alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Plaintiff alleges Defendant hired telemarketers to unlawfully solicit him, calling his cell phone at least thirteen times between April 22, 2022, and August 19, 2022. 1st Am. Compl. ("FAC") ¶ 65 Table A, ECF No. 10. When Plaintiff answered each phone call, [2] he talked to telemarketers from a company named "American Debt Relief" who solicited debt-relief services. FAC ¶¶ 39, 51–52, 65. These calls were not personalized to Plaintiff, but rather targeted "anyone in the United States." FAC ¶ 44. All phone calls were made using a "spoofed" phone number that had a local area code. FAC ¶¶ 40–42. Plaintiff did not have a connection to the telemarketers making the calls or to Defendant, and he did not know who Defendant was prior to receiving the calls. FAC ¶ 46.

When he received the first twelve calls, Plaintiff answered and told the telemarketers he was not interested in debt-relief services. FAC ¶ 65 Table A. On the thirteenth call, annoyed over the repeated calls, Plaintiff talked with a telemarketer and feigned interest in the debt-relief services. FAC ¶ 52. The telemarketer told him he was "pre-qualified for a debt relief program," FAC ¶ 51, collected Plaintiff's personal and financial information, FAC ¶ 53, and then transferred Plaintiff and his personal information to a loan specialist, FAC ¶¶ 54, 56–57. The loan specialist accepted the transfer from the telemarketer and solicited specific debt-relief services to Plaintiff. FAC ¶¶ 59–63. The specialist then sent Plaintiff two follow-up emails, which revealed that the specialist was employed by Defendant. FAC ¶ 64.

Plaintiff filed the FAC on March 6, 2023, claiming that Defendant violated the TCPA's restriction on the use of automated calling equipment, the TCPA's restriction on calling consumers listed on the National Do-Not-Call Registry, the Federal Communication Commission's ("FCC") minimum standards for telemarketers, and two telemarketing provisions of the Texas Business and Commerce Code. FAC ¶¶ 115–136. On March 20, 2023, Defendant filed its Motion to Dismiss, requesting the Court dismiss the FAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed a Response ("Plaintiff's Response"), ECF No. 15, along with the Motion to Amend. Defendant then filed a Reply, ECF No. 20, along with a Response in Opposition to Plaintiff's Motion to Amend ("Defendant's Response"), ECF No. 21.

## II. DISCUSSION

### A. Standard

***2** A motion to dismiss pursuant to Rule 12(b)(6) challenges a complaint on the basis that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, a "court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir. 2002); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Though a complaint need not contain detailed factual allegations, it must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works. 

248, 252 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (cleaned up); *Colony Ins. Co.*, 647 F.3d at 252. Ultimately, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). Nevertheless, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The Court holds pro se pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981)). Nevertheless, pro se litigants must set forth either "direct allegations on every material point necessary to sustain a recovery" or "allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2d ed. 1986)).

### B. Analysis

In the Motion to Dismiss, Defendant argues that Plaintiff has failed to properly state all five of his claims. Mot. to Dismiss 1. Defendant's arguments are unavailing.

#### 1. Plaintiff has sufficiently alleged Defendant violated § 227(b)(1)(A) by hiring telemarketers who used an automated telephone dialing system to solicit Plaintiff.

Plaintiff claims Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii) at least thirteen times by hiring telemarketers to call Plaintiff's cell phone using an automatic telephone dialing system ("ATDS") without Plaintiff's express, written consent. FAC ¶ 116. Plaintiff claims Defendant is liable for the calls because, after Plaintiff eventually showed interest in debt-relief services, the telemarketers connected him to Defendant. FAC ¶¶ 48–64. Defendant argues this claim should be dismissed because (1) Plaintiff has not sufficiently alleged an ATDS was used to make those calls, Mot. to Dismiss 4–5, and (2) Plaintiff has not sufficiently alleged Defendant is vicariously liable for the telemarketers' actions, *id.* 6–9.

#### a. Plaintiff sufficiently alleges the telemarketers used an ATDS.

Section 227(b) prohibits calling "any telephone number assigned to a ... cellular telephone service" using an ATDS absent the "express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is any equipment that can "store or produce telephone numbers to be called, using a random or sequential number generator," and that is also capable of dialing such numbers. *Id.* § 227(a)(1)(A)–(B); *see Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169–73 (2021) (holding that to qualify as an ATDS under § 227 an autodialer must use "a random or sequential number generator to either store or produce phone numbers to be called").

***3** Defendant argues the § 227(b) claim should be dismissed because Plaintiff has not sufficiently alleged that the calls were made using an ATDS. Mot. to Dismiss 3–6; Reply 2–3. Defendant only cites a single case to briefly argue the claim must be dismissed because Plaintiff failed to plead "key details of each call allegedly made by" Defendant. Mot. to Dismiss 4 (citing *Cunningham v. TechStorm, LLC*, No. 3:16-CV-2879-M, 2017 WL 721079, at *2 (N.D. Tex. Feb. 23, 2017)). Defendant's reliance on this case is unpersuasive because *Cunningham* only ruled that the "key details" plaintiffs should plead to survive motions to dismiss include "the approximate number of offending calls or approximate date they were received." *Cunningham*, 2017 WL 721079, at *2. Plaintiff has made such factual allegations: he provided the date and time at which he received all thirteen calls and stated what transpired in each call. *See* Compl. ¶ 65 Table A.

Defendant provides no authority for its proposition that *Cunningham*'s "key details" requirement impugns the sufficiency of Plaintiff's allegations that the calls were made with an ATDS. *See* Mot. to Dismiss 4. Indeed, Plaintiff has pled specific facts indicating that the calls he received were made using an ATDS. Plaintiff alleges the thirteen calls all came from the same "spoofed" number, FAC ¶¶ 40, 42, they all solicited debt-relief services, FAC ¶ 39, and the solicited services did not target Plaintiff individually but rather targeted

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works. 

"anyone in the United States." FAC ¶ 44. Plaintiff further alleges the debt-relief services were not personalized to him, but rather were "in the abstract." FAC ¶ 96. And Plaintiff alleges he did not have "an established business relationship" with Defendant and did not know anything about Defendant prior to the calls. FAC ¶ 46. For these reasons, Plaintiff believes the telemarketers used an ATDS to generate leads for Defendant's debt relief services. FAC ¶ 30.

Courts in this district have frequently denied motions to dismiss TCPA claims making similar allegations. *See, e.g., Callier v. Jumpstart Fin., LLC*, No. EP-22-CV-00399-FM, 2023 WL 4155421, at *4 (W. D. Tex. Apr. 13, 2023) (finding sufficient the plaintiff's allegations that he had never done business with the defendants and had not given them his number, and the caller was soliciting "general debt elimination services, for which he was not pre-qualified"); *Callier v. Multiplan, Inc.*, EP-20-CV-00318-FM, 2021 WL 8053527, at *1–2, 17–18 (W.D. Tex. Aug. 16, 2021) (finding sufficient the plaintiff's allegations that he had received nine calls from a spoofed number, had not consented to the calls, had no prior relationship with the defendants, and the calls followed a prerecorded script); *Libby v. Nat'l Republican Senatorial Comm.*, 551 F. Supp. 3d 724, 728–29 (W.D. Tex. 2021) (finding sufficient the plaintiff's allegation that the defendant was using an ATDS because he had received "generic and obviously prewritten" text messages); *Atkinson v. Pro Custom Solar LCC*, No. SA-21-CV-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16, 2021) (finding sufficient the plaintiff's bare allegation that the defendant had called and texted her using an ATDS). Although the FAC does not allege common indicia of ATDS-use, such as dead airtime or a beep, courts have repeatedly found that plaintiffs do not need to allege any such "badges" of "ATDS-use to survive a motion to dismiss." *Jumpstart Fin.*, 2023 WL 4155421, at *4. Plaintiff has alleged Defendant's telemarketers repeatedly called him using a spoofed number and solicited generic debt-relief services to Plaintiff, even though Plaintiff had not interacted with Defendant beforehand. This suffices to state a claim under § 227(b)(1)(A)(iii). [3]

**b. Plaintiff has alleged facts showing an agency relationship between Defendant and the telemarketers.**

***4** Defendant's second argument is that Plaintiff has failed to state a claim under § 227(b)(1)(A) because he has not adequately alleged the telemarketers were acting as Defendant's agents and therefore Defendant is not vicariously liable for the telemarketers' actions. Mot. to Dismiss 6. Specifically, Defendant argues Plaintiff has not adequately alleged the telemarketers had actual or apparent authority to act on Defendant's behalf when soliciting Plaintiff, Mot. 6–8, nor that Defendant ratified the telemarketers' actions, Mot. 8–9.

Although § 227 broadly applies to "any person" who makes a call that violates the TCPA, 47 U.S.C. § 227(b)(1), it does not explicitly authorize vicarious ability. The FCC, the agency charged with implementing the Act, has clarified that the TCPA allows sellers to "be held vicariously liable under federal common law principles of agency" for the acts of telemarketers they have hired. *In re Joint Pet. Filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6574 (2013); *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016) (finding "no cause to question" the FCC's decision on this matter). A seller may be held vicariously liable for the actions of a telemarketer if it gave "apparent (if not actual) authority" to the telemarketer to take those actions. *In re Joint Pet. Filed by Dish Network, LLC*, 28 FCC Rcd. at 6586. This "apparent authority can arise in multiple ways, and does *not* require that" the seller affirmatively authorized the telemarketer to take unlawful actions. *Id.* at 6586 n.2. Similarly, a seller can be liable for the unlawful acts of a telemarketer if it "ratifies those acts by knowingly accepting their benefits." *Id.* at 6587. At the pleadings stage, the FCC has emphasized that a plaintiff is not required "to prove at the time of their complaint (rather than reasonably allege) that a call was made on the seller's behalf." *Id.* at 6593 n.139.

Here, Plaintiff has alleged the telemarketers called him thirteen times from the same number, always soliciting debt-relief services but never identifying what company they were affiliated with. FAC ¶¶ 39, 45. For the first twelve calls, Plaintiff told the telemarketers he was not interested. FAC ¶ 65 Table A. On the thirteenth call, Plaintiff played along and told the telemarketer he was interested in debt-relief services, at which point the telemarketer collected Plaintiff's financial and personal information and transferred him to a loan specialist. FAC ¶¶ 52–54, 56. Plaintiff alleges the telemarketer also sent his personal information directly to that loan specialist. FAC ¶ 57. After talking with Plaintiff, the loan specialist sent him two follow-up emails, revealing that the specialist was employed by Defendant. FAC ¶ 64. Plaintiff alleges Defendant knew the telemarketers were violating the TCPA as a sales strategy, FAC ¶ 67, and nonetheless compensated the telemarketers for client referrals, FAC ¶ 69.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works. 

These allegations allow the Court "to draw the reasonable inference," *Iqbal*, 556 U.S. at 678, that there was an agency relationship between Defendant and the telemarketers. The telemarketers called Plaintiff thirteen times, and the one time he engaged with them and investigated the debt-relief services being solicited, he was connected to Defendant's loan specialist. Taking Plaintiff's allegations as true, they create a reasonable inference that the telemarketers were authorized by Defendant to find clients for it—i.e., the telemarketers plausibly had actual authority to market Defendant's products. *See, e.g., Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 660–61 (4th Cir. 2019) (finding the defendant was liable for TCPA violations committed by telemarketers it had hired); *MultiPlan, Inc.*, 2021 WL 8053527, at *15 (finding allegations that a defendant had authorized telemarketers to generate prospective customers warranted a reasonable inference of the existence of an agency relationship); *Cunningham v. Politi*, No. 4:18-CV-00362-ALM-CAN, 2019 WL 2519568, at *7 (E.D. Tex. Apr. 30, 2019) (finding allegations that the plaintiff had received a call from a telemarketer who then connected plaintiff to the defendant company plausibly showed an agency relationship existed), *adopted by* No. 4:18-CV-362, 2019 WL 2524736, at *1 (E.D. Tex. June 19, 2019). The Court finds Plaintiff has sufficiently alleged the telemarketers were acting as Defendant's agents.

***5** Therefore, the Motion to Dismiss is denied with respect to the § 227(b)(1)(A) claim.

**2. Plaintiff has plausibly alleged Defendant is vicariously liable for the telemarketers' violations of FCC regulations.**

Next, Plaintiff claims Defendant violated multiple provisions of 47 C.F.R. § 64.1200(d), promulgated by the FCC pursuant to § 227(c)(2), which prohibits a person or entity from initiating "any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive such calls made by or on behalf of that person or entity." FAC ¶¶ 125–28. Defendant's sole argument about this claim is it should be dismissed because Plaintiff has not alleged that Defendant called him but rather that telemarketers called him. Mot. to Dismiss 9. This argument fails because a telemarketer's violation of regulations promulgated under § 227(c) can be vicariously imputed to the seller who hired a telemarketer. *See In re Joint Pet. Filed by Dish Network*, 28 FCC Rcd. at 6584. As described above, Plaintiff has plausibly alleged the telemarketers here acted as Defendant's agent when soliciting Defendant's debt-relief services. Therefore, the Motion to Dismiss is denied with respect to Plaintiff's claim under § 64.1200(d).

Plaintiff also claims Defendant violated another regulation promulgated under § 227(c), 47 C.F.R. § 64.1200(c)(2), which prohibits telephone solicitations to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." FAC ¶¶ 120–24. Defendant does not make any specific arguments about why this claim should be dismissed. *See generally* Mot. to Dismiss; Reply. As such, the Motion to Dismiss is denied with respect to Plaintiff's claims under § 64.1200(c)(2).

**3. Plaintiff has plausibly alleged violations of Texas law.**

Plaintiff also makes several claims under Texas law, including that (1) Defendant violated section 305.053 of the Texas Business and Commerce Code, which authorizes any person who received "a communication that violates" the TCPA to recover damages, FAC ¶ 130, and (2) Defendant committed ten violations of section 302.101 of the Code, which requires any seller soliciting products in Texas to hold a current "registration certificate for the business location from which the telephone solicitation is made," FAC ¶ 135. Defendant argues the Court should dismiss both claims.

First, Defendant asserts that Plaintiff's claim under section 305.053 fails because liability under that statute is predicated upon Defendant violating the TCPA, and Defendant maintains Plaintiff has not stated a claim under the TCPA. Mot. to Dismiss 9–10. Because the Court finds that Plaintiff has sufficiently alleged Defendant violated multiple provisions of the TCPA, Defendant's argument necessarily fails. The Motion to Dismiss is denied with respect to Plaintiff's claim under section 305.053.

Second, Defendant argues that Plaintiff has not stated a claim for violations of section 302.101 because the telemarketers —rather than Defendant—called Plaintiff and, regardless, an online search of registration records "clearly reveals that [Defendant] is registered." Mot. to Dismiss 10. Section 302.101 prohibits sellers from making telephone solicitations in Texas without first filing a registration certificate for the business from which a solicitation is made. The Code further provides that "a person makes a telephone solicitation if the

 © 2023 Thomson Reuters. No claim to original U.S. Government Works. 

person *effects or attempts to effect* a telephone solicitation." Tex. Bus. & Com. Code § 302.002 (emphasis added). Pursuant to this plain language—and mindful that the Code should "be liberally construed and applied to promote its underlying purpose to protect persons," Tex. Bus. & Com. Code § 302.003—the Court finds Plaintiff has plausibly alleged that Defendant effected or attempted to effect the thirteen calls Plaintiff received by hiring telemarketers to make those calls. *See Johnson v. Palmer Admin. Servs., Inc.*, No. 6:22-CV-121-JCB-KNM, 2022 WL 17546957, at *9 (E.D. Tex. Oct. 20, 2022) (finding the defendant could be vicariously liable for telemarketer's violations of section 302.101); *MultiPlan, Inc.*, 2021 WL 8053527, at *19 (same).

***6** Finally, Defendant argues that it *was* properly registered to make telephone solicitations under section 302.101, despite Plaintiff's allegations to the contrary. Mot. to Dismiss 10. This argument is inappropriate in the context of a motion to dismiss, where the Court must accept Plaintiff's well-pleaded facts as true. *Calhoun*, 312 F.3d at 733. Plaintiff alleges that during ten of the thirteen telephone solicitations he received, Defendant did not have a registration certificate. FAC ¶ 71. Plaintiff provided the results of a search query showing Defendant was registered for two time periods: January 29, 2020, through January 29, 2021, and June 1, 2022, through June 1, 2023. FAC Ex. C. Plaintiff also specified the date that he received each phone call. FAC ¶ 65 Table A. Comparing these dates with the search query results corroborates the allegation that Defendant did not have a registration certificate at the time of ten of the thirteen calls. *See id.* Therefore, Plaintiff has sufficiently alleged Defendant violated section 302.101. Defendant's contrary evidence may be considered at summary judgment, but not at this stage. *Calhoun*, 312 F.3d at 733. The Motion to Dismiss is denied with respect to Plaintiff's claim under section 302.101.

### III. MOTION TO AMEND

In his Motion to Amend, Plaintiff requests permission to file a Second Amended Complaint that incorporates "new facts" relevant to his claims against Defendant. Mot. to Amend 1–2. Defendant opposes the Motion to Amend, arguing that it cannot properly be granted while the Motion to Dismiss is pending and it also does not cure the deficiencies outlined within the Motion to Dismiss. Def.'s Resp. 2. As explained above, the allegations in the FAC raise plausible claims for relief; thus, amendment is not necessary to cure any deficiencies. But Plaintiff filed the Motion to Amend before a scheduling order was issued, so the Court's consideration of the motion is guided by the permissive standard in Federal Rule of Civil Procedure 15(a)(2), instructing that leave to amend should be given "when justice so requires." *See, e.g., T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 418 (5th Cir. 2021). Defendant has not shown that allowing the amendment would cause it injustice, and the Second Amended Complaint provides additional details that further dispel Defendant's concerns about the sufficiency of Plaintiff's allegations, as discussed *supra* in footnote 3. Therefore, Plaintiff's Motion for Leave to Amend is granted.

### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss, ECF No. 12, is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion to Amend, ECF No. 16, is **GRANTED.**

**IT IS FURTHER ORDERED** that Defendant shall **FILE** an answer or otherwise respond to Plaintiff's Second Amended Complaint **on or before October 2, 2023**.

**SO ORDERED.**

**All Citations**

Slip Copy, 2023 WL 6053742

## Footnotes

1 All facts described in this Section are taken as true from the allegations in Plaintiff's Complaint. *See Arnold v. Williams*, 979 F.3d 262, 265 n.1 (5th Cir. 2020).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works. 

2 Plaintiff uses his cell phone for personal, family, navigational, informational, and household uses. FAC ¶ 114. Plaintiff's cell phone line is registered in his name, and he maintains no residential landline. *Id.* The phone number has been on the National "Do-Not-Call Registry" since August 19, 2021. FAC ¶ 23.

3 In Plaintiff's proposed Second Amended Complaint, he further alleges that (1) when he answered the calls there was a "pause and beep" before he was greeted by a telemarketer, 2d Am. Compl. ¶¶ 41, 43, ECF No. 16-1; (2) the telemarketer's statement that Plaintiff had "pre-qualified" for a debt-relief program was part of a script, *id.* ¶ 47; and (3) the telemarketer did not know Plaintiff's name, *id.* ¶ 48. These allegations, if assumed to be true, add further support for Plaintiff's ATDS claim. *See, e.g., Callier v. McCarthy Law, PLC*, EP-21-CV-15-DCG-ATB, 2021 WL 6010595, at *3 (W.D. Tex. Dec. 20, 2021) (finding allegations that the plaintiff heard a pause and a beep when answering phone calls created a reasonable inference that the calls were made using an ATDS), *adopted by* No. EP-21-CV-15-DCG, 2022 WL 1098843, at *1 (W.D. Tex. Jan. 12, 2022); *Callier v. GreenSky, Inc.*, No. EP-20-CV-304-KC, 2021 WL 2688622, at *5 (W.D. Tex. May 10, 2021) (finding adequate the plaintiff's allegations that he heard a seconds-long pause after he answered phone calls and that call agents followed a script).

**End of Document**

© 2023 Thomson Reuters. No claim to original U.S. Government Works.