UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANGELA MORGAN,

Plaintiff,

v. **Case No: 6:17-cv-1972-Orl-41GJK**

ORLANDO HEALTH, INC., G&G ORGANIZATION, LTD and RMB, INC.,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendant G&G Organization, Ltd.'s ("G&G") Motion for Summary Judgment (Doc. 194), Defendant RMB, Inc.'s ("RMB") Motion for Summary Judgment (Doc. 196), Defendant Orlando Health, Inc.'s ("Orlando Health") Motion for Summary Judgment (Doc. 197) (collectively, "Motions"), and all of the Responses (Doc. Nos. 220, 221, 222)[1] and Replies (Doc. Nos. 216, 217) thereto. As set forth below, the Motions will be denied.

I. BACKGROUND

On or about November 19, 2016, non-party Maria R. consented to Orlando Health contacting her at a phone number ending in 2301 ("the 2301 Number"). (Farrell Decl., Doc. 197-1, ¶ 27). Plaintiff maintains that she was assigned the 2301 Number in August 2016. (Pl. Dep., Doc. 197-3, at 49:1–7). Regardless of the timing of Maria R.'s consent and Plaintiff's reassignment

[1] Plaintiff's Responses are filed under seal. Redacted versions of the responses were also filed on the docket. (Doc. Nos. 203, 204, 205).

of the 2301 Number, the parties do not dispute that Plaintiff was the cellular phone subscriber to the 2301 Number during the relevant timeframe.

Orlando Health referred Maria R.'s account to G&G, which handled billing and payment services for Orlando Health, (Brodman Decl., Doc. 178-2, ¶¶ 2, 4, 7), and then to RMB, which handled accounts receivable and delinquent account recovery for Orlando Health, (Meyers Decl., Doc. 178-3, ¶¶ 8, 10). Between February 3, 2017, and April 5, 2017, G&G placed nine calls to the 2301 Number; the first eight were unanswered. (Doc. 178-2 ¶¶ 7–8). On the ninth call, Plaintiff answered and informed G&G that it had the wrong number. (*Id.* ¶ 8). G&G immediately stopped placing calls to the 2301 Number. (*Id.*). RMB placed two calls to the 2301 Number. (Doc. 197-1 ¶ 32). Once RMB learned that the 2301 Number no longer belonged to Maria R., it also ceased calling the number. (*Id.* ¶ 33).

Plaintiff now asserts claims against Defendants for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. Defendants move for summary judgment on all claims.

II. SUMMARY JUDGMENT STANDARD

"The court shall 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). In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). However, when faced with a "properly supported motion for summary judgment," the nonmoving party "must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997).

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Essentially, the inquiry is 'whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Sawyer v. Sw. Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (D. Kan. 2003) (quoting *Anderson*, 477 U.S. at 251–52); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.").

III. ANALYSIS

The TCPA makes it "unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii). It is undisputed that G&G and RMB made calls on Orlando Health's behalf to Plaintiff's cellular phone via the 2301 Number. For purposes of this Order, Defendants are also not disputing the use of a prerecorded voice[2] and that they did not receive Plaintiff's express consent for such calls. But, Defendants argue that they still are not liable under the TCPA because they received the express consent from Maria R. to make those calls.

A. *ACA International* and Reasonable Reliance

[2] G&G disputes the use of an automatic telephone dialing system. (Doc. 194 at 8 n.6). Whether G&G used such a system is irrelevant for purposes of this Order.

The parties' primary argument in this regard involves *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018). In 2015, the Federal Communications Commission ("FCC") issued a Declaratory Ruling and Order, addressing twenty-one separate petitions for rulemaking or requests for clarification. *Id.* at 693; *see also generally In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015) (hereinafter "*2015 Declaratory Ruling*"). As applicable here, the FCC "determined that the term 'called party' refers not to 'the intended recipient of a call' but instead to 'the current subscriber' (i.e., the current, nonconsenting holder of a reassigned number rather than a consenting party who previously held the number)." *ACA Int'l*, 885 F.3d at 694 (quoting *2015 Declaratory Ruling*, 30 FCC Rcd. at 7999). "But the [FCC] did not hold a caller strictly liable when unaware that the consenting party's number has been reassigned to another person. Instead, the agency allowed one—and only one—liability-free, post-reassignment call for callers who lack 'knowledge of [the] reassignment' and possess 'a reasonable basis to believe that they have valid consent.'" *Id.* (second alteration in original) (quoting *2015 Declaratory Ruling*, 30 FCC Rcd. at 8000).

The *ACA International* Court held that this one-call, post-reassignment safe harbor was arbitrary and capricious. *Id.* at 705. In doing so, the court did not take issue with the FCC's interpretation of "called party" as meaning "current subscriber." *See id.* at 706 (noting that the FCC's interpretation was permissible). Instead, the court determined that the FCC's decision to limit its safe harbor to one call was inexplicable and did not align with the reasons the FCC gave for creating the safe harbor. *See id.* at 707. Specifically, the FCC attempted to justify the one-call safe harbor on the basis of reasonable reliance—i.e., that the caller was permitted to reasonably rely on the consent of the previous subscriber "because the 'caller in this situation cannot

reasonably be expected to divine that the consenting person is not the subscriber.'" *Id.* (quoting *2015 Declaratory Ruling*, 30 FCC Rcd. at 8001–02).

Significantly, the *ACA International* Court expressed no opinion as to whether this reasonable reliance approach was correct or supported by the statute. *See id.* at 692 (summarizing the opinion's holdings and stating only that it "determine[d] that the agency's one-call safe harbor, at least as defended in the order, is arbitrary and capricious" and not providing any opinion regarding a purported reasonable reliance approach); *see also id.* at 705–09 (fully discussing the applicable ruling). Instead, it merely concluded that if the FCC wanted to take a reasonable reliance approach, a one-call safe harbor would not accomplish such a goal. *Id.* at 707–08. Then, the court determined that, in light of the FCC's purported reasonable reliance justification, it was not clear that the FCC would have issued the ruling without the safe harbor provision. *Id.* at 708–09. Therefore, the entire *2015 Declaratory Ruling* as it applied to reassigned numbers was set aside. *Id.* at 709.

Defendants argue that *ACA International* created a reasonable reliance approach when dealing with reassigned numbers. It did not. Yes, the court in *ACA International* acknowledged that the FCC's interpretation of the TCPA had involved a consideration of reasonable reliance, and the court refused to allow the remainder of the applicable ruling to stand without the safe harbor because it was not entirely convinced the FCC would have done so. But nothing in the *ACA International* opinion approves of or recognizes a new approach. Nor does the FCC's justification for creating the one-call safe harbor require the creation of a reasonable reliance framework. Even ignoring the fact that the entire scheme was set aside and is inapplicable here, the FCC's extremely

limited one-call safe harbor exhibits a reluctance to allow the sweeping reasonable reliance approach advocated for by Defendants.[3]

Further, Defendants' reliance on *Roark v. Credit One Bank, N.A.*, CV 16-173 (PAM/ECW), 2018 WL 5921652, (D. Minn. Nov. 13, 2018), is unavailing. This is the only post-*ACA International* case submitted by the parties that has applied a reasonable reliance approach. Notably, *Roark* is a non-binding district court case from a different Circuit. Also, *Roark* simply concludes—without citation or discussion—that it must "consider the reasonableness of the caller's reliance on a prior number holder's express consent." *Id.* at *3. Respectfully, based on the above discussion, this Court disagrees.

Accordingly, because *ACA International* did not create a new reasonable reliance approach and because the entire *2015 Declaratory Ruling* as it applies to reassigned numbers was set aside, the Court must turn to Eleventh Circuit precedent to determine the proper approach to reassigned numbers.

B. Called Party and Good Faith

In 2014—prior to the *2015 Declaratory Ruling* and unaffected by *ACA International*—the Eleventh Circuit adopted the Seventh Circuit's definition of "called party" as "subscriber to the cell phone service." *Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265, 1267 (11th Cir. 2014); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1251–52 (11th Cir. 2014); *see also Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012). Therefore, under the plain language of the statue, Defendants were prohibited from calling the 2301 Number without prior

[3] Similarly, the FCC's more recent rulemaking efforts on this front also indicate a refusal to create a sweeping reasonable reliance approach. *See In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12024, 12043–45 (2018) (developing a reassigned numbers database and creating a "limited safe harbor" for those entities that utilize the database).

express consent of the subscriber—Plaintiff. Nevertheless, Defendants argue that a good faith defense exists under the TCPA.

Defendants primarily rely on two unpublished, out-of-Circuit district court cases—*Chyba v. First Financial Asset Management, Inc.*, 12-cv-1721-BEN WVG, 2014 WL 1744136 (S.D. Cal. Apr. 30, 2014),[4] and *Danehy v. Time Warner Cable Enterprises*, 5:14-cv-133-FL, 2015 WL 5534094 (E.D.N.C. Aug. 6, 2015). *Chyba* involved a debt collector in possession of an agreement purportedly signed by the plaintiff, which provided a cell phone number and consented to calls. 2014 WL 1744136, at *1–2. The *pro se* plaintiff in *Chyba* denied ever signing the agreement. *Id.* at *11. Citing to case law addressing the Fair Debt Collection Practices Act—not the TCPA—the *Chyba* Court concluded that the agreement "gave [the d]efendant a good-faith basis to believe that it had consent to contact [the p]laintiff at that number," which the court held was sufficient for the defendant to avoid liability. *Id.*

In a Report and Recommendation, the Magistrate Judge in *Danehy*—relying on *Chyba* and again not citing any portion of the TCPA—recommended that the good-faith defense be applied in a factual scenario nearly identical to this case. 2015 WL 5534094, at *1–2, *6–7. Notably, this recommendation was an alternative conclusion; the Magistrate Judge recommended that summary judgment be granted against the *pro se* plaintiff on other bases as well. *Id.* at *8–9. In adopting the Report and Recommendation, the *Danehy* district court primarily relied on the other grounds recommended by the Magistrate Judge for granting summary judgment and noted that it was only reviewing the good-faith portion of the Report and Recommendation for clear error. *Danehy v. Time Warner Cable Enter. LLC*, 5:14-cv-133-FL, 2015 WL 5534285, at *3 (E.D.N.C. Sept. 18,

[4] The Court notes that while *Chyba* was affirmed by the Ninth Circuit, 671 F. App'x 989 (9th Cir. 2016), the appellate opinion included no discussion of the purported good-faith defense.

2015). Importantly, in finding no such error, the *Danehy* district judge explained that the Fourth Circuit—which would have been binding on the *Danehy* Court—had not addressed this issue. *Id.* But it referenced that the Eleventh Circuit—which is binding on this Court—had indicated that no such defense would be available. *Id.* (citing *Breslow*, 755 F.3d at 1267).

In sum, the cases Defendants cite for the proposition that a good-faith defense exists in reassignment cases under the TCPA are not persuasive to this Court, and indeed, at least *Danehy* supports the proposition that such a defense would be rejected in the Eleventh Circuit. Further, it appears that the Eleventh Circuit's analysis in *Breslow* precludes the application of a good-faith defense under these circumstances. In *Breslow*, like here, the new subscribers received calls from the defendant based on the previous subscriber's consent. 755 F.3d at 1266–67. Although the *Breslow* Court did not explicitly address a good faith defense, it unequivocally determined that because the defendant did not obtain consent from the "called party" as required by the TCPA, the plaintiff was entitled to summary judgment on the issue. *Id.* at 1267.

This Court cannot reject this clear message sent by binding Eleventh Circuit precedent—good-faith is not a defense under these circumstances. *Id.; see also Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011) (addressing a similar TCPA prohibition on unsolicited faxes and stating that "[t]he TCPA is essentially a strict liability statute"); *Denova v. Ocwen Loan Servicing, LLC*, 8:17-cv-02204-23AAS, 2018 WL 1832901, at *6 (M.D. Fla. Jan. 25, 2018) (recommending in a Report and Recommendation that the defendant's good-faith defense in a TCPA action be stricken); *Denova v. Ocwen Loan Servicing, LLC*, 8:17-cv-2204-T-23AAS, 2018 WL 1832902, at *1 (M.D. Fla. Feb. 28, 2018) (adopting the above-referenced Report and Recommendation and stating that "[t]he sixth affirmative defense (good faith) is inapplicable to

the TCPA claim"). Defendants are not entitled to summary judgment on the basis of a good-faith defense.

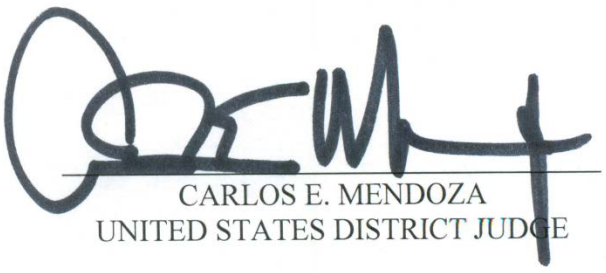
C. Orlando Health

Orlando Health argues that it is not directly liable for any of the calls made to Plaintiff and, instead, its liability is dependent on the liability of G&G and RMB—i.e., if G&G and RMB are not liable then Orlando Health is similarly not liable. The parties engage in an academic discussion of direct liability versus vicarious liability under the TCPA; however, at this stage in the litigation, the vehicle for liability is a distinction without a difference. Because G&G and RMB's Motions for Summary Judgment are being denied, Orlando Health's Motion for Summary Judgment also fails.

IV. CONCLUSION

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** that Defendant G&G Organization, Ltd.'s Motion for Summary Judgment (Doc. 194), Defendant RMB, Inc.'s Motion for Summary Judgment (Doc. 196), and Defendant Orlando Health, Inc.'s Motion for Summary Judgment (Doc. 197) are **DENIED**.

DONE and **ORDERED** in Orlando, Florida on October 14, 2019.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record