UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELSA CASTRO, individuals and NICK TOSTO, individuals,

Plaintiffs,

v. Case No: 8:16-cv-889-T-17TGW

CAPITAL ONE SERVICES, LLC, a foreign limited liability company, LEGAL PREVENTION SERVICES, LLC, a foreign limited liability company, WALDEN ASSET MANAGEMENT, LLC, a foreign for-profit corporation, and EVANS LAW ASSOCIATES, P.C., a foreign professional corporation,

Defendants.

ORDER

This cause comes before the Court pursuant to the motions for default judgment (Doc. No. 34 & 36) (the "**Motions for Default Judgment**") filed by the Plaintiffs, Elsa Castro and Nick Tosto (the "**Plaintiffs**") against Legal Prevention Services, LLC ("**LPS**") and Walden Asset Management, LLC ("**WAM**") (collectively, the "**Defendants**"). Through the Motions for Default Judgment, the Plaintiffs seek entry of a final default judgment against the Defendants for alleged violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §§ 227, *et seq.* (the "**TCPA**"), the Florida Consumer Collection Practices Act, Fla. Stat., §§ 559.55 – 559.785 (the "**FCCP**"), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* (the "**FDCPA**"). For the reasons set forth below, the Motions for Default Judgment are **GRANTED IN PART AND DENIED IN PART**.

I. Background

The Plaintiffs commenced this case by filing a complaint (Doc. No. 1) (the "**Complaint**") against the Defendants on April 13, 2016. Through the Complaint, the Plaintiffs assert claims for alleged violations of the TCPA, the FCCPA, and the FDCPA. The Plaintiffs effectuated services of process on LPS and WAM via personal service on April 22, 2016 and May 12, 2016, respectively. (Doc. Nos. 10 & 14). The Defendants did not respond to the Complaint within the time permitted, and Clerk's Defaults were entered on June 23, 2016. (Doc. Nos. 19 & 21). On October 10, 2016, the Plaintiffs filed the Motions for Default Judgment, seeking entry of a final default judgment against the Defendants. However, because another defendant had timely answered the Complaint, the Court deferred ruling on the Motions for Default Judgment pending resolution of the case on the merits as to the non-defaulting defendant. (Doc. Nos. 38 & 39). Thereafter, on March 7, 2017, the Court was advised that the case had settled as to the non-defaulting defendant. (Doc. No. 40). As a result, the Motions for Default Judgment are ripe for consideration.

II. Discussion

"Default judgment is appropriate if the well-pled allegations of the complaint establish that the plaintiff is entitled to relief and the defendant has failed to plead or defend within the time frame set out in the rules." *Dores v. One Main Fin.*, 2016 WL 3511744, at *1 (E.D. Va. June 1, 2016). "By defaulting, the defendant admits the plaintiff's well-pled allegations of fact, which then provide the basis for judgment." *Id.* "Although a defaulted defendant admits well-pleaded allegations of liability, allegations relating to the amount of damages are not admitted by virtue of default." *Burns v. Halsted Fin. Servs., LLC*, 2016 WL 5417218, at *1 (N.D. Ga. Sept. 3, 2016). "Rather, the Court determines

the amount and character of damages to be awarded." *Id.* Where damages are liquidated and capable of mathematic calculation, such as a claim for damages under the TCPA, the Court may award damages without a hearing. *Coniglio v. Bank of Am., N.A.*, 2014 WL 5366248, at *5 (M.D. Fla. Oct. 21, 2014), *rev'd on other grounds*, 638 F. App'x 972 (11th Cir. 2016). Consistent with the foregoing authority, the Court will first consider (A) whether the Plaintiffs are entitled to a final default judgment on their claims under the FCCPA, FDCPA, and TCPA and, if so, (B) the appropriate measure of damages on each claim.

A. Plaintiffs' entitlement to entry of a final default judgment under the FCCPA, FDCPA, and TCPA

1. FCCPA

Through the Motions for Default Judgment, the Plaintiffs seek a default judgment under four separate provisions of the FCCPA: Count I – Section 559.72(4); Count II – Section 559.72(7); Count III – Section 559.72(9); and Count V – Section 559.72(18). Those sections provide that,

> [i]n collecting consumer debts, no person shall . . . .
>
> (4) Communicate or threaten to communicate with a debtor's employer before obtaining a final judgment against the debtor, unless the debtor gives her or his permission in writing to contact her or his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection . . . .
>
> (7) Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of his or her family . . . .
>
> (9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows the right does not exist . . . [or]

> (18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address.

Fla. Stat., § 559.72(4), (7), (9), & (18).

In the Complaint, the Plaintiffs allege that WAM violated Section 559.72(4) by placing telephone calls to the Plaintiffs during which it "threatened to send documentation regarding the Debt . . . to Ms. Castro's place of employment, without first obtaining a final judgment against Ms. Castro, and without first obtaining Ms. Castro's express written consent to contact Ms. Castro's employer." (Doc. No. 1, at ¶ 146). With respect to Section 559.72(7), the Plaintiffs allege that the Defendants called them numerous times, both prior to and after they told the Defendants they did not consent to receiving further telephone calls. (Doc. No. 1, at ¶¶ 149-159). As for Section 559.72(9), the Plaintiffs allege that the Defendants threatened to take legal action against them despite the fact that their claims were barred by the applicable statute of limitations. (Doc. No. 1, at ¶¶ 163-169). Finally, with respect to Section 559.72(18), the Plaintiffs allege that the Defendants communicated with them despite knowing that they were represented by legal counsel with respect to the underlying debt. (Doc. No. 1, at ¶ 174). Taken together, the foregoing allegations are sufficient to state claims under Sections 559.72(4), (7), (9), and (18) of the Florida Statutes. Thus, the Plaintiffs are entitled to a final default judgment on Counts I, II, III, and V of the Complaint.

2. FDCPA

Through the Motions for Default Judgment, the Plaintiffs seek default judgment on three alleged violations of the FDCPA: Count VI – Section 1692c(a)(2); Count VII – Sections 1692d and 1692d(6); and Count VIII – Sections 1692e, e(2)(A), and e(10). Section 1692c(a)(2) states that

> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt . . . if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.

15 U.S.C. § 1692c(a)(2). Sections 1692d and 1692d(6), for their part, provide in pertinent part that

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section . . . . (6) . . . the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692d(6). Finally, Sections 1692e, 1692e(2)(A), and 1692e(10), which relate to false or misleading representations, state that

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section . . . (2) The false representation of (A) the character, amount, or legal status of any debt . . . . (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. §§ 1692e(2)(A) & 1692e(10).

In the Complaint, the Plaintiffs allege that LPS violated Section 1692c(a)(2) by communicating with them despite knowing that they were represented by counsel. (Doc. No. 1, at ¶¶ 178-180). As for Sections 1692d and 1692d(6), the Plaintiffs allege that the Defendants called them numerous times, both prior to and after they told the Defendants they did not consent to receiving further telephone calls. (Doc. Nos. 1, at ¶¶ 183-192). Finally, as to Sections 1692e, 1692e(2)(A), and 1692e(1), the Plaintiffs allege that the Defendants threatened to take legal action against them despite the fact that their claims

were barred by the applicable statute of limitations. (Doc. No. 1, at ¶¶ 194-201). Taken together, the foregoing allegations are sufficient to state claims under Sections 1692c(a)(2), 1692d and 1692d(6), and 1692e, 1692e(2)(A), and 1692e(10). Thus, the Plaintiffs are entitled to a final default judgment on Counts VI, VII, and VIII of the Complaint.

3. TCPA

The Complaint contains one count for violations of the TCPA: Count IX – 47 U.S.C. § 227(b)(1)(A). Section 227 of title 47 of the United State Code makes it

> unlawful for any person within the United States, or any person outside the United States if the recipient is 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). In Count IX of the Complaint, the Plaintiffs allege that (1) LPS made at least five calls to the Plaintiffs' cellular telephone using an automatic telephone dialing system or an artificial or pre-recorded voice, (2) WAM made at least eight calls to the Plaintiffs' cellular telephone using an automatic telephone dialing system or an artificial pre-recorded voice, and (3) at least 20 additional unlawful calls were made to the Plaintiffs' cellular telephone on behalf of LPS. (Doc. No. 1, at ¶¶ 204-206). These "allegations are sufficient to state a claim under the TCPA." *Dores*, 2016 WL 3511744, at *1. Moreover, nothing in the record indicates that any calls fall within an exception to the TCPA, or that the Plaintiffs consented to receiving automated calls from the Defendants. *See* (Doc. No. 1, at ¶¶ 207-208) (alleging that the Plaintiffs did not consent to receive any of the foregoing calls). Consequently, the Plaintiffs are entitled to a default judgment on Count IX of the Complaint.

B. Damages

1. FCCPA

As noted above, the Plaintiffs are entitled to a default judgment against both Defendants on Counts II, III, and V of the Complaint, and against WAM on Count I. Pursuant to Section 559.77 of the Florida Statutes, "[a]ny person who fails to comply with any provision of [Section] 559.72 is liable for actual damages and for additional statutory damages as the court may allow, but not exceeding $1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff." Fla. Stat., § 559.77(2). "In determining the defendant's liability for any additional statutory damages, the court shall consider the nature of the defendant's noncompliance with [Section] 559.72, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional." Fla. Stat., § 559.77(2). Importantly, $1,000 is the maximum a plaintiff may be awarded in statutory damages under the FCCPA, even when a series of FCCPA violations exist. *Arianas v. LVNV Funding LLC*, 54 F. Supp. 3d 1308, 1310 (M.D. Fla. 2014).

Here, based on the allegations in the Complaint, the Court has no difficulty concluding that both of the defaulting Defendants are liable for the maximum award of statutory damages pursuant to Section 559.77(2) of the Florida Statutes. *See Smith v. Royal Oak Fin. Servs., Inc.*, 2012 WL 3290153, at *5 (M.D. Fla. June 18, 2012) (awarding the maximum statutory damages based on the plaintiff's allegations that frequency, persistence, and nature of the alleged violations). However, the Plaintiffs' request for an additional $5,000 for "stress, anxiety, loss of sleep, and deterioration of relationships" is too tenuous to warrant an award of actual damages at this stage of the pleadings. *See Titus v. Comm. Recovery Sys., Inc.*, 2014 WL 55016, at *2 (M.D. Fla. Jan. 7, 2014)

(stating that where a plaintiff fails to submit medical records or expert testimony in support of her request for emotional damages, and the defendant's conduct did not severely impact the plaintiff, an award of actual damages under the FDCPA is inappropriate). Accordingly, the Plaintiffs are each entitled to the maximum statutory damages against both Defendants under Section 559.77(2); however, because the Plaintiffs failed to adequately prove their entitlement to actual damages, no further damages will be awarded under the FCCPA.

2. FDCPA

As stated previously, the Plaintiffs are entitled to a default judgment against both Defendants on Counts VI, VII, and VIII of the Complaint. Much like under Section 559.77 of the FCCPA, Section1692k(a) provides that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of (1) any actual damage sustained by such person as a result of such failure; [and] (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000." 15 U.S.C. § 1692k(a)(1)-(2)(A). Moreover, as is the case under the FCCPA, "[r]ecovery of statutory damages under 15 U.S.C. § 1692k is limited by the language of the statute to $1,000 per action." *Beeders v. Gulf Coast Collection Bureau*, 632 F. Supp. 2d 1125, 1129 (M.D. Fla. 2009). Here, for the reasons stated above with respect to the Plaintiffs' claims under the FCCPA, the Plaintiffs are entitled to the maximum award of statutory damages under Section 1692k, but have not adequately proven their entitlement to actual damages.

3. TCPA

Finally, discussed above, the Plaintiffs are entitled to a default judgment against the Defendants on Count IX of the Complaint. "The TCPA provides for statutory damages

in the amount of $500 per violation." *Dores*, 2016 WL 3511744, at *2. The TCPA also "permits the award of treble damages where a defendant has acted willfully or knowingly." *Id.* "[E]ach call made in contravention of the TCPA constitutes an independent violation entitling the plaintiff to statutory damages." *Id.* Here, the Plaintiffs alleged that LPS, or parties acting on LPS' behalf, placed 25 separate calls to their cellular telephones in violation of the TCPA. (Doc. No. 1, at ¶¶ 204 & 206). Therefore, the Plaintiffs are entitled to an award of statutory damages against LPS in the amount of $500.00 for each of the 25 calls, for a total of $12,500.00. As for WAC, the Plaintiffs allege that WAC placed eight separate calls to their cellular telephones in violation of the TCPA. (Doc. No. 1, at ¶ 205). Therefore, the Plaintiffs are entitled to recover statutory damages against WAC in the amount of $500.00 for each of the eight calls, for a total of $4,000.00

The allegations supporting the Plaintiffs' claim for treble damages, however, are legal in nature, "and as such need not be accepted as true" at this stage of the pleadings. *Dores*, 2016 WL 3511744, at *3. "The sparse record in this case does not adequately support a finding that [the] Defendant[s] acted willfully or knowingly." *Id.* "Moreover, the question of whether to award treble damages is committed to the Court's discretion even upon finding that a violation was willful or knowing." *Id.* "In similar situations, when liability is established through default judgment rather than the merits, courts routinely award the minimum statutory damages." *Id.* Accordingly, given the lack of record evidence regarding the alleged willfulness of the Defendants' conduct, the Court finds that an award of the minimum statutory damages, or $500 per violation, is appropriate.

III. Conclusion

Accordingly, it is

ORDERED that the Motions for Default Judgment are **GRANTED IN PART AND DENIED IN PART**. The Plaintiffs are directed to file a proposed form of final judgment consistent with the terms of this order within 14 days.

It is further **ORDERED** that since the case has been settled as to the sole non-defaulting defendant, the Clerk of Court is directed to **CLOSE** this case. The Plaintiffs and the non-defaulting defendant have 60 days from entry of this order to submit a proposed form of final judgment or stipulation of dismissal or, upon good cause, to file a motion to reopen the case.

It is further **ORDERED** that any motion for attorney's fees and costs shall be filed in accordance with the Federal Rules of Civil Procedure.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 3rd day of August, 2017.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record