UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61017-CIV-ALTONAGA/Seltzer

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

POINTBREAK MEDIA, LLC, *et al.*,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS JUSTIN RAMSEY AND DUSTIN PILLONATO'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Justin Ramsey and Dustin Pillonato ("Moving Defendants") premise their motion for partial judgment on the pleadings on a misreading of the Federal Trade Commission's ("FTC") First Amended Complaint. Moving Defendants claim that the First Amended Complaint alleges that they called only businesses and, thus, they cannot be liable for violations of the Telemarketing Sales Rule ("TSR"). To the contrary, the FTC alleges that Defendants called "small businesses ***and other consumers***" and that the "recipients of Defendants' robocalls have included ***individuals*** who have placed their phone numbers on the National Do Not Call Registry ("DNC Registry")." ECF No. 109 at ¶¶ 35-36 (emphasis added). This misreading of the First Amended Complaint is fatal to their motion. The fact that the business-to-business exemption is an affirmative defense, for which the Moving Defendants bear the burden of proof, only exacerbates the infirmity of their argument.

ARGUMENT

A. Legal Standard

"Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 965 (11th Cir. 2014). Specifically, "Judgment on the pleadings is appropriate only when the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002) (quoting *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir. 2001)). In reviewing a motion for judgment on the pleadings, the Court must "accept all of the allegations in the complaint as true and view them in the light most favorable to . . . the nonmoving party." *Mikko v. City of Atlanta, Georgia*, 857 F.3d 1136, 1139 (11th Cir. 2017).

B. The FTC Alleges that the Defendants Placed Robocalls to Non-Businesses, Including Individuals Who Registered Their Numbers on the Do Not Call Registry.

In their motion, Moving Defendants do not dispute that the allegations in the FTC's First Amended Complaint, if true, satisfy the elements needed to establish violations of the TSR, as alleged in Counts III and IV of the First Amended Complaint. Specifically, Moving Defendants do not dispute that the FTC has alleged that they initiated or caused others to initiate outbound telephone calls delivering a prerecorded message ("robocalls") to induce the purchase of goods or services, in violation of 16 C.F.R. § 310.4(b)(1)(v).[1] *See* ECF No. 109 at ¶ 224 (Count III). Moving Defendants likewise do not dispute that the FTC has alleged that they have initiated or

[1] This provision states, in relevant part, that it is "an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in… [i]nitiating any outbound telephone call that delivers a prerecorded message."

caused others to initiate outbound telephone calls to phone numbers on the DNC Registry, in violation of 16 C.F.R. § 310.4(b)(1)(iii)(B).[2] *See* ECF No. 109 at ¶ 226 (Count IV). Nor do Moving Defendants dispute that the FTC's allegations, if true, would render Ramsey and Pillonato individually liable for these TSR violations.

Instead, Moving Defendants contend that the FTC "only alleges facts suggesting that the Corporate Defendants transmitted prerecorded messages and telemarketing calls *to businesses* for purposes of Counts III and IV." ECF No. 177-1 at 3 (emphasis in original). As a result, Moving Defendants argue, the TSR's business-to-business exemption, 16 C.F.R. § 310.6(b)(7), excuses their TSR violations and entitles them to judgment on the pleadings. To support this argument, they note that Counts III and IV rely "upon the allegations contained in Paragraphs 35-46 of the Amended Complaint." ECF No. 177-1 at 3. Moving Defendants, however, ignore the allegations contained in the first two paragraphs they cite. These allegations directly rebut Moving Defendants' contention that their robocalls were only made to businesses.

Specifically, in Paragraphs 35 and 36 of its First Amended Complaint, the FTC alleges that the Defendants called non-businesses in addition to businesses. First, the FTC alleges that Defendants "placed threatening calls delivering prerecorded messages ('robocalls') to small business owners ***and other consumers***." ECF No. 109 at ¶ 35 (emphasis added). Second, the FTC alleges that "recipients of Defendants' robocalls have included ***individuals*** who have placed their phone numbers on the National Do Not Call Registry." ECF No. 109 at ¶ 36 (emphasis added). Moreover, Moving Defendants have admitted to making robocalls in their answers to

[2] This provision states, in relevant part, that it is "an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in . . . "[i]nitiating any outbound telephone call to a person when… [t]hat person's telephone number is on the 'do-not-call' registry, maintained by the Commission."

the First Amended Complaint.[3] Therefore, the FTC's allegations, which must be taken as true and construed in the light most favorable to the FTC, establish that Defendants (1) made robocalls, (2) to individuals on the DNC Registry, and (3) did not make these calls exclusively to businesses.

Defendants' calls to non-businesses are, of course, not subject to the business-to-business exemption. The cases cited by Moving Defendants, ECF No. 177-1 at 5-6, therefore do not help them. Those cases only acknowledge that the business-to-business exemption exists; unsurprisingly, none apply it to calls, like those alleged by the FTC, made to non-businesses.[4]

C. The Pleadings Do Not Support Moving Defendants' Affirmative Defense.

Setting aside that the FTC clearly meets its burden to overcome a motion for judgment on the pleadings, Moving Defendants' argument that telemarketing calls to businesses are exempt from TSR violations is an affirmative defense that the Moving Defendants must prove call-by-call. The business-to-business exemption of the TSR exempts:

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[3] Specifically, Justin Ramsey and Dustin Pillonato admitted that Pointbreak Media, LLC made the following robocall:

> Hi, this is Jennifer Taylor, data service provider for Google and Bing. This is an urgent message for the business owner. We have tried numerous times to contact you through mail and now by telephone regarding your Google listing webpage. This is your final notice. If you do not act soon, Google will label your business as permanently closed. Press one now to speak with me or another Google specialist.

ECF No. 138 at ¶ 38; ECF No. 139 at ¶ 38.

[4] Moving Defendants also appear to argue that the "purpose" of any calls to non-businesses was to sell products to businesses. ECF No. 177-1 at 5. This argument is irrelevant. "[T]he plain language of the TSR clearly and unambiguously states that the 'business-to-business' exemption applies solely to 'telephone calls' between telemarketers and businesses. ***Nowhere in this language are the subjective intentions of telemarketers referenced***." *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1007 (N.D. Cal. 2010) (emphasis added), *aff'd* 475 F. App'x 106 (9th Cir. 2012). Thus, even if the Defendants intended to contact only businesses, the FTC's allegations that they ***actually*** called individuals defeat the Moving Defendants' motion for partial judgment on the pleadings.

> Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, except calls to induce the retail sale of nondurable office or cleaning supplies; provided that §§310.4(b)(1)(iii)(B) and 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

16 C.F.R. § 310.6(b)(7). Because "the telemarketing call to business call provisions are written as exemptions to the general rule," it "is treated as an affirmative defense for which [the defendant] bears the burden of proof." *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942, 1008 (C.D. Ill. 2014) (citing *Shaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005)), *vacated in part on other grounds*, 80 F. Supp. 3d. 917 (C.D. Ill. 2015). Moving Defendants acknowledge that the business-to-business exemption is an affirmative defense by pleading it as such. ECF No. 138 at 44 (Ramsey); ECF No. 139 at 44 (Pillonato).

For the reasons explained above, the pleadings alone, viewed in the light most favorable to the FTC, do not allow Moving Defendants to meet their burden. Moving Defendants cannot rely on the FTC's Amended Complaint as proof that they called only businesses when, in fact, it alleges the opposite. Nor are there any facts the Court may take judicial notice of that would be sufficient to allow Moving Defendants to meet that burden. Judgment on the pleadings is plainly inappropriate.

CONCLUSION

For the reasons set forth above, the FTC respectfully requests that the Court deny Defendants Justin Ramsey and Dustin Pillonato's motion for partial judgment on the pleadings.

Respectfully submitted,

Dated: October 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on October 2, 2018, a true and correct copy of the foregoing was served on all counsel or parties of record on the Service List, via the method indicated below.

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