UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DENISE FORNEY,

Plaintiff,

v.

18-CV-616

GRAND ISLAND CHIROPRACTIC, P.C., and CHIROPRACTIC OFFICE SOLUTIONS, INC.

Defendants.

REPORT, RECOMMENDATION AND ORDER

This case was referred to the undersigned by the Hon. Lawrence J. Vilardo, pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. No. 9.

Plaintiff Denise Forney ("Plaintiff") alleges that Defendants violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by sending unsolicited commercial text messages to her cell phone. Dkt. No. 1. Currently before the Court is Defendants' Motion for Summary Judgment. Dkt. No. 18.[1] For the following reasons, the Court recommends that Defendants' motion be denied, and discovery be allowed to proceed.

[1] In support of their Motion for Summary Judgment, Defendants submit an Attorney Declaration (Dkt. No. 25-1), a Statement of Undisputed Facts (Dkt. No. 18-2), the Affidavit of Jody Notaro with Exhibit (Dkt. No. 18-3), the Affidavit of Jenna Palka (Dkt. No. 18-4), a Memorandum of Law (Dkt. No. 18-5), and a Reply Memorandum of Law (Dkt. No. 25). In Opposition to the Motion, Plaintiff filed the Affidavit of Denise Forney (Dkt. No. 23), a Statement of Undisputed Facts (Dkt. No. 23-1), and a Memorandum of Law (Dkt. No. 23-2).

FACTUAL BACKGROUND

The following facts are taken from the parties' Local Rule 56(a)(1) Statements of Facts and supporting Affidavits, and the Amended Complaint. Dkt. Nos. 17, 18-2, 23-1. Dr. Jack R. Saia is a chiropractic doctor who provides chiropractic and weight loss services. Dkt. No. 18-2, ¶ 11. In 2012 or 2013, Plaintiff consulted with a dietitian at Dr. Saia's practice and purchased a personalized weight loss package. Dkt. No. 18-2, ¶¶ 14, 15; Dkt. No. 23-1, ¶¶ 12-15. Shortly thereafter, Plaintiff contacted Dr. Saia's office to cancel her participation in the weight loss program and get a refund. Dkt. No. 23-1, ¶ 15. Dr. Saia's office refunded Plaintiff's money, less the fee for her individualized consultation session. Dkt. No. 18-2, ¶ 16; Dkt. No. 23-1, ¶ 16.

In February 2016, Defendant Grand Island Chiropractic ("GIC") acquired Dr. Saia's practice, including his patient lists and patient records. Dkt. No. 18-2, ¶ 6. GIS has three office locations: Grand Island Chiropractic on Grand Island, NY; Notaro Chiropractic in Niagara Falls/Wheatfield, NY; and Notaro Chiropractic in East Amherst, NY. Dkt. No. 18-2, ¶ 1. Since February 2016, Dr. Saia has practiced out of Notaro Chiropractic's East Amherst Office. Dkt. No. 18-2, ¶ 7.

According to Defendants, Jodi Notaro acts as the office manager of all three GIS locations, a position she has held since 2006. Dkt. No. 18-2, ¶ 2. Ms. Notaro is also the sole owner and operator of Defendant Chiropractic Office Solutions ("COS"). Dkt. No. 18-2, ¶ 3. COS "performs marketing and advertising work" for GIS pursuant to an oral contract. Dkt. No. 18-2, ¶ 4. COS uses a software company called Campaign Manager to

"facilitate outgoing technical support," such as outgoing text messages. Dkt. No. 18-3, ¶ 16.

According to Plaintiff, in March 2017, COS sent her text messages on her cellular phone "multiple times per week and often times multiple times in a single day." Dkt. No. 17, ¶ 17. One such text message stated, "Dr. Jack Saia has now joined Notaro Chiropractic Offices located at 4754 North French Road. Dr. Saia is now taking insurances & has expanded his hours! In addition our office has massage therapy! Text directly to 716-534-8885 or Call 716-688-8815 for a chiropractic or massage therapy appointment today!" Dkt. No. 17, ¶ 18. Plaintiff allegedly "texted Defendant back and told them to stop texting her." Dkt. No. 17, ¶ 19. Shortly thereafter, according to Plaintiff, she received another text message stating, "It's the chiropractic office, we have a chiropractic appointment available at 3/15/2017, at 9:50 A.M. at the East Amherst Location. If you would like that appointment then please call our office at 688-8815 to book the appointment. Hope to see you soon, Thank You!" Dkt. No. 17, ¶ 20.

According to Ms. Notaro, after Plaintiff filed her complaint, she asked Campaign Manager to determine how many texts had been sent to Plaintiff's cellular phone. Dkt. No. 18-3, ¶ 16. "Campaign Manager determined that on April 2, 2018, at 19:13:25:847 p.m., a text message was sent to Denise Forney at 716-870-2650[,]" which stated "Hello, Massage appointments available at ALL locations (Grand Island & East Amherst & Niagara Falls)! Text directly to 716-534-8885 or Call 716-773-2222 for an appointment today!" Dkt. No. 18-3, ¶¶ 17-18. Campaign Manager reported to Ms. Notaro that contact data older than January 1, 2017, might have been "archived off." Dkt. No. 18-

3, ¶¶ 19-20. According to Defendants, "[h]ad plaintiff texted 'stop' in response to a text message purportedly received in March 2017, as alleged in her complaint, [COS] has a protocol in place to remove patients from the text message list." Dkt. No. 18-3, ¶ 21.

In her sworn affidavit, Plaintiff states that she was not removed from the text message list and that even after filing this lawsuit, she received a text message from the Defendants. Specifically, on December 28, 2018, Defendants texted her a message, clearly meant for another person, which stated, "Hi Casey, reminder that you have a chiropractic appointment at Notaro Chiropractic-East Amherst location 12/29/18, at 10 a.m. Thank you. Text STOP to unsubscribe. Reply 'ok' or 'cancel.'" Dkt. No. 23, ¶ 16.

DISCUSSION AND ANALYSIS

Summary Judgment Standard

Summary judgment is appropriate 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). A factual dispute is material "only if it has some effect on the outcome of the suit." *Eagley v. State Farm Ins. Co*., No. 13-CV-6653, 2015 WL 5714402, at *5 (W.D.N.Y. Sept. 29, 2015) (citation and quotation omitted). A genuine issue exists as to a material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). In determining whether an issue is genuine, "[t]he inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion." *Cronin v. Aetna Life Ins. Co*., 46 F.3d 196,

202 (2d Cir. 1995) (citing *U.S. v. Diebold, Inc*., 369 U.S. 654, 655 (1962) (per curiam), and *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989)).

TCPA

Congress enacted the TCPA in 1991 to protect consumers from the "pervasive" proliferation of "intrusive, nuisance calls" to consumers' home phones seeking to market "goods and services." Pub.L. No. 102-243 § 2 (1991). "The TCPA makes it unlawful to send texts[2] or place calls to cell phones through automated telephone dialing systems, except under certain exemptions or with consent." *Latner v. Mount Sinai Health Sys., Inc.*, 879 F.3d 52, 54 (2d Cir. 2018), *as amended* (Jan. 9, 2018) (citing 47 U.S.C. § 227(b)(1)(A)(iii)). An aggrieved party may bring a private action against a defendant under the TCPA to "receive $500 in damages for each violation" and treble damages for "willful or knowing violations." 47 U.S.C. § 227.

"Prior express consent is an affirmative defense to liability under the TCPA." *Latner*, 879 F.3d at 54. The Federal Communications Commission ("FCC"), under a Congressional grant of authority, issues regulations under the TCPA. 47 U.S.C. § 227(b)(2). In its initial interpretation of what constitutes "prior express consent," the FCC

[2] The TCPA has been interpreted to "encompass[ ] both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls . . . ." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14115 (2003). Within the Second Circuit, district courts have treated text messages as "calls" within the meaning of the TCPA. *Krady v. Eleven Salon Spa*, No. 16CV5999MKBRML, 2017 WL 6541443, at *3 (E.D.N.Y. July 28, 2017), *report and recommendation adopted*, No. 16CV5999MKBRML, 2017 WL 6542462 (E.D.N.Y. Dec. 21, 2017); *Melito v. Am. Eagle Outfitters, Inc.,* No. 14 CV 02440, 2015 WL 7736547, at *4 (S.D.N.Y. Nov. 30, 2015) ("The plain language of section 227(b)(1)(A)(iii) imposes liability upon persons that 'make' a telephone call or text."); *see also Jackson v. Caribbean Cruise Line, Inc*., 88 F. Supp. 3d 129, 135 (E.D.N.Y. 2015).

concluded that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8768-69 ¶ 31 (1992). The FCC extended this exemption to wireless cell phone numbers in 2008. *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 564 ¶ 9 (2008).

A party who sends a text message "that includes or introduces an advertisement or constitutes telemarketing . . . ." must have the prior *written* consent of the party to whom the message is sent. 47 C.F.R. § 64.1200(a)(2). "[T]elemarketing" is defined by the FCC as a "call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12). "The term advertisement" is similarly defined as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.100(f)(1).

Prior written consent is not required where an autodialed or prerecorded call or message "delivers a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those are defined in the HIPAA Privacy Rule." 47 C.F.R. § 64.1200(a)(2). HIPAA defines "health care" as "care, services, or supplies related to the health of an individual." 45 C.F.R. § 160.103. Thus, communications sent to an individual "[f]or treatment . . . by a health care provider . . . or to direct or recommend alternative treatments" are exempt from the TCPA's prior *written* consent requirements. 45 C.F.R. §

164.501; *Latner*, 879 F.3d at 55. "Health care" messages remain subject to the less stringent requirement of prior express consent, although such consent need not be in writing or subject to specific disclosures. *Zani v. Rite Aid Hdqtrs. Corp.*, 725 Fed. App'x 41, 43 (2d Cir. 2018).

The FCC also requires that exempted health care messages must meet other criteria: (1) they must be sent only to the wireless telephone number provided by the patient; (2) they must state the name and contact information of the healthcare provider; (3) they must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules; (4) they must be concise, generally 160 characters or less in length for text messages; (5) the healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week; (6) the healthcare provider must offer recipients within each message an easy means to opt out of future messages; and (7) the healthcare provider must honor the opt-out requests immediately. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8032 ¶ 147 (2015).

This Court finds that several genuine issues of material fact exist which preclude summary judgment at this juncture. Because no discovery has been conducted in this case, there is very little information about the substance or frequency of Defendants' text messages to Plaintiff, the circumstances under which Plaintiff provided her consent to Dr. Saia's office, whether Plaintiff requested to opt out of receiving messages from GIC, and if so, whether GIC honored her request to opt out. The parties have provided the

substance of four text messages sent by Defendants to Plaintiff's cellular phone regarding Dr. Saia joining GIS, massage therapy, and the availability of appointments. Dkt. No. 17, ¶¶ 18 -20; Dkt. No. 18-3, ¶¶ 17-18. Three of these messages appear to be health care messages that are exempt from the prior written consent requirement.[3] These messages, however, are apparently only a fraction of those that Defendants allegedly sent to Plaintiff on her cell phone. Plaintiff states in her sworn affidavit, that Defendants sent her numerous texts over the course of many months attempting to "solicit" her as a patient. Dkt. No. 23, ¶¶ 12, 15.

Because Defendant moved for summary judgment before discovery could be conducted, the rest of the alleged texts sent to Plaintiff are not before this Court. It is therefore impossible to determine whether they constitute health care messages, which is a highly fact specific inquiry. As the Second Circuit Court of Appeals has recognized, "[t]here may well be messages that, though purportedly delivering a health care message, are so laden with marketing material as to raise a factual issue as to whether they fall outside the health care exemption." *Zani*, 725 Fed. App'x at 44. It bears noting here that Ms. Notaro, GIS' Office Manager, described her work with COS and Campaign Manager as "marketing and advertising work." Dkt. No. 18-2, ¶ 4.

[3] The appointment reminder message sent to Plaintiff for a different patient named "Casey," Dkt. No. 23, ¶ 16, which Defendants allegedly sent to Plaintiff's cell phone after she asked them to stop texting them, arguably falls outside of the health message exception. *Coleman v. Rite Aid of Georgia, Inc.*, 284 F. Supp. 3d 1343, 1349-50 (N.D. Ga. 2018) (holding that the defendant pharmacy's pre-recorded automated voice messages on plaintiff consumer's cell phone about prescription refills for someone else, after consumer told pharmacy to stop calling him, did not fall within "health care treatment" exception to TCPA's prohibition on unauthorized automated calls to cell phones; even if pharmacy refill calls were type of call exempted from TCPA's prior express consent requirement by the health care treatment exception; pharmacy failed to satisfy prerequisites to exception's operation, namely, to honor opt-out requests immediately, and to provide an appropriate opt-out mechanism in the offending calls).

Moreover, given the minimal record, it is unclear whether the alleged text messages fall beyond the scope of Plaintiff's initial consent, presuming for the purposes of argument only that she gave it. The FCC has cautioned that "the scope of [an individual's prior express] consent must be determined upon the facts of each situation." *Matter of GroupMe, Inc./Skype Commc'ns S.A.R.L Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 3442, 3446 ¶ 11 (March 27, 2014). The context of the consent provided is absolutely critical. *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 343 (6th Cir. 2016) (holding that plaintiff, whose wife provided their cell phone numbers in paperwork she filled out when he was admitted to the hospital, gave prior express consent to receive calls relating to medical debt on those numbers).

Here, Defendants have not offered any evidence that Plaintiff provided her cellular phone number or otherwise agreed to be contacted on her cellular phone when she became a patient of Dr. Saia's. Although consent to receive messages may be written or implied or even "obtained and conveyed via intermediaries," *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1123 (11th Cir. 2014), Defendants must at a minimum establish that Plaintiff consented through her words or actions to receive messages on her cell phone when she became Dr. Saia's patient. Defendants failure to do so sets it apart from seemingly analogous cases in which the Second Circuit Court of Appeals found that a patient provided prior express consent to receive health care messages. *See Lautner*, 879 F.3d at 53 (holding that the patient plaintiff who was sent a flu shot reminder text message on behalf of hospital at which he had a health examination gave his prior express consent to be texted on his cell phone when he signed a New

Patient Health Form containing his contact information and an Ambulatory Patient Notification Record that granted consent to the hospital to use his health information for "payment, treatment and hospital operations purposes"); *Zani*, 725 Fed. App'x at 43-44 (holding that the consumer plaintiff provided prior express consent to receive flu shot reminder calls when he provided his cell number to his pharmacy and signed the privacy notice consenting to receiving messages).[4]

Further discovery will reveal whether the text messages sent by Defendants to Plaintiff's cell phone "fall within the scope of [her initial] consent." *Bailey v. CVS Pharmacy, Inc*., No. 17CV11482PGSLHG, 2018 WL 3866701, at *7 (D.N.J. Aug. 14, 2018), *appeal dismissed*, No. 18-3057, 2019 WL 1284314 (3d Cir. Feb. 12, 2019) (reasoning that "so long as the call or message "closely relate[s] to the circumstances under which plaintiff provided his cell phone number," it will fall within the scope of consent). "TCPA does not require that a call be made for the exact purpose for which the number was provided, but it undoubtedly requires that the call bear some relation to the product or service for which the number was provided." *Bailey*, 2018 WL 3866701, at *7 (quoting Olney *v. Job.Com, Inc.*, No. 12-1724, 2014 WL 1747674, at *7, 2014 U.S. Dist. LEXIS 60843, at *22 (E.D. Cal. May 1, 2014)). Because so many factual issues exist, this Court recommends that Defendants' Motion for Summary Judgment be denied without prejudice to renew after the parties conduct discovery.

[4] This case is also distinguishable because *Latner* and *Zani* each involved a single health care message, whereas Defendants here allegedly sent Plaintiff numerous messages over several months.

CONCLUSION

For all of the above reasons, it is recommended that Defendants' Motion for Summary Judgment (Dkt. No. 18) be **DENIED** without prejudice.

Therefore, it is hereby **ORDERED** pursuant to 28 U.S.C. § 636(b)(1) that:

This Report, Recommendation, and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation, and Order must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report, Recommendation, and Order in accordance with the above statute, Fed.R.Civ.P. 72(b)(2) and Local Rule 72. **Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Judge's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72 of the Local Rules for the Western District of New York, "written objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection, and shall be supported by legal authority." **Failure to comply with the provisions of Local Rule 72 may result in the District Judge's refusal to consider the objection.**

The district judge will ordinarily refuse to consider *de novo* arguments, case law, and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance. *See, e.g., Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988). In accordance with the requirements set forth in Local Rule 72, "[a]ny party filing objections to a Magistrate Judge's order or recommended disposition must include with the objections to the District Judge a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge."

SO ORDERED.

DATED: Buffalo, New York
November 8, 2019

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge