IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAMELA ROMANO **v.** **WESTGATE RESORTS, LTD., a Wholly-owned subsidiary of CENTRAL FLORIDA INVESTMENTS, INC.,**	**CIVIL ACTION** **NO. 16-02714**

MEMORANDUM RE: DEFENDANT'S MOTION TO VACATE ENTRY OF DEFAULT JUDGMENT

Baylson, J. **July 18, 2017**

I. Introduction

Plaintiff Pamela Romano ("Plaintiff") filed this action against Westgate Resorts, Ltd. ("Defendant") alleging one count of violation of the Telephone Consumer Protections Act ("TCPA"). (See ECF 1, Complaint, "Compl." ¶ 1). On April 11, 2017, this Court granted Plaintiff's motion for default judgment against Defendant (ECF 10).

Before the Court is Defendant's motion to vacate the default, dated April 19, 2017 (ECF 13, Defendant's Motion to Vacate, "Def.'s Mot."), to which Plaintiff filed an Opposition on May 3, 2017 (ECF 15, Plaintiff's Response to Defendant's Motion to Vacate, "Pl.'s Opp'n"), and Defendant filed a Reply on May 10, 2017 (ECF 16, "Def.'s Reply").

For the reasons explained below, Defendant's motion to vacate will be GRANTED.

II. Factual Background and Procedural History

Plaintiff alleges that, in May of 2015, Defendant began to contact her by calling her on her cellphone. (Compl. ¶ 2). Plaintiff alleges that while she originally consented to the calls, "during the first phone call from Defendant to Plaintiff's cellular telephone, Plaintiff . . . revoked her consent." (Compl. ¶¶ 2-3). On July 3, 2015, after a few months of allegedly rocky business

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dealings, Defendant received a letter from Plaintiff's counsel. (Id. at 3). The letter stated that Defendant had violated the TCPA by contacting Plaintiff approximately twenty-five times after Plaintiff had allegedly revoked her consent in May 2015. (Id.).

Defendant forwarded this letter to its counsel, Greenspoon Marder Law ("GM"). (Id.). On July 13, 2015, GM responded to Plaintiff's letter, ""den[ying] [Plaintiff's] allegations regarding any artificial, prerecorded messages," and stating that it "intends to aggressively defend against any ill-advised lawsuit based upon these allegations should [Plaintiff] proceed with these claims." GM closed by saying that if Plaintiff's counsel had any additional questions or concerns, he should "not hesitate to contact" GM. (Def.'s Mot, Ex. B, "July 13, 2015 Letter," at 9).

On June 2, 2016—almost a year after this exchange—Plaintiff filed the instant Complaint against Defendant. According to Plaintiff, she served the Complaint with a summons on one Paula Clark ("Clark"), who was a "team member services specialist (Authorized) designated by law to accept service of process on behalf of [Defendant]," on June 27, 2016. (See ECF 2, Proof of Service).

On August 3, 2016, Plaintiff filed a request for default against Defendant, pursuant to Federal Rule of Civil Procedure 55(a) (ECF 3). The default was entered based upon the affidavit of Plaintiff's counsel in this case, which stated, in pertinent part,

(1) "Defendant was personally served with a copy of the amended complaint and summons," which was attached thereto as Exhibit A;

(2) "[A]n answer to the complaint was due on July 18, 2016[;]" and

(3) Since "Defendant failed to plead or otherwise defend within the time allowed," Defendant was in default.

(ECF 3-1, Affidavit of Lynn Bennecoff Ginsburg).

Seven months later, on March 23, 2017, Plaintiff filed its motion for Default Judgement against Defendant, in which Plaintiff requested a total of $37,500 in damages, $1,500 for each of the alleged twenty-five calls in violation of the TCPA. (ECF 4, Plaintiff's Motion for Default Judgment, "Pl.'s Mot.," at 1). In the motion, Plaintiff's counsel asserted that she "caused a true and correct copy of the foregoing Plaintiff's Motion for Default Judgment. . . to be served by certified regular U.S. Mail on [Defendant] who has not entered an appearance in this case." (ECF 4-3, Pl.'s Certificate of Service).

On April 10, 2017, this Court held a hearing, at which Defendant did not appear (ECF 7). The following day, because Defendant "failed to plead or otherwise defend in this action," the Court granted Plaintiff's motion for default judgment, and entered final judgment in Plaintiff's favor, rendering Defendant liable to Plaintiff for $37,500 in damages. (ECF 9).

Defendant avers that April 10, 2017 was also the first time that Plaintiff and Defendant communicated since July 13, 2015, the date of GM's letter to Plaintiff's counsel. (Def.'s Mot. at 4). Defendant states that Plaintiff's motion—which took eighteen days to be delivered via standard mail—arrived at Defendant's address on April 10, 2017, and that GM only learned of it when one of Defendant's representatives emailed it, along with correspondence with Plaintiff's counsel, on April 11, 2017. (Id.).

On April 12, 2017, GM attorney Jeffrey Backman ("Backman") emailed Plaintiff's counsel, informing her that Defendant was only made aware of the lawsuit on April 10, 2017, and that neither GM nor Defendant had heard anything from Plaintiff since 2015. (ECF 13, Ex. E, "GM Email"). Since Defendant and GM were now aware of the motion, Backman continued, they would "be moving to vacate the judgement," which, he indicated in a follow up email, was "clearly a mistake." (Id.).

On April 19, 2017, Defendant filed the instant motion to vacate, along with its first Notice of Appearance. (ECF 11, Notice of Appearance; Def.'s Mot. at 5). In its motion, Defendant argues that it was never made aware of Plaintiff's Complaint, noting that "neither the manner nor location of service was indicated on the [proof of service] Form." (Def.'s Mot. at 4). Defendant further argues that if the Complaint was in fact served on Clark,[1] that Clark had failed to follow the established procedure for dealing with legal documents.[2] (Def.'s Mot. at 4).

In support, Defendant filed the declaration of Anita Robinson, Defendant's employee, in which she stated that upon searching Clark's "drawers, files and e-mails for any documents regarding the Romano lawsuit," she found nothing, leading her to conclude that "to the extent [Clark] was actually served . . . [she] did not follow the system that has been put in place to ensure the appropriate personnel at Westgate and/or GM are made aware of the service of lawsuits." (ECF 13, Ex. C, "Robinson Decl." at 2).

Defendant contends that between June 27, 2016, when Plaintiff filed her Complaint, and April 10, 2017, when default was entered against Defendant, "Plaintiff's counsel [n]ever attempt[ed] to notify or contact GM, the law firm know by Plaintiff's counsel to represent Westgate." (Def.'s Mot. 5). Additionally, Defendant argues, had it or GM been aware of the lawsuit, they would have defended against it. (Id.)

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[1] Clark was placed on a paid leave of absence in January 2017, returned to work for a "short period of time" and was placed back on paid leave in April of 2017. (Id., at 5). She has not participated in the legal proceedings or given a Declaration as of July 10, 2017.

[2] In its motion in support of default judgment, Defendants filed the affidavit of Kathryn G. Saft (ECF 13, Ex. 2, "Saft Decl."), who explained, "to allow GM to promptly and expeditiously handle Westgate's legal matters, Westgate has implemented a system to ensure that all served lawsuits . . . are properly transmitted to the appropriate personnel at GM." Id. at 2.

III. Legal Standard

Rule 55(c) provides that "for good cause shown the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Rule 60(b) states, in pertinent part: "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1).

When deciding whether to vacate a default judgment, courts take into consideration four factors associated with FRCP 55(c): (1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a prima facie meritorious defense; (3) whether the defaulting defendant's conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions. Emcasco Ins. Co v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987).

The Court has broad discretion in deciding whether to set aside a default judgment. Momah, M.D. v. Albert Einstein Med. Ctr., 161 F.R.D. 304, 307 (E.D. Pa. 1995). In general, defaults are not favored because the interests of justice are best served by reaching a decision on the merits. Id. The Third Circuit has explicitly stated it "does not favor default judgments and in a close case, doubts should be resolved in favor of setting aside the default and reaching the merits." Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 420 (3d Cir. 1987). Thus, motions to set aside default judgments are construed in favor of the movant. Brokerage Concepts, Inc., v. Nelson Med. Group, 99-cv-5214, 2000 WL 283849, at *1 (E.D. Pa. Mar. 15, 2000).

IV. Discussion

The subject of the instant motion is whether the Court should exercise its discretion, pursuant to Rule 55(c) and Rule 60(b)(1),[3] to grant Defendant's motion to vacate the default judgment entered in Plaintiff's favor. (Def.'s Mot. at 1).

Defendant argues its motion to vacate should be granted for various reasons, namely:

(1) Defendant's July 13, 2015 letter to Plaintiff qualifies as an "appear[ance]," within the meaning of F.R.C.P. 55(b)(2), such that Plaintiff was required to—but failed to—provide adequate notice of its Complaints to Defendant (Def.'s Reply at 2-3);

(2) the Court lacks personal jurisdiction over Defendant as there was improper service and Defendant was not the entity involved in the alleged telephone calls that violated the TCPA;

(3) Plaintiff failed to present a legitimate cause of action;

(4) Defendant's failure to timely respond was due to excusable neglect;

(5) Defendant has meritorious defenses;

(6) Westgate's conduct was not culpable; and

(7) Plaintiff would not be prejudiced if the default judgement was set aside.

(Def.'s Mot. at 1-2).

In opposition, Plaintiff argues that,

(1) The notice requirement of Rule 55(b)(2) is not applicable in this case because Defendant never "appeared," within the meaning of the rule, before the April 10, 2017 hearing;

(2) The fact that the Court entered a default judgement against Defendant is evidence that Plaintiff plead sufficient facts to state her claim; and

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[3] In its Reply, Defendant also argues that the default judgement should be vacated for lack of personal jurisdiction. (Def.'s Reply at 4-7). However, Rule 60(b)(4)—not 60(b)(1)—governs motions to vacate default judgments for lack of personal jurisdiction. See Arpaio v. Dupre, 527 Fed. App'x 108, 111 (3d Cir. 2013) ("The District Court erred by analyzing arguments made under Rule 60(b)(4) within the Rule 60(b)(1) rubric"). Accordingly, since Defendant moved to vacate, pursuant to Rule 60(b)(1), for "excusable neglect," the Court will not consider this alternative, jurisdictional ground.

(3) Defendant has failed to demonstrate good cause to vacate the judgement

(Pl.'s Opp'n at 4-5, 11).

A. Rule 55(b)(2) Notice of Default

Defendant first argues that the entry of default judgment was improper because Plaintiff failed to satisfy the notice obligation of Rule 55(b)(2), which states, in pertinent part, that "[if] the party against whom judgment is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 7 days prior to the hearing of such application." Fed. R. Civ. P. 55(b)(2) (emphasis added). Plaintiff concedes that no notice was given to Defendant prior to their filing of the application for entry of default judgment. Nevertheless, Plaintiff argues that no notice was needed since Defendant had not "appeared" in the action, such that the Rule 55(b)(2) notice requirement was not triggered.

As Defendant notes, courts in this District have interpreted Rule 55(b)(2) to mean that a party may make either a *formal* appearance, by filing a notice of appearance with the court, or an *informal* appearance, by indicating to the plaintiff a clear intent to defend the suit. See Natasha C. v. Visionquest, Ltd., No. 03-cv-1903, 2003 WL 21999591, at *2 (E.D. Pa. Aug. 25, 2003) (citing FROF, Inc. v. Harris, 695 F. Supp. 827, 830 (E.D. Pa. 1988)). While Defendant never formally entered its appearance on the docket, the Court agrees that the July 13, 2015 letter sent to Plaintiff's counsel was a clear intention to defend in any legal proceedings. (Def.'s Reply at 3) (citing July 13, 2015 Letter ("[Defendant] intends to aggressively defend against any ill-advised lawsuit based upon these allegations should your client proceed with these claims" will be considered an informal appearance.)). See Visionquest, 2003 WL 21999591, at *2 (finding notice required satisfied where plaintiff received, *inter alia*, "a letter from [defendant's] counsel that advised [the plaintiff] of defense counsel's representation in the matter.").

Accordingly, the Court finds that Defendant was entitled to notice at least 7 days prior to the April 10, 2017, hearing. See Corestates Leasing, 1997 WL 325798, at *2 (finding Defendant's informal appearance mandated that they be given notice at least seven days prior to the motion for default judgement hearing).

The failure to give notice does not, however, mandate that the Court vacate the default judgment. Id. Instead, the decision to set aside the default judgment remains a matter of discretion pursuant to Rules 55(c) and 60(b). Collex, Inc. v. Walsh, 74 F.R.D. 443, 447 (E.D. Pa. 1997).

B. Analysis Pursuant to Rule 55(c) and Rule 60(b)

The Court must examine whether to vacate the default judgment in light of four factors the Third Circuit has outlined:

(1) whether the defendant has meritorious defenses;

(2) whether the default was the result of the defendant's culpable conduct

(3) whether the plaintiff will be prejudiced if the default judgement is set aside; and

(4) whether alternative sanctions would be effective

See Mrs. Ressler's Food Products v. KZY Logistics LLC, 675 Fed. App'x 136, 139-140 (3d Cir. 2017). The Court will consider each factor in turn.

While all four factors must be considered, "the threshold consideration is whether the defendant has alleged facts which would constitute a meritorious defense." NuMed Rehabilitation, Inc. v. TNS Nursing Homes of Pennsylvania, Inc., 187 F.R.D. 222, 224 (E.D. Pa.1999) (citing Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994)). Here, Defendant has met this threshold by providing a meritorious defense, and the remaining three factors also weigh in favor of granting its motion to vacate.

a. Defendant has meritorious defenses

In her Complaint, Plaintiff alleges that Defendant violated Section 227(b)(1)(A)(ii) of the TCPA[4] by making calls to her cell phone using an artificial or prerecorded voice after she revoked her consent to receiving those call. Defendant argues that it has set forth a meritorious defense to this claim because it has asserted, in its Opposition and in the accompanying Declarations, that: (1) "calls made to Plaintiff were made by a live operator and not conducted through prerecorded/artificial messages"; (2) "the business records showed that Plaintiff provided her consent in February 2015 *when she purchased* the timeshare interest"; and (3) "there were no business records indicating that Plaintiff 'revoked' her consent." (Def.'s Reply at 9).

"The showing of a meritorious defense is accomplished when allegations of defendant's answer, if established at trial, would constitute a complete defense to the action." United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984); see Insurance Co. of America v. Packaging Coordinators, Inc., 2000 WL 1586081, at *1 (E.D. Pa. Oct. 24, 2000) (to assess whether the defendant has alleged facts which could constitute a meritorious defense, "the court may examine the defendant's answer, or if none was filed, the allegations in its motion to vacate the default judgment or set aside entry of default."). A defendant need not prove that it *will* win at trial. Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987). Rather, it is sufficient for a defendant to show that its defense is not "facially unmeritorious." Id. (quoting Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 123 (3d Cir. 1983)). It is not enough, however, for a

[4] Section 227(b)(1)(A)(ii) of the TCPA makes it unlawful for any person within the United States to make any call without the prior express consent of the recipient and that is not for emergency purposes, using an automatic telephone dialing system or an artificial prerecorded voice to a telephone number assigned to a cellular telephone service.

defendant to allege only "simple denials or conclusory statements." $55,510.05 in U.S. Currency, 728 F.2d at 195.

The Court finds that Defendant has proffered a meritorious defense by asserting in its Opposition, as stated above, that the calls made to Plaintiff were not made by an artificial/prerecorded voice and were made with Plaintiff's consent. (See Def.'s Mot. at 16; see also Def.'s Reply at 9). These defenses, if proven to be true at trial, would absolve Defendant of liability to Plaintiff. See Blue Ribbon Commodity Traders, Inc. v. Progresso Cash & Carry, 07-cv-4122, 2008 WL 2909360, at *2 (E.D. Pa. July 23, 2008) (finding "the evidence that [defendant] proffers is irrelevant to the question now before the court of whether [defendant's] claims, *if true*, would constitute a meritorious defense.") (emphasis in original).

Accordingly, this Court's inquiry into the merits of Defendant's defense is, at the time, complete, and this factor weighs in favor of vacating the default judgement and giving Defendant a chance to present its defense at trial.

b. Defendant did not engage in culpable conduct

The second factor to consider is whether Defendant's failure to defend against Plaintiff's action was due to "excusable neglect," as opposed to any culpable conduct.

"The standard for defendant's culpability in failing to answer . . . is whether it acted willfully or in bad faith." WPHL TV, Inc. v. Marketing Specialists, Inc., 88-cv-3079, 1988 WL 80041, at *1 (E.D. Pa., Aug. 1, 1988) (holding the defendant's "neglect in failing to appear or otherwise respond to the complaint and summons is excusable . . . [because] it was confused as to the validity of service.").

Here, there is no evidence to suggest that Defendant acted willfully or in bad faith in its failure to respond to Plaintiff's Complaint.[5] The Court accepts Defendant's statement that neither it nor its Counsel, GM, was even aware of Plaintiff's Complaint. (See Def.'s Mot. at 13). This contention is corroborated by the Robinson Declaration, in which she stated she "had no knowledge of Ms. Clark actually being served with [Plaintiff's] lawsuit papers" and after speaking with "other personnel in HR" she found "none of them ha[d] any knowledge of Ms. Clark's [service] . . . or any knowledge regarding [Plaintiff's] lawsuit prior to April 2017." (See Robinson Decl. ¶ 2). Additionally, Defendant offered a credible explanation of its procedures, such that if Clark had followed them after being served with Plaintiff's Complaint, the Complaint would have "been promptly forwarded to the appropriate GM personnel." (Def.'s Mot. at 4). However, Defendant avers that the summons and Complaint were never seen or found in Clark's files. (Id.).

The purpose of a sanction as severe as a default judgment is to deter "flagrant bad faith." Emcasco, 834 F.2d at 75 (citing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976)). Here, not only is there no evidence of bad faith, but Defendant has also, with the exception of timely responding to the Complaint, been responsive to communications from Plaintiff. For instance, Defendant responded to Plaintiff within ten days of receiving its July 3, 2015, letter (see Def.'s Mot. at 3), and responded promptly after receiving notice of Plaintiff's default judgement. (Id. at 5).

In response, Plaintiff argues that Defendant's conduct was culpable because it "ignored the Complaint that was served on [Defendant] . . . and then waited until April 11, 2017, to

[5] The Court finds credible the declarations provided by Defendant's employees, which propose that Clark allegedly accepted service during a time where she was in declining health, and that she did not follow proper procedure or notify appropriate personnel at Defendant's place of business. (See, e.g., Saft Decl.; Robinson Decl.)

forward the Motion for Default Judgement to its counsel," in "reckless disregard" of Plaintiff's allegations. (Pl.'s Opp'n at 12). However, the Court rejects Plaintiff's argument that these actions were the result of "reckless disregard" by Defendant. As explained, *supra*, the Court accepts Defendants explanation that no one besides Clark was aware of Plaintiff's Complaint, and that Defendant responded timely once it and GM were apprised of the motion for default judgment.

Accordingly, the Court is satisfied that Defendant's conduct in failing to respond to the June 27, 2016, service was non-culpable.

c. Plaintiff will not be prejudiced if the default judgment is vacated

The third factor to consider is whether Plaintiff will suffer prejudice if the Court vacates the default judgment. A plaintiff suffers prejudice of this kind when "[the] 'plaintiff's claim would be materially impaired because of the loss of evidence, an increased potential for fraud or collusion, substantial reliance on the entry of default, or other substantial factors.'" Blue Ribbon Commodity Traders, Inc. v. Quality Foods Distributors, No. CIV.A. 07-4037, 2007 WL 4323001, at *2 (E.D. Pa. Dec. 11, 2007) (quoting Dizzley v. Friends Rehab. Program, 202 F.R.D. 146, 147-148 (E.D. Pa 2001)).

Here, Plaintiff argues that she would suffer prejudice if the default was vacated because her phone carrier, Sprint, only keeps phone records for eighteen months, such that her phone records from the spring of 2015—the time of the allegedly unwanted calls—are no longer available. (Pl.'s Opp'n at 16-17).

District Courts addressing this type of general "loss of evidence" argument have consistently concluded that a "speculative fear of loss of evidence does not suffice to display prejudice." Quality Foods, 2007 WL 432001, at *3. Moreover, Plaintiff fails to acknowledge

that more than eighteen months had already elapsed between the calls and the entry of default judgment, such that Plaintiff would not have been able to present the phone records even if Defendant had appeared at the April 10, 2017 hearing. (Def.'s Mot at 9).

Finally, Defendant filed its motion to set aside the default judgment nine days after the judgment was entered. Plaintiff fails to identify any risk of prejudice that is a result of this nine-day delay, and does not suggest that it relied on the entry of default. See Progresso, 07-cv-4122, 2008 WL 2909360, at *3 (E.D. Pa. July 23, 2008); see also, Dizzley, 202 F.R.D. at 147-48 (holding that a three-month delay caused no prejudice); Visionquest, 2003 WL 21999591, at *3 (holding that a two-month delay caused no prejudice).

Accordingly, like many courts in this District, this Court finds that such a delay will cause no prejudice to Plaintiff.

d. Alternative Sanctions

Finally, mindful that "[d]ismissal must be a sanction of last, not first, resort," Emcasco, 834 F.2d at 75, the court must consider whether to impose alternative sanctions. "[P]unitive sanctions are inappropriate absent evidence of bad faith or willful misconduct, or where the defendant sets forth a meritorious defense." Quality Foods, 2007 WL 4323001, at *4. (quoting Royal Ins. Co. Of Am. v. Packaging Coordinators, Inc., 00-cv-3231, 2000 WL 1586081, at *3 (E.D. Pa. Oct. 24, 2000)). As discussed, *supra,* Defendant has not shown bad faith or willful misconduct, and has a meritorious defense. Thus, sanctions are inappropriate.

V. Conclusion

For the foregoing reasons, Defendant's motion to vacate the default judgment will be GRANTED.

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