IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TIFFANY TANNER, Plaintiff, v. LOAN SCIENCE, LLC, Defendant/Third-Party Plaintiff, v. RISK MANAGEMENT RESOURCES, INC., Third-Party Defendant.	§ § § § § § § § § § § § §	1:16-cv-644-RP

ORDER

Before the Court is Third-Party Plaintiff Loan Science, LLC's Traditional and No Evidence Motion for Summary Judgment, filed June 23, 2017. (Dkt. 41). For the reasons that follow, the Court finds that the motion should be granted in part.

BACKGROUND

On June 1, 2016, Plaintiff Tiffany Tanner filed this action against Defendant and Third-Party Plaintiff Loan Science, LLC ("Loan Science"). (*See* Compl., Dkt. 1). Loan Science owned Plaintiff's student loan debt and was engaged in efforts to collect on her debt following her default. Plaintiff alleged that Loan Science violated the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, by calling her up to 158 times after she withdrew her consent to be called on June 20, 2014.

On August 19, 2016, Loan Science filed a third-party complaint naming Risk Management Resources, Inc. ("RMR") as a third-party defendant. (Dkt. 14). Loan Science had contracted with RMR to conduct its collection activities. Pursuant to the contract between the two entities, Loan Science was to provide client information to RMR or its agent, and RMR or its agent would

undertake collection efforts and provide account updates to Loan Science. (*See* Service Agreement, Dkt. 41-1, at 2). RMR eventually contracted with a third party, Mercantile Adjustment Bureau ("Mercantile") to perform the collection services. (Mercantile Agreement, Dkt. 41-1, at 153). The contract between Loan Science and RMR additionally required RMR to manage Mercantile's performance to ensure the best results for Loan Science, implement Loan Science's collection strategy, and to engage in an ongoing process of evaluating and improving collection operations. (Service agreement, 41-1, at 2). Additionally, the contract required RMR and Mercantile to comply with all federal and state laws and regulations governing the collection of debts. (*Id.* at 4).

Each party agreed to indemnify the other under the contract. RMR and Mercantile were to indemnify Loan Science for all losses that directly resulted from their "negligence, willful misconduct, or performance or failure to perform" under the contract. (*Id.*). This indemnification was contingent upon Loan Science's warranting that "to the best of its knowledge the information furnished by it to [Mercantile] regarding the identity of the debtor or any other such information regarding the debtor is accurate as of the date furnished." (*Id.*). Loan Science agreed to indemnify RMR and Mercantile for any losses sustained as a result of its provision of inaccurate debtor information. (*Id.*).

Loan Science asserts that the indemnification clause requires RMR to indemnify it for the losses it sustained as a result of Plaintiff's litigation. More specifically, Loan Science argues that RMR and Mercantile failed to perform adequately under the relevant agreements because Mercantile failed to make note of Plaintiff's "do not call" request and did not notify Loan Science of the request. This failure to convey the information resulted in Loan Science's continuing to provide Plaintiff's account

information to Mercantile in the "Daily Dialer File"[1] to continue collection activities. This in turn resulted in Mercantile's continuing to call Plaintiff, as seemingly instructed by Loan Science, notwithstanding her "do not call" request, giving rise to Plaintiff's cause of action.

LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only 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, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he moving party may [also] meet its burden by simply pointing to an absence of evidence to support the nonmoving party's case." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted. *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000). The court will view the summary judgment evidence in the light most favorable to the non-movant. *Rosado v. Deters*, 5 F.3d 119, 123 (5th Cir. 1993).

[1] The "Daily Dialer File" was a data file provided by Loan Science to Mercantile each day and included the identity of a debtor, the amount owed, and other account information. Loan Science asserts that the system also allowed Mercantile to update account information which would be returned to Loan Science.

DISCUSSION

Loan Science and RMR appear to be in agreement that the indemnification clause of their contract is valid and enforceable. They disagree, however, on whether the facts of this case have triggered a duty for RMR to indemnify Loan Science for losses sustained in this litigation. The issues thus requiring resolution are: (1) whether RMR engaged in negligence, willful misconduct, or failed to perform under the contract; (2) if so, whether indemnification is excused because of Loan Science's failure to provide RMR with accurate information; and (3) whether the losses for which Loan Science seeks indemnification resulted directly from RMR's wrongdoing.

1. RMR's Wrongdoing

The failure of RMR and its agent, Mercantile, to perform under the contract with Loan Science is clear. As noted above, the contract imposed upon RMR and Mercantile an independent obligation to comply with federal law governing debt collection. The evidence establishes that Mercantile received Plaintiff's "do not call" request, yet immediately disregarded the request. (Mot. Summ. J. Exs. F–G, Dkt. 41-1). There appears to be no dispute that Mercantile called Plaintiff up to 158 times thereafter.

RMR does not dispute that Mercantile received Plaintiff's request yet continued to call her. Rather, it argues that there is "no evidence that [it] acted negligently or willfully." (Resp., Dkt. 47, at 9). But the parties' agreement did not limit RMR's liability to situations of negligence or willful misconduct; it also required RMR and Mercantile to indemnify Loan Science for any damages resulting from their "performance or failure to perform" under the contract. (Service Agreement, Dkt. 41-1, at 4). The failure of RMR and its agent to comply with Plaintiff's "do not call" request was a violation of federal law, and thus a breach of its agreement to abide by all law governing its collection activities. (*See id.* ("RMR and [Mercantile] shall comply with all provisions of relevant . . . statutes and regulations, if any, governing the collection of the subject debt.")).

RMR makes several other arguments to shift blame for the violation back to Loan Science. First, RMR argues that Loan Science should have discontinued instructing Mercantile to call Plaintiff after she made her "do not call" request. (Resp., Dkt. 47, at 8). The Court would agree, were there any evidence that Mercantile communicated the request to Loan Science. Obviously, Loan Science cannot be faulted for failing to make updates to its files on the basis of information it did not have—information that RMR or Mercantile received yet withheld.[2] Additionally, even if RMR's obligation to indemnify Loan Science was dependent on Loan Science's provision of accurate debtor information, the obligation of RMR's agent to comply with federal law was not. Thus, the fact that Loan Science conveyed Plaintiff's account information in its Daily Dialer File might excuse indemnification, but it would not excuse the failure of RMR and its agent to enact procedures to ensure compliance with federal law, and stop calls to a person who has made a do not call request. (*See* Service Agreement, Dkt. 41-1, at 2 (requiring RMR to "[e]ngage in ongoing process evaluations and improvement . . . with regard to collection performance," and to "[m]anage [Mercantile's] performance and operation to assure best possible results for [Loan Science]").

Second, RMR argues that Loan Science should have never directed it to call Plaintiff, even before her "do not call" request in June 2014, because she had made another request sixteen months earlier. While true that Plaintiff withdrew her consent to be called on March 5, 2013, she signed a

[2] RMR makes a patently misleading argument that Loan Science "apparently had knowledge of [Plaintiff's] request, such that [Loan Science] called RMR's agency to discuss it and request documentation." (Resp., Dkt. 47, at 8). As support for this assertion, RMR cites a declaration and deposition of Gary Ciesla, a former employee of MAB. In his declaration, Ciesla states that, in July 2014, he received a call from an unnamed woman from Loan Science to discuss a complaint received from *a* debtor, and that he discussed the complaint and the notes on file, including a "do not call" request. (Ciesla Dep., Dkt. 47-1, at 34). At his deposition, Ciesla expressly stated that he did not recall the name of the consumer that was the subject of the call. (Ciesla Dep., Dkt. 47-1, at 39). This evidence establishes only that Loan Science once called to discuss one of the hundreds or thousands of Loan Science accounts Mercantile handled. It is mere speculation to suggest that Loan Science had called to inquire about Plaintiff's complaint. And it is highly misleading to assert without qualification, as RMR has done, that the call concerned Plaintiff's account. The Court will assume at this time that a stern admonition should suffice to convey the seriousness with which the Court views such baseless and deceptive argument.

forbearance application the next day once again authorizing Loan Science to contact her by phone. (*See* Forebearance Application, Dkt. 50-1, at 6). The prior "do not call" request therefore has no bearing on the issues currently under consideration.

Finally, RMR argues that the system in place—the Daily Dialer File—did not allow RMR or its agent to communicate a "do not call" request to Loan Science. This is a red herring. First, nothing suggests that the Daily Dialer File was the sole means of communication between Loan Science and Mercantile. Mercantile could have contacted Loan Science in any number of ways regarding the "do not call" request, and asked them to remove Plaintiff from the Daily Dialer File. Second, as stated repeatedly, the obligation of RMR and Mercantile to comply with federal law was an independent one not apparently requiring communication with Loan Science. Third, the Ciesla declaration establishes that Mercantile had the capacity to note in its own files that a debtor withdrew consent to be called. (Ciesla Decl., Dkt. 47-1, at 34 ("I discussed the complaint and the notes on the file, including the do not call notation . . . .")). The ability or inability to include Plaintiff's request in the Daily Dialer File therefore cannot excuse the failure of RMR and Mercantile to note the request in its own records and honor it.

The Court therefore finds that the evidence before it demonstrates beyond any genuine fact dispute that RMR and Mercantile breached the agreement with Loan Science to engage in collection activities consistent with federal law. Having established a violation, the Court next turns to whether Loan Science failed to provide RMR or Mercantile with appropriate information, relieving them of their duty to indemnify Loan Science for any losses.

2. Loan Science's Provision of Accurate Information

Loan Science argues that it has provided necessary and accurate information to RMR and Mercantile pursuant to its agreement. (Mot. Summ. J., Dkt. 41, at 9). As evidence, it points to the deposition of Donald Whittaker, RMR's President, wherein he testified that he had no reason to

believe that Loan Science had failed to provide correct information as to the categories of data enumerated in the parties' agreement. (Whittaker Dep., Dkt. 41-1, at 49). And although Whittaker faulted Loan Science for failing to communicate Plaintiff's 2014 "do not call" request (back) to Mercantile (which had already received the request directly from Plaintiff), he conceded that he had no personal knowledge of any evidence suggesting that this request was communicated to Loan Science in the first instance—other than a subjective belief that the debt collector was experienced enough that she *should have* reported the request. (*Id.* at 49–51).[3]

The evidence demonstrating whether the "do not call" request was received by Loan Science is crucial to RMR's defense. Contrary to RMR's apparent belief, the indemnification clause does not excuse its liability in all cases in which Loan Science provides inaccurate information. Rather, Loan Science warranted only that "*to the best of its knowledge* the information furnished by it . . . is accurate as of the date furnished." (Service Agreement, Dkt. 41-1, at 4). Thus, even if the information provided by Loan Science was in some way inaccurate in light of Plaintiff's "do not call" request, RMR is excused from liability under the indemnification agreement only if the inaccurate information was not to the best of Loan Science's knowledge. Loan Science has presented evidence tending to show that it lacked knowledge of Plaintiff's "do not call" request. (Rudolph Decl., Dkt. 41-1, at 10). RMR does not properly rebut this evidence by showing only that the collector who received Plaintiff's request was experienced enough to know she should record it.[4]

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[3] In the Court's view, the force of any platitudes about wisdom drawn from experience is undermined to some degree by the collector's decision to immediately redial Plaintiff after being instructed not to call. The collector apparently had second thoughts about recording an acknowledgment of Plaintiff's "do not call" request when she erased her first message and rerecorded a second leaving out that Plaintiff "said something about us … that we need to stop calling … yeah?" (Callback Message, Dkt. 41-1, at 158).

[4] In response to an interrogatory requesting RMR to support any contention that Plaintiff's request was communicated to Loan Science, RMR vaguely asserts that "[Mercantile] sent its daily uploads to Loan Science. On the evening of June 20/early morning of June 21, [Mercantile] uploaded the file." (Resp. Interrog. No. 6, Dkt. 41-1, at 170). Other than this conclusory assertion, no evidence suggests that Plaintiff's request was included in that upload.

RMR makes two attempts to create a fact dispute here, but each is unsuccessful. First, RMR argues that Loan Science failed to conduct any audit of "do not call" requests until after August 2014, which, it asserts, vitiates any indemnification obligations. (Resp., Dkt. 47, at 9). But nothing in the parties' agreement imposes upon Loan Science any obligation to conduct audits. On the contrary, the duty to conduct collections activity, manage Mercantile's performance (including the obligation to comply with federal law), and engage in "ongoing process evaluations and improvement" was allocated exclusively to RMR under the plain and unambiguous terms of the contract. (Service Agreement, Dkt. 41-1, at 2). In fact, to the extent the relevant information to be audited was within Mercantile's possession, as appears to be the case, the contract explicitly forbade Loan Science from obtaining the information without RMR's authorization. (Service Agreement, Dkt. 41-1, at 3 ("At no time will [Loan Science] be allowed to communicate with [Mercantile] . . . unless preauthorized by RMR.")). Additionally, and most fundamentally, a failure to audit, standing alone, is meaningless if it did not result in the provision of inaccurate information to RMR and Mercantile.

Second, RMR again argues that the information Loan Science provided was somehow inaccurate because of Plaintiff's 2013 "do not call" request. As explained above, however, that prior request is irrelevant. Finally, RMR again misleadingly asserts here that Loan Science had knowledge of Plaintiff's June 2014 "do not call request" because it called Mercantile or RMR to discuss it. The Court will not address this argument again.

Loan Science has met its burden of providing evidence tending to show that it provided necessary information to RMR and Mercantile that was correct to the best of its knowledge. RMR has failed to respond to this evidence in any meaningful way. Accordingly, the Court finds it established beyond any genuine factual dispute that Loan Science satisfied all conditions precedent

to RMR's duty to indemnify. *See* Fed. R. Civ. P. 56(e)(2). The Court will next turn to the issue of loss.

3. Directly Resulting Loss

As noted previously, the indemnification clause holds RMR responsible for all losses that "directly result" from RMR's or Mercantile's wrongdoing. Thus, in order for RMR to be liable for any amount, it must be shown that RMR's wrongdoing was the direct cause of the loss.

Loan Science's evidence on this point is scant. Loan Science first directs the Court's attention to the Notice of Settlement, (Dkt. 33), to establish the fact that Loan Science entered a settlement agreement with Plaintiff. Loan Science then states that it "suffered $71,000 in damages to settle Tanner's claims, along with attorneys' fees incurred in the defense of Tanner's claims and the prosecution of Loan Science's claims against RMR." (Mot. Summ. J., Dkt. 41, at 11). To support this assertion, Loan Science cites the declaration of Jeff Rudolph, a Loan Science partner, wherein he offers the conclusory statement that "[a]s a result of the RMR and MAB's negligence . . . Loan Science suffered $71,000 in losses to settle Tanner's claims." (Rudolph Decl., Dkt. 41-1, at 10). This completes Loan Science's showing.

Apparently, the figure claimed by Loan Science includes Plaintiff's debt, which Loan Science seems to have discharged as part of the settlement agreement. The suggestion that Loan Science seeks to recover Plaintiff's debt from RMR was first raised in RMR's response brief. (*See* Resp., Dkt. 47, at 10 (stating, apropos of nothing, that "[a]ny amounts attributed to [Plaintiff's] debt that LS seeks to recover now are improper"). The Court only gained confidence that Plaintiff's debt was relevant to the losses now claimed when Loan Science stated in its reply brief that it "properly included the written-off debt in its requested judgment." (Reply, Dkt. 50, at 7).

In support of its position that this debt is properly charged to RMR, Loan Science simply states that "RMR cites no support for the proposition that these amounts are improper." (*Id.*). But

the Court notes that Loan Science, too, provided no support for the proposition that the amounts *are* proper. As both third-party plaintiff and summary judgment movant, the burden rests with Loan Science to establish its entitlement to the relief it seeks. While common sense dictates that RMR would be responsible for the statutory penalties resulting from its violations of federal law, it is difficult to see how RMR's actions were the cause, rather than just the occasion, for the discharge of Plaintiff's debt.

Although the Court concludes that RMR must indemnify Loan Science for those losses it has caused, it cannot determine what portion of claimed loss is properly charged to RMR and can therefore not grant summary judgment in full.

CONCLUSION

For the foregoing reasons, Loan Science's Motion for Summary Judgment is hereby **GRANTED IN PART**. (Dkt. 41). The Court **GRANTS** the motion as to the question of RMR's liability under the indemnification clause, but **DENIES** the motion as to the issue of damages.

In the interest of judicial economy, the Court **ORDERS** Loan Science to file a supplemental motion for summary judgment on the issue of damages **on or before August 2, 2017**. The motion shall include or refer to[5] a breakdown of the settlement amount and provide evidence and argument establishing what portion of the amount, if any, "directly result[ed]" from RMR's conduct outlined above. (*See* Service Agreement, Dkt. 41-1, at 4). Loan Science's failure to provide adequate evidence may result in summary judgment being rendered against it. *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 435 (5th Cir. 2000) ("The district court may enter summary judgment sua sponte if the parties are provided with reasonable notice and an opportunity to present argument opposing the judgment."). RMR's response to Loan Science's motion shall be due one week after the motion is

[5] The Court recognizes that Loan Science may be under an obligation to keep details its settlement agreement with Plaintiff confidential. If this is the case, Loan Science may file the details of the settlement agreement separately and under seal.

filed. Loan Science may file a reply within one week of RMR's response, but the Court need not wait for any reply before issuing a ruling. *See* Local Rule CV-7(f)(2).

SIGNED on July 21, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE