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United States District Court, C.D. California.

Saber AHMED, et al.
v.
HSBC BANK USA, NATIONAL ASSOCIATION, et al.

ED CV 15-2057 FMO (SPx)
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Proceedings: (In Chambers) Order Re: Motion to Strike

Fernando M. Olguin, United States District Judge

***1** Having reviewed all the briefing filed with respect to defendants' Motion to Strike Class Allegations (Dkt. 76, "Motion"), the court finds that oral argument is not necessary the Motion, see Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

INTRODUCTION

On October 6, 2015, plaintiff Saber Ahmed ("Ahmed") filed a Complaint, individually and on behalf of all others similarly situated, against defendant HSBC Mortgage Corporation (USA)[1] ("HSBC") alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq. (See Dkt. 1, Complaint at ¶¶ 23-30). On March 15, 2017, Ahmed and plaintiff John Monteleone (collectively, "plaintiffs") filed a First Amended Complaint ("FAC") against HSBC and defendant PHH Mortgage Corporation ("PHH" and collectively, "defendants"), for negligent and willful violations of the TCPA. (See Dkt. 27, FAC at ¶¶ 65-73). Defendants now move to strike the class allegations in the FAC pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.[2] (See Dkt. 76, Motion at 4).

LEGAL STANDARD

Under Rule 12(f) of the Federal Rules of Civil Procedure, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[D]efendants must state factual matter to support the plausibility of their defenses." ABC Distrib., Inc. v. Living Essentials LLC, 2016 WL 8114207, *1 (N.D. Cal. 2016). An allegation is "[r]edundant" if it is "needlessly repetitive or wholly foreign to the issues involved in the action." Cal. Dep't. of Toxic Substances Control v. Alco Pac., Inc., 217 F.Supp.2d 1028, 1033 (C.D. Cal. 2002). " 'Immaterial' matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting 5 Wright & Miller, Federal Practice and Procedure § 1382, at 706-07 (1990)), rev'd on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S.Ct. 1023 (1994). " 'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." Id. (quoting 5 Wright & Miller, Federal Practice and Procedure § 1382, at 711 (1990)). "Scandalous" allegations include those "that cast a cruelly derogatory light on a party or other person." In re 2TheMart.com, Inc. Sec. Litig., 114 F.Supp. 2d 955, 965 (C.D. Cal. 2000).

DISCUSSION

Defendants move to strike the class allegations in the FAC arguing that: (1) recent Ninth Circuit and district court decisions preclude the possibility that a "class can possibly be maintained on the face of the pleadings for this type of TCPA case[;]" (2) TCPA claims based on whether individual class members consented are not appropriate for class determination; and (3) plaintiffs lack standing to represent class members who received calls directly from HSBC. (See Dkt. 76, Motion at 1-2, 5 & 10).

***2** "A decision to grant a motion to strike class allegations ... is the functional equivalent of denying a motion to certify a case as a class action[.]" Bates v. Bankers Life & Casualty Co., 848 F.3d 1236, 1238 (9th Cir. 2017). "Class allegations are generally not tested at the pleadings stage and instead are usually tested after one party has filed a motion for class certification." Romero v. Securus Techs., Inc., 216 F.Supp.3d 1078, 1095 (S.D. Cal. 2016). "Striking class allegations prior to a formal certification motion is generally disfavored due to the lack of a developed factual record." Pepka v. Kohl's Department Stores, Inc., 2016 WL 8919460, *1 (C.D. Cal. 2016); see Collins v. Gamestop Corp., 2010 WL 3077671, *2 (N.D. Cal. 2010) ("Class allegations are generally not tested at the pleadings stage and instead are usually tested after one party has filed a motion for class certification."); Donaca v. Metro. Life Ins. Co., 2014 WL 12597152, *3 (C.D. Cal. 2014) (noting that "it is in fact rare to [grant a motion to strike class allegations] in advance of a motion for class certification"). "However, as the Supreme Court has explained, '[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim.' " Keen v. Coral Reef Prods., Inc., 2015 WL 12910696, *2 (C.D. Cal. 2015) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372 (1982)) (alteration in original). Therefore, "a court may grant a motion to strike class allegations if it is clear from the complaint that the class claims cannot be maintained." Id.

As an initial matter, defendants do not cite to any relevant binding authority in support of their Motion. (See, generally, Dkt. 76, Motion; Dkt. 84, Defendants' Reply in Support of Motion [ ] ("Reply")). For instance, defendants rely on Gannon v. Network Telephone Servs., Inc., 628 Fed.Appx. 551 (9th Cir. 2016), (see Dkt. 76, Motion at 6), but that is an unpublished decision concerning the denial of class certification. Defendants also cite Pepka, 2016 WL 8919460, at *1, claiming the class definition in that case is "virtually identical to this case." (Dkt. 76, Motion at 5, 7-9). However, the class definition in Pepka, included whether the recipient gave "prior express consent[,]" 2016 WL 8919460, at *1, and as defendants acknowledge, plaintiffs' class definition does not include consent. (See Dkt. 76, Motion at 8). Moreover, the question of consent is not necessarily a bar to class certification in a TCPA action. See, e.g., Caldera v. American Medical Collection Agency, 2017 WL 2812898, *5 (C.D. Cal. 2017) (granting class certification of TCPA class and finding "no indication that individualized issues of consent would be an obstacle to managing this case as a class action"); Bee, Denning, Inc. v. Capital Alliance Grp., 310 F.R.D. 614, 629 (S.D. Cal. 2015) ("Where a party has not submitted any evidence of ... express consent, courts will not presume that resolving such issues requires individualized inquiries."); Kristensen v. Credit Payment Services, 12 F.Supp.3d 1292, 1307 (D. Nev. 2014) ("courts should ignore a defendant's argument that proving consent necessitates individualized inquiries in the absence of any evidence that express consent was actually given. It also means that courts should afford greater weight to a plaintiff's theory of class-wide proof of lack-of-consent when that theory is entirely unrebutted by the precise type of evidence which could do it greatest harm—evidence of express consent.").

Defendants also argue that the court should strike plaintiff's class allegations because plaintiffs are alleging an improper fail-safe class.[3] (See Dkt. 84, Reply at 5-6). However, courts have rejected such arguments with respect to class definitions similar to plaintiffs' class definitions. See, e.g., Waterbury v. A1 Solar Power Inc., 2016 WL 3166910, *4-5 (S.D. Cal. 2016) ("Plaintiffs do not use failsafe class definitions. The Court can determine membership in Plaintiffs' putative classes using objective criteria[.]"); Panacci v. A1 Solar Power, Inc., 2015 WL 3750112, *8 (N.D. Cal. 2015) ("to determine whether someone is in the class, one simply needs to answer questions such as whether the person is on a DNC registry or whether the person received a certain number of phone calls from Defendants within a certain timeframe"); O.P. Schuman & Sons, Inc. v. DJM Advisory Grp., LLC, 2017 WL 634069, *4 (E.D. Pa. 2017) (distinguishing the plaintiffs' class allegations from

a failsafe class because "it does not rely on ascertaining whether potential class members' provided Defendants permission or invitation"); see also Juarez v. Citibank, N.A., 2016 WL 4547914, *5 (N.D. Cal. 2016) (finding defendant's motion to strike class allegations as "failsafe" classes to be premature).

***3** Finally, defendants contend that plaintiffs do not have standing to represent class members who received calls directly from HSBC because plaintiffs only received calls from PHH. (See Dkt. 76, Motion at 10-11; Dkt. 84, Reply at 10). Defendants do not explain the basis for the standing argument or cite to applicable authority in their moving papers. [4] (See, generally, id.). In any event, "[a] request to find that Plaintiff does not have standing does not fall within the scope of Rule 12(f)." [5] Olney v. Job.com, Inc., 2013 WL 5476813, *4 (E.D. Cal. 2013); see also Rosales v. FitFlop USA, LLC, 882 F.Supp.2d 1168, 1179 (S.D. Cal. 2012) (denying motion to strike class allegations based in part on lack of standing as premature).

In short, "[g]iven the lack of obvious defects in Plaintiff's class definitions and the infrequency of striking class allegations prior to motions for class certification, Defendants' Motion under Rule 12(f) is denied." Panacci, 2015 WL 3750112, at *9; see Iniguez v. The CBE Grp., 969 F.Supp.2d 1241, 1248 (E.D. Cal. 2013) ("This case is not one in which the pleadings clearly indicate that the class action requirements cannot be met. Defendant's motion to strike is accordingly premature, and it is denied. The sufficiency of Plaintiff's class allegations are better addressed in Plaintiff's pending motion for class certification.") (citations omitted); Slovin v. Sunrun, Inc., 2016 WL 5930631, *2 (N.D. Cal. 2016) ("Defendants essentially seek to litigate Rule 23 class certification prematurely.").

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Defendants' Motion to Strike Class Allegations **(Document No. 76)** is **denied**.

2. Defendants' Ex Parte Application to Stay, Motion to Modify Scheduling Order, and Motion for Review and Reconsideration **(Document Nos. 104, 105 and 106)** are **denied as moot**.

All Citations

Not Reported in Fed. Supp., 2017 WL 5765734

Footnotes

1 Erroneously sued as HSBC Bank, USA, National Association. (See Dkt. 62, HSBC Mortgage Corporation (USA)['s] Opposition [ ] at 1).

2 Although defendants suggest the court may strike class allegations under Rule 23(c)(1)(A) and (d)(1)(D), they only provide authority based on Rule 12(f). (See Dkt. 76, Motion at 4).

3 A fail-safe class is "defined in a way that precludes membership unless the liability of the defendant is established." Kamar v. RadioShack Corp., 375 Fed.Appx. 734, 736 (9th Cir. 2010).

4 It is unclear if defendants are referring to Article III standing or statutory standing. See, e.g., Agne v. Papa John's Int'l, Inc., 286 F.R.D. 559, 564-65 (W.D. Wash. 2012) (discussing standing in TCPA cases).

5 In addition, it appears the FAC alleges that on at least one occasion after receiving a "robocall," plaintiff Monteleone spoke with a live operator and "obtained verbal confirmation from Defendant HSBC that the calls were robocalls" and "after answering one of Defendants' calls ... had [an] exchange with an HSBC Mortgage Service Center representative." (Dkt. 27, FAC at ¶¶ 38-39; see also id. at ¶¶ 40-47). The FAC also claims PHH was HSBC's agent and therefore HSBC is liable for PHH's calls on its behalf. (See Dkt. 27, FAC at ¶¶ 17-22). The Ninth Circuit has held that a "defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller." Gomez v. Campbell-Ewald Co., 768 F.3d 871, 879 (9th Cir. 2014), aff'd, 136 S.Ct. 663 (2016).