UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RENY RIVERO,

Plaintiffs,

- against -

AMERICA'S RECOVERY SOLUTIONS, LLC, and MAINSAIL PORTFOLIO FUND I, LLC,

Defendants.

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REPORT & RECOMMENDATION
13 CV 3359 (ENV)(LB)

BLOOM, United States Magistrate Judge:

Plaintiff Reny Rivero brings this *pro se* action against Defendants asserting violations of the Fair Debt Collection Act ("FDCA"), 15 U.S.C. §§ 1692d, 1692e, 1692g, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and New York City's Consumer Protection Laws and Regulations, N.Y.C. Admin. Code §§ 20-494, 20-700–02; N.Y.C.R.R. tit. 6, § 5-77. He voluntarily dismissed Defendant Mainsail Portfolio Fund I, LLC, and moved for a default judgment against Defendant America's Recovery Solutions, LLC for failure to retain new counsel and respond to his Amended Complaint. The Honorable Eric N. Vitaliano granted the motion and referred the matter to me to conduct an inquest on damages and to write a Report and Recommendation pursuant to 28 U.S.C. § 636(b). (ECF Nos. 29, 35.) For the reasons set forth below, it is recommended that the Court should reconsider the grant of the default judgment motion as to Plaintiff's city-law claims and that Plaintiff should be awarded $2,673.50 in damages on his FDCPA and TCPA claims.

BACKGROUND

Plaintiff's Amended Complaint alleges the following. On or about June 13, 2012, August 27, 2012, and September 21, 2012, America's Recovery Solutions, LLC ("ARS"), a debt

collection agency, used an automatic telephone dialing system to call Plaintiff without his permission. (Am. Compl., ECF No. 22 ¶¶ 13, 36, 46, 47, 65.)[1] Plaintiff avers that the telephone that ARS contacted, which Plaintiff interchangeably calls his "residential telephone line" and cellular phone, had a greeting directing callers not to leave a message unless in an emergency. (Id. ¶¶ 36, 46, 47, 86.) The ARS representatives nevertheless left voicemail messages after each call, stating their name and requesting that Plaintiff return the call directly to the representative. (Id. ¶ 65, Ex. G.) In the days after its initial call, ARS "failed to send [Plaintiff] the notice of validation" of his debt, which would include information regarding the amount and owner of the debt and notification that the debtor could verbally dispute the debt. (Id. ¶¶ 40, 41.) On May 29, 2013, Plaintiff contacted ARS regarding the calls. (Id. ¶ 48.) He requested a validation notice for the debt ARS sought to collect; ARS then emailed Plaintiff the notice, which was dated June 24, 2010, correctly addressed to Plaintiff, and validated a debt Plaintiff owed to Citibank. (Id. ¶¶ 49, 52, Ex. F.)

On June 12, 2013, Plaintiff commenced this *pro se* action for "actual and statutory damages" provided for by the TCPA, the FDCPA, and New York "Local Law 15." (Id. ¶¶ 1, 79–136.) Plaintiff properly served the summons and complaint upon ARS, which initially appeared in this action and answered Plaintiff's original complaint. (ECF Nos. 5, 11.) However, Plaintiff amended his complaint and counsel then withdrew from its representation of ARS. (ECF Nos. 19, 20, 22.) Despite the Court's orders directing ARS to retain new counsel and to answer the Amended Complaint, it failed to do so and the Clerk of Court entered its default. (ECF Nos. 23, Entry at 1/16/2015.)

[1] The Court notes that the paragraphs in Plaintiff's Amended Complaint are not consecutively numbered, with some numbers repeating.

Plaintiff moved for a default judgment pursuant to Federal Rule of Civil Procedure 55(b) against ARS. (ECF No. 28.) Judge Vitaliano granted the motion and referred the matter to me to conduct an inquest on damages. (ECF No. 29.) Because Plaintiff's Amended Complaint and the supplement to Plaintiff's motion make clear the damages he seeks, (ECF No. 34), and he restricts his request to statutory damages, I find that an inquest is unnecessary. The Court may rely on Plaintiff's Amended Complaint and the supplemental calculations to determine the proper damages award. See Fed. R. Civ. P. 55(c) (providing that Court may rely on affidavits and documentary evidence in lieu of holding an inquest on damages).

DISCUSSION

Rule 55 of the Federal Rules of Civil Procedure establishes the two-step process for a plaintiff to obtain a default judgment. After the clerk enters the default of a defendant that "has failed to plead or otherwise defend," the Court may, on a plaintiff's motion, enter a default judgment if the defendant fails to appear or move to set aside the default under Rule 55(c). Fed. R. Civ. P. 55(a), (b)(2). On a motion for default judgment, the Court "deems all the well-pleaded allegations in the pleadings to be admitted." Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 108 (2d Cir. 1997) (citation omitted). However, the party in default does not admit conclusions of law. Rolls-Royce plc v. Rolls-Royce USA, Inc., 688 F. Supp. 2d 150, 153 (E.D.N.Y. 2010). The Court therefore has the "responsibility to ensure that the factual allegations, accepted as true, provide a proper basis for liability and relief." Id. (citing Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)). In evaluating "whether the unchallenged facts constitute a legitimate cause of action," the Court is limited to the four corners of the complaint. Id. (citation omitted). It is not so restricted in determining damages, which the Court may calculate based on documentary evidence, affidavits, or evidence gleaned

from conducting a hearing on damages. See Transatlantic Marine Claims Agency, Inc., 109 F.3d at 111.

Here, in granting Plaintiff's motion for a default judgment, Judge Vitaliano found that "the docket . . . reflects Plaintiff's substantial entitlement to a default judgment he requests and his service of the motion . . . on ARS . . . ." (ECF No. 29.) However, the Order did not mention the particular facts underlying Plaintiff's claims. Further, the Order mentions only Plaintiff's claims under the TCPA and FDCPA, and not his city-law claims. In the interest of clarity, I address liability and damages under Plaintiff's TCPA, FDCPA, and city-law claims. To the extent that default judgment has already been granted, I respectfully recommend that the judgment should be reconsidered and that the following analysis should be adopted by the Court.

I. TCPA

a. Liability

The TCPA prohibits callers within the United States from using an "automatic telephone dialing system or an artificial or prerecorded voice" to call any "telephone number assigned to a . . . cellular telephone service . . . or any service for which the party is charged for the call . . . ." 47 U.S.C. § 227(b)(1)(A)(iii). A second subsection, (B), similarly prohibits calls to "any residential telephone line." Id. § 227(b)(1)(B). Both provisions exempt calls made for emergency purposes or with the prior consent of the called party. Id. In addition, the TCPA permits the FCC to carve out an exemption under subsection (A), only for "calls assigned to a telephone number service that are not charged to the called party," and under (B), for non-commercial calls made to residential telephone lines. Id. § 227(b)(2)(B), (C).

The FCC created an exemption regarding calls between businesses and consumers that have an established business relationship. 47 C.F.R. § 64.1200(a)(2)(iv). In the debt collection

context, the so-called established business exemption extends to "a third party plac[ing] a debt collection call on behalf of the company holding the debt." In re Rules Implementing the TCPA of 1991, 7 FCC Rcd. 8752, 8771–73 (1992).[2] Notably, the exemption explicitly applies only to autodialed calls made to a "residential line," *i.e.* not a cellular phone or other service. See 47 C.F.R. § 64.1200(a)(2); Levy v. Receivables Performance Mgmt., LLC, 972 F. Supp. 2d 409, 417 (E.D.N.Y. 2013).

Although Plaintiff here alleges that Defendant utilized an automatic telephone dialing system, and the Court must accept that pleading as true on default, he confusingly alleges that the number ARS called is both a residential line and a cellular phone. (Am. Compl. ¶¶ 36, 46, 86.) The Court takes judicial notice that Plaintiff subscribes to a Voice over Internet Protocol (VoIP) service from Vonage that offers him 300 minutes per month. Rivero v. ACB Receivables Mgmt. Inc., No. 13-cv-4573, ECF No. 1 ¶¶ 19–20.[3] This service routes calls through his internet connection to his "phone line which is connected to [his] home phone." Id. ¶ 26.[4]

There is little guidance in the Second Circuit on the issue of whether a VoIP intermediary connection alters the nature of the receiving telephone under the TCPA. See Ghawi v. Law Offices Howard Lee Schiff, No. 13-cv-115, 2015 U.S. Dist. LEXIS 152008, at *13 (D. Conn.

[2] The FCC has eliminated the business relation exemption , but only for telemarketing calls. See §§ 64.1200(a)(2), (a)(3); 77 Fed. Reg. 34233, at 13471 (June 11, 2012); 77 Fed. Reg. 66935 (November 8, 2012) (correcting the effective date to October 16, 2012).

[3] Plaintiff, who is a frequent filer in this Court, has previously alleged that debt collectors called the same telephone number identified in the instant Amended Complaint. One of those complaints explains that Plaintiff pays a flat fee for 300 minutes of a VOIP service from Vonage. The records Plaintiff provides in this case confirm that the phone at issue here was connected to the same Vonage service. (Am. Compl., Ex. G.) Additionally, Plaintiff alleges specifically in the Amended Complaint that he does not have an unlimited telephone service; "[t]he calls cost [him] money." (Am. Compl. ¶ 68.)

[4] For further explanation of the technology, see Voice over Internet Protocol (VoIP), Fed. Comm. Commission, https://www.fcc.gov/guides/voice-over-internet-protocol-voip (last visited Nov. 17, 2015).

Nov. 10, 2015) (addressing the lack of firm guidance in the Second Circuit on applicability of the TCPA to VoIP services).[5] However, a recent Fourth Circuit decision is instructive.

In Lynn v. Monarch Recovery Management, 953 F. Supp. 2d 612 (4th Cir. 2013), the Fourth Circuit addressed the issue and affirmed a district court's application of the TCPA to a call to a VoIP-enabled residential line. The VoIP service utilized in that case charged the plaintiff a set amount per call and connected to the plaintiff's residential line. Lynn, 953 F. Supp. 2d at 625. The Fourth Circuit held that because the plaintiff was charged for each of the defendant's calls, the calls were made to "a service for which the party is charged for the call," which is prohibited under § 227(b)(1)(A)(iii). Id. The panel rejected the debt collector's argument that a telephone service cannot be both "a service for which the party is charged for the call" and a "residential telephone line." Id. The court concluded that there was no evidence that the two provisions were mutually exclusive or that latter trumped the former. Id. It noted that its holding aligned with Congress's intent that automated calls not add expense to annoyance. Id. at 625 & n.38 (citing § 227(b)(1)(A)(iii).

I find the Fourth Circuit's reasoning in Lynn is persuasive. Plaintiff's VoIP service is not an unlimited calls/flat fee plan as the TCPA presumes is generally the case with a traditional residential telephone line. See In the Matter of Rules & Regs. Implementing the TCPA of 1991, 27 FCC Rcd 1830, 1839–40 (2012) (explaining that the "unique protections for wireless consumers contained in the TCPA" are due in part because "the costs of receiving [the calls] often rests with the wireless subscriber"). Rather, it is "a service for which the party is charged for the call" described under § 227(b)(1)(A)(iii), because each call by Defendant depletes Plaintiff's store of limited minutes. See id. (noting that the TCPA seeks to avoid costs in the form of deductions from a "bucket of minutes"); Thomas v. Dun & Bradstreet Credibility Corp.,

[5] The Clerk of Court is directed to send Plaintiff the attached copies of the unreported cases cited herein.

No. cv 15-03194, 2015 U.S. Dist. LEXIS 103322, at *22 (C.D. Cal. Aug. 5, 2015) (finding that defendant's call depleted allocated minutes of fixed-minute plan and constituted an economic loss to account holder); Tel. Sci. Corp. v. Trading Advantage, LLC, No. 14 C 4369, 2015 U.S. Dist. LEXIS 18591, at *2–3 (N.D. Ill. Feb. 17, 2015) (finding that plaintiff stated a claim under TCPA because defendant's calls to VoIP service connected to residential line was a service for which the called party is charged for the call). There is no regulatory exemption to this provision because the TCPA permits the FCC to create limited exemptions only to the prohibition of calls to certain cell phones (under subsection (A)) and to residential lines (under subsection (B)). See § 227(b)(1)(B), (C). Accordingly, Defendant's calls to Plaintiff's VoIP phone line violated the TCPA.

b. Damages

Under the TCPA, affected consumers may recover the greater of actual damages or $500 per violation. 47 U.S.C. § 227(b)(3). For willful or knowing statutory violations, the Court may award treble statutory damages, up to $1,500 per violation. Id. In his Amended Complaint, Plaintiff requests treble statutory damages for four telephone calls made to his VoIP number.[6] However, he alleges that Defendant called him only three times, and his calculation of damages assumes only three calls. (See Am. Compl. ¶¶ 36, 46, 47; ECF No. 34.) Plaintiff apparently adds a fourth violation in his Amended Complaint based on his allegation that ARS's counsel initially conceded to a fourth call in ARS's answer to the original complaint. (See Am. Compl. ¶ 54.) Because that answer is no longer operative as of the time Plaintiff filed his Amended Complaint, I do not consider the purported admission of a fourth call by Defendant. Further, Plaintiff has no personal knowledge of that call and makes no allegation regarding whether that call was made

[6] Although Plaintiff fails to reproduce his calculation of TCPA damages in his motion for a default judgment, he has provided sufficient detail in his Amended Complaint as to the damages he seeks.

using an automatic dialing system or automatic or pre-recorded message so as to violate the TCPA. Accordingly, I find that Plaintiff establishes three compensable violations under the TCPA.

As to Plaintiff's request for treble statutory damages, I recommend that it should be denied and that straight statutory damages of $500 per violation should be awarded instead. Had Plaintiff used a traditional residential line, Defendant's calls would have fallen within the established business exemption and would not have violated the TCPA. Given the lack of evidence that Defendant knew Plaintiff would be charged for its calls, treble damages are inappropriate. Because Plaintiff has chosen not to seek actual damages, the TCPA entitles Plaintiff to $500 for each of the three phone calls. I therefore recommend that Plaintiff should be awarded $1,500 in statutory damages under the TCPA.

II. FDCPA

Plaintiff accuses Defendant of violating multiple FDCPA provisions, including those that prohibit: "causing a telephone to ring . . . with intent to annoy, abuse, or harass any person at the called number," 15 U.S.C. § 1692d(5); failing to identify the caller, id. § 1692d(6); using a "false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer," id. § 1692e(10); failing to indicate that the calls were for the purpose of collecting a debt, id. § 1692e(11); and failing to send a written validation notice of the debt within five days of the initial communication, id. § 1692g.

Accepting the allegations of Plaintiff's Amended Complaint to be true, Defendant is a debt collector that called Plaintiff three times in an attempt to collect a debt, and left messages requesting that the call be returned, without identifying the purpose for the call or that Defendant is a debt collection agency. (Am. Compl., Ex. G.) Somehow knowing that the calls regarded a

debt, Plaintiff sent Defendant a request to validate the debt and, when that prompted no response, he called ARS for a debt validation notice. Defendant did not continue to call Plaintiff thereafter. These actions alone are sufficient to establish an FDCPA violation. I therefore need not decide whether Plaintiff's allegations that Defendant belatedly sent Plaintiff a validation notice[7] or made a "false representation" in collecting a debt also establish FDCPA violations.

The FDCPA caps statutory damages at $1,000. 15 U.S.C. § 1692k(a)(2)(A). Whether to award that maximum amount depends on "the frequency and persistence of noncompliance of the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b)(1). When the defendant's conduct is not egregious, and does not exhibit a "pattern of threats, abuse, or harassment," maximum statutory damages are not warranted ; a $500 award may suffice. Abrahmov v. Fidelity Info. Corp., No. 12-CV-3453, 2013 U.S. Dist. LEXIS 135910, at *8–9 (E.D.N.Y. Aug. 6, 2013); see Cook v. First Revenue Assurance, LLC, No. 10-CV-5721, 2012 U.S. Dist. LEXIS 10819, at *6 (E.D.N.Y. Jan. 9, 2012) ("[A] $500 award is appropriate where there is no repeated pattern of intentional abuse or where the violation was technical."), adopted by, 2012 U.S. Dist. LEXIS 10815 (Jan. 30, 2012).

Here, Defendant called Plaintiff three times over the course of three months. The messages left were polite and non-threatening.[8] Defendant's calls stopped after Plaintiff called Defendant. Plaintiff's bare allegation that Defendant's conduct was abusive does not make it so as a matter of law. Rather, the factual allegations show that Defendant's acts were somewhat persistent, but

[7] The statute does not require that Plaintiff *receive* the validation notice. See Schneider v. Cont'l Serv. Grp., No. 13-CV-5034, 2013 U.S. Dist. LEXIS 176447, at *15 (E.D.N.Y. Dec. 16, 2013) (stating that § 1692g requires only that the debt collector *send* the validation notice). However, it is unclear whether the validation notice, dated prior to the first call Defendant made to Plaintiff, itself provides evidence that it was timely sent. As stated above, I do not reach the issue here.

[8] One transcribed example of Defendant's message is as follows: "Hi, this message is for [Reny Rivero]. [T]his is Katelyn calling from America's Recovery Solutions. I need you to return my call to 877-267-3265 ext. 5731. Thank you and have a nice day." (Am. Compl. Ex. G.)

not the egregious daily badgering and harassment for which maximum damages are awarded. See Goode v. Vision Financial Corp., No. 14-CV-4272, No. 2015 U.S. Dist. LEXIS 101267, at *6–8 (E.D.N.Y. May 7, 2015) (listing cases and recommending $750 in statutory damages for calls that violated the FDCPA and were daily but were non-threatening or abusive), adopted by, 2015 U.S. Dist. LEXIS 100940 (Aug. 3, 2015); compare Nero v. Law Office of Sam Streeter, P.L.L.C., 655 F. Supp. 2d 200, 210 (E.D.N.Y. 2009) ($500 award where the communication contained no threatening language and no allegation as to persistence of defendant's unlawful conduct); Dona v. Midland Credit Mgmt., Inc., No. 10-CV-0825, 2011 U.S. Dist. LEXIS 27136, at *7–8 (E.D.N.Y. Feb. 10, 2011) (awarding $500 because only FDCPA violation involved one non-threatening message on plaintiff's answering machine), adopted by, 2011 U.S. Dist. LEXIS 27093 (Mar. 15, 2011), with Cook, 2012 U.S. Dist. LEXIS 10819, at *6–7 (awarding $1000 due to repeated pattern of intentional abuse from collector which called plaintiff multiple times a day for nearly six months). It is therefore respectfully recommend that Plaintiff should be awarded $750 in statutory damages for Defendant's FDCPA violations.

Plaintiff also requests an award of costs and attorney's fees. Because he is proceeding *pro se*, he is not entitled to attorney's fees. See Warren v. Colvin, 744 F.3d 841, 845 n. 5 (2d Cir. 2014) (attorney's fees cannot be granted where none have been incurred); Milton v. Rosicki, Rosicki & Assocs., P.C., No. 02-CV-3052, 2007 U.S. Dist. LEXIS 56872, at *10 (E.D.N.Y. 2007) (denying attorney's fees to prevailing plaintiff in FDCPA claim because he proceeded *pro se*). The FDCPA does, however, entitle the prevailing party to costs. 15 U.S.C. § 1692k(a)(3). Costs for filing fees, service, process servers, and postage are routinely awarded to prevailing parties. Goode, 2015 U.S. Dist. LEXIS 101267, at *15–16 (citation omitted). Here, Plaintiff seeks the costs of the $400 filing fee, $100 in service expenses, and $28 in postage costs. (ECF No. 28.)

The Court takes judicial notice that Plaintiff paid the $400 filing fee. (See ECF Entry at 6/12/2013.) According to the docket, however, Plaintiff expended only $23.50 in serving ARS. (ECF No. 11.) Despite the Court's direction to supplement his calculation of damages, Plaintiff has failed to provide proof of his postage costs. (ECF Nos. 33, 34.) I therefore respectfully recommend that $423.50 in costs, in addition to the $750 in statutory damages, should be awarded to Plaintiff pursuant to the FDCPA.

III. New York City Law

The last of Plaintiff's claims arise under New York City's Consumer Protection Laws and Regulations. Those provisions define and prohibit unconscionable and deceptive trade practices and set forth the rules governing the licensing of debt collection agencies. N.Y.C. Admin. Code §§ 20-493, 20-700; see id. § 20-702 (permitting creation of regulations defining prohibited practices); N.Y.C.R.R. tit. 6, § 5-77 (defining "unconscionable and deceptive trade practices"). Any violation of the Consumer Protection Law and Regulations may result in a "civil penalty in the sum of fifty dollars to three hundred and fifty dollars, to be recovered in a civil action." N.Y.C. Admin. Code § 20-703. If it is a knowing violation, the civil penalty may reach $500. Id. Separate penalties may be imposed for failing to license with the Department of Consumer Affairs ("DCA") prior to collecting a debt. See id. § 20-494.

Plaintiff assumes that he is entitled to recover these civil penalties through a private civil action. He is not. Only the DCA Commissioner can bring suit and impose the penalties under the provisions Plaintiff invokes. See N.Y.C. Admin. Code § 20-104 ("The commissioner or the commissioner's designee shall collect all fees for all such licenses and permits and shall otherwise enforce the [licensing] provisions of chapter two."); Kuklachev v. Gelfman, 600 F. Supp. 2d 437, 476 (E.D.N.Y. 2009) (stating that there is no private cause of action under N.Y.C.

Admin. Code § 20-700) (citing Collier v. Home Plus Assoc., Ltd., 856 N.Y.S. 2d 497 (Sup. Ct. 2007)). Accordingly, Plaintiff cannot state a cause of action under New York City's Consumer Protection Laws and Regulations and therefore the Court should reconsider his motion for a default judgment on these claims and dismiss them.

CONCLUSION

For the foregoing reasons, it is respectfully recommended that Plaintiff should be awarded $2,673.50 in statutory damages and costs under the TCPA and FDCPA. It is further recommended that the Court should reconsider its grant of Plaintiff's motion for a default judgment to the extent it granted the city-law claims, and Plaintiff's city-law claims should be dismissed.

FILING OF OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F.3d 42 (2d Cir. 2002); Small v. Sec'y of Health & Human Servs., 892 F.2d 15 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

SO ORDERED.

/S/ Judge Lois Bloom

Dated: November 30, 2015
Brooklyn, New York

LOIS BLOOM
United States Magistrate Judge