UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JANE HUDSON, Plaintiff, v. SHARP HEALTHCARE, Defendant.	NO. 13-CV-1807-MMA (NLS) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [Doc. No. 42]

Defendant Sharp Healthcare ("Defendant" or "Sharp") moves for summary judgment or, in the alternative, partial summary judgment pursuant to Federal Rule of Civil Procedure 56. [Doc. No. 42.] Plaintiff Jane Hudson ("Plaintiff") filed an opposition to the motion, to which Defendant replied. [Doc. Nos. 54–55.] The Court, in its discretion, took the matter under submission pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **GRANTS** Defendant's motion for summary judgment.

BACKGROUND[1]

On September 24, 2012, Plaintiff and her minor child, S.H., went to Sharp Grossmont Hospital to receive treatment for possible food poisoning. Upon

[1] The following facts are not reasonably in dispute, unless otherwise noted. The facts cited herein are taken from the parties' separate statements of undisputed facts, and are construed in the light most favorable to Plaintiff. *See Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007).

admission, Plaintiff, on behalf of herself and S.H., received and acknowledged receipt of Sharp's Conditions of Admission ("COA") paperwork including: (1) Admission Agreement for Inpatient and Outpatient Services; (2) Attestation; and (3) Notice of Privacy Practices. [Def.'s Separate Statement of Uncontroverted Facts ("DSSUF") Nos. 21–23.] Plaintiff executed the Attestation document, verifying her cellular telephone number ending in 5954 as her sole point of contact with Sharp. The COA paperwork included a payment provision, which stated:

> 13. Financial Agreement: You agree, whether you sign as agent or as patient, that in consideration of the services to be rendered to the patient, you hereby individually obligate yourself to pay all the hospital bills in accordance with the rates as indicated in the hospital charge description master and terms of the hospital to include service charges and/or interest bearing payment plans. The hospital, or other entity contracting with the hospital, may obtain credit reports from national credit bureaus. Should the account be referred to an attorney or collection agency for collection, you shall pay all related fees and collection expenses. All delinquent accounts shall bear interest at the legal rate.

[Kiesendahl Decl., Exs. D, G.]

The Notice of Privacy Practices form also included a "Payment" section, which stated:

> We may use or disclose your information for billing and to arrange for payment from you, an insurance company, a third party or a collection agency.

[*Id.*, Ex. C.]

Upon admission to the hospital, Plaintiff believed that both she and S.H. had active Medi-Cal coverage. However, Sharp advised Plaintiff this was incorrect. Although S.H. had coverage at that time,[2] Plaintiff's coverage had lapsed.

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[2] Sharp's computerized medical records showed that Medi-Cal reported S.H. owed a Share of Costs, patient deductible, of $737.00. On or about October 22, 2012, Sharp received a $34.10 payment from Medi-Cal on S.H.'s account. However, Sharp refunded that payment because it did not reflect the appropriate Share of Costs. Medi-Cal later provided retroactive coverage for S.H. without a Share of Costs. However, $34.10 was and is still due on S.H.'s account. Currently, Sharp has an appeal pending with Medi-Cal to obtain payment. Until paid, Sharp contends that Plaintiff is individually obligated for the debt pursuant to the COA payment provisions. [Mot. at 9–10.]

After discharge that same day, Plaintiff sought to reinstate her Medi-Cal coverage, but was not immediately successful. In the interim, beginning on or about October 22, 2012, Sharp made a series of autodialed calls to Plaintiff's cellular telephone number, attempting to collect payment for the treatment provided in September 2012. Plaintiff admitted at her deposition that she does not recall Sharp demanding payment from her. [Vanden Heuvel Decl., Ex. A ("Hudson Dep.") 84:20–85:2.] Rather, the phone calls between Plaintiff and Sharp from October 2012 through January 2013 were made with the goal of obtaining Medi-Cal coverage to pay the bills. [*Id.* at 88:7–89:12.]

On January 23, 2013, Medi-Cal notified Plaintiff that she was retroactively approved for coverage. At that time, Plaintiff informed Sharp that she had obtained coverage, and Sharp made no further calls to Plaintiff's cellular telephone number regarding Plaintiff's account. [*See* DSSUF Nos. 53–54; Hudson Dep. 84:20–85:2.] However, after January 23, 2013, and until August 24, 2013, Sharp continued to call Plaintiff regarding the outstanding balance due on S.H.'s account. [DSSUF No. 54; Sevenikar Decl., Exs. F, G.]

On August 24, 2013, Plaintiff filed this action under the Telephone Consumer Protection Act ("TCPA") against Defendant on behalf of herself and "all persons within the United States who received any telephone call from Defendant or their agents to said person's cellular telephone through the use of any automatic telephone dialing system or with an artificial or prerecorded voice who did not provide prior express consent during the transaction that resulted in the debt owed, within the four years prior to the filing of the Complaint in this action." [*See* Doc. No. 1.] The operative complaint alleges two causes of action against Defendant: (1) negligent violations of the TCPA, and (2) knowing and/or wilfull violations of the TCPA. [*Id.* ¶¶ 37–44.] Defendant now moves for summary judgment on both of Plaintiff's claims. [Doc. No. 42.]

LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *Celotex*, 477 U.S. at 325.

In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portions in the record "which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968). The opposing party must support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations . . . or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251–52 (1986); *Owens v. Local No. 169, Assoc. of W. Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir. 1987). The opposing party must also demonstrate the dispute about a material fact "is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In other words, before the evidence is left to the jury, the judge needs to answer the preliminary question of "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party

producing it, upon whom the *onus* of proof is imposed." *Id.* at 251 (quoting *Improvement Co. v. Munson*, 81 U.S. 442, 448 (1871)) (emphasis in original). As the Supreme Court explained, "[w]hen the moving party has carried its burden under Rule [56(a)], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Therefore, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 587.

In resolving a summary judgment motion, the evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255. The Court may not make credibility determinations or weigh conflicting evidence. *See id.* The ultimate question on a summary judgment motion is whether the evidence "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52.

DISCUSSION

Defendant moves for summary judgment on both of Plaintiff's claims. It argues that it had prior express consent to call Plaintiff at her cellular telephone number, and that the purpose of the calls was within the scope of consent.

A. Telephone Consumer Protection Act

The TCPA makes it unlawful for a person to call the cellular telephone number of any other person using an automatic telephone dialing system without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii); *see also Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). Defendant bears the burden of proving prior express consent as an affirmative defense. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C.R. 559 ¶ 10 (Jan. 4, 2008); *Van Patten v. Vertical Fitness Grp., LLC*, --- F. Supp. 2d ---- (2014); 2014 WL 2116602, at *3 (S.D. Cal. May 20, 2014) (citations

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