Circuit Court for Harford County
Case No. 12-C-18-000639

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2137

September Term, 2018

MICHAEL C. WORSHAM

v.

RAYMOND C. CARNEY, et al.

Meredith,*
Graeff,
Wells,
JJ.

Opinion by Meredith, J.

Filed: August 10, 2021

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Michael C. Worsham ("Worsham"), appellant, filed a complaint against Raymond C. Carney ("Carney") and Carbro Sales & Survey, LLC ("Carbro"), appellees, in the Circuit Court for Harford County, alleging violations of the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*., and the Maryland Telephone Consumer Protection Act ("MDTCPA"), Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("Com. Law"), § 14-3201. The circuit court granted appellees' motion to dismiss, and, at the same time, denied a discovery motion as moot. Worsham raises the following two questions for our review:

> I. Whether the Harford County Circuit Court erred in granting Defendants'/Appell[ee]s' Motion to Dismiss and dismissing the Amended Complaint with prejudice.
>
> II. Whether the Harford County Circuit Court erred in denying as moot Worsham's Motion for Order for [Discovery of] Records from Comcast.

For the reasons that follow, we shall vacate the circuit court's order granting the motion to dismiss and the order denying discovery, and we shall remand the case for further proceedings.

STANDARD OF REVIEW

Appellees have correctly quoted the following summary of the appropriate standard of appellate review from our explanation in *Collins v. Li*, 176 Md. App. 502, 534 (2007):

> The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action. In reviewing the complaint, **we must presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom. Dismissal is proper only**

> **if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven.**

(Emphasis added; internal quotation marks and citation omitted.)

"We review the grant of a motion to dismiss *de novo*." *Reichs Ford Road Joint Venture v. State Roads Com'n*, 388 Md. 500, 509 (2005).

PROCEDURAL AND FACTUAL BACKGROUND

From the amended complaint that is the subject of this appeal, we have discerned the following well-pleaded facts. Worsham alleged that, at the time relevant to this case, he subscribed to a specified cellular phone number (410-[redacted]). He alleged that this telephone number had been registered on the national Do-Not-Call list since July 15, 2006, and that he used that phone number for personal and residential phone service. The complaint alleged that, despite Worsham's phone number being on the Do-Not-Call registry, appellees Carney and Carbro had caused several telephone calls to be placed to that phone number, including several calls that utilized a prerecorded message, and that, in doing so, the appellees had violated both the federal TCPA and this State's MDTCPA.

Assuming as true the facts alleged in Worsham's amended complaint, the complaint described four unsolicited phone calls that were received on his cellular phone number, all having to do with the sale of products that were being promoted as helpful with the maintenance of septic tanks and septic systems. Worsham was aware that Carney had previously been engaged in marketing septic care products, and he alleged that Carney and Carbro were the source of the unwanted telemarketing calls he received on his cellular phone. In his amended complaint, Worsham described the four calls as follows.

The first call was received on August 5, 2017. Worsham alleged that, in that call, a male voice, in a "prerecorded voice message," stated that the call "was not a sales call, and then proceeded to give a sales pitch for an[] environmental product that it stated was for septic cleaning." The recording did not provide either the identity of the caller or the telephone number from which the call originated. Worsham's Caller ID service provided him a ten-digit number and a city purporting to be the caller's information, but, Worsham alleged, telemarketers like the defendants commonly "transmit false or spoofed Caller ID numbers . . . in the calls which deliver their prerecorded messages." During the first call, Worsham "pressed 1 to find out who called, but no one was on the line, and a prerecorded message asked [him] to leave [his] contact information," which he declined to do, and the call disconnected itself.

The second call Worsham identified as a violation of the TCPA and MDTCPA was received on his cellular phone on August 14, 2017. With respect to this call, Worsham alleged that the prerecorded message stated in a male voice:

> Hello, this is not a sales call or a solicitation. We're calling from an environmental company, with information for all septic tank and cesspool owners. We would like to give you some free info on our environmentally safe all natural septic tank cleaning product. The product is U.S.D.A. approved for safety and is fully guaranteed to eliminate the need for tank pump outs and prevent any costly repairs by maintaining your entire septic system or cesspool. If you'd like free information on how to maintain your system and protect the environment, please press 1. If you[']d like to be removed from our calling list please press 2.

Worsham alleged that he pressed 1 and left his name as "Craig Worsham," and, when asked to leave his contact information, provided his mailing address, but did not provide his phone number.

The third call was received on December 1, 2017, and, when Worsham answered the call, he "heard the same prerecorded message in the clear male voice that he heard in Calls 1 and 2." He again left his name and address, but not his phone number.

On December 4, 2017, Worsham received a call on his cell phone about a septic system product sold as "Activator 1000." This call was not a prerecorded message, but rather, a live female sales agent. At the end of a nearly ten-minute conversation, Worsham agreed that the salesperson could send him a 3-year supply of the product. He was told that no credit card was required at that time, and that another person would call to confirm his address. Within minutes after the first call ended, Worsham received another call on his cell phone from a person who "identified herself as Petra with the shipping department." Petra confirmed Worsham's address for shipping a 3-year supply. But Worsham never received the product.

Worsham also alleged that he attempted to place a small order for Activator 1000 online in an effort to ascertain the identity of the party that had initiated the prerecorded calls to his cellular phone. But the order was cancelled by the vendor and his purchase money (paid via credit card through PayPal at the time of the order) was refunded by Carbro. (There is a discrepancy between the date alleged in the text of the amended complaint and the dates of the order confirmation and refund documentation that Worsham provided with his opposition to the motion to dismiss. Worsham argued in his opposition that the dates stated in his amended complaint were in error, and that the correct dates were set forth in his opposition and another document he filed attempting to amend the amended

complaint. Given the other allegations in the amended complaint, we view this discrepancy as immaterial to the outcome of this appeal.)

On March 7, 2018, Worsham filed a complaint alleging that the appellees (and one other entity since dismissed by Worsham) were responsible for the calls just described, and further alleging that the telemarketing calls violated the TCPA and MDTCPA in multiple ways. An amended complaint was filed on April 30, 2018, omitting the third defendant. On May 23, 2018, appellees moved to dismiss the amended complaint for failure to state a claim upon which relief could be granted. Two days later, Worsham filed an "amendment" to his amended complaint, in which he attempted to correct the date of his online purchase that he had misstated in the amended complaint. On June 8, 2018, Worsham filed an opposition to the appellees' motion to dismiss. Appellees filed a reply on June 20, 2018.[1]

On June 25, 2018, the circuit court entered an order (that the court had signed on June 22) that stated simply: "It is this 22nd day of June, 2018 ORDERED based upon Defendant Raymond C. Carney and Carbro Sales & Survey, LLC's Motion to Dismiss and any response filed hereto, [sic] that Plaintiff's Amended Complaint is DISMISSED with prejudice." On the same date(s), the court denied "as moot" Worsham's motion for an order to compel discovery from Comcast.

[1] Although Worsham included a request for hearing under a separate heading at the end of his opposition to appellees' motion to dismiss, he concedes in his reply brief that his request for hearing did not fully comply with the requirements of Maryland Rule 2-311(f) because that rule requires *also*: "The title of the motion or response shall state that a hearing is requested." The *title* of his opposition did not state that a hearing was requested.

On July 3, 2018, Worsham filed a motion to alter or amend the judgment. Appellees filed an opposition, and Worsham filed a reply in support of his motion. The court denied Worsham's motion to alter or amend on August 16, 2018. Worsham noted this appeal on September 4, 2018.

DISCUSSION

In *Worsham v. Fairfield Resorts, Inc.*, 188 Md. App. 42 (2009), we provided a summary of certain provisions of the TCPA that are pertinent to this case as well. It is clear that, under the version of the TCPA that was in effect at the time of the telephone calls that are the subject of this case, the TCPA prohibited a caller from initiating any telephone call to any residential telephone line and then using "a prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). We stated in the *Fairfield Resorts* case:

> The most pertinent provisions of the TCPA are 47 U.S.C. § 227(b)(1)(B), prohibiting calls to a residential telephone line by use of any prerecorded voice, and 47 U.S.C. § 227(b)(3), providing for a private cause of action for a violation of 47 U.S.C. § 227(b).
>
> The first, 47 U.S.C. § 227(b)(1)(B), states:
>
> 47 U.S.C. § 227. Restrictions on use of telephone equipment.
>
> * * *
>
> (b) Restrictions on use of automated telephone equipment.
> (1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> * * *

> (B) **to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party**, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission under paragraph (2)(B); . . . .
>
> The second pertinent provision, 47 U.S.C. § 227(b)(3), states:
>
> (3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.
>
> Accordingly, the TCPA prohibits the commercial use of prerecorded telephone messages in calls placed to residential telephone lines, subject to certain exemptions. Further, the TCPA provides for pursuit of a private cause of action in State court seeking an injunction or damages or both.

188 Md. App. at 46-47 (emphasis added; footnote omitted). *See also Barr v. American Association of Political Consultants, Inc.*, ____ U.S. ___, 140 S.Ct. 2335, 2346 (2020) (stating that the TCPA's "Section 227(b)(1)(A)(iii) generally bars robocalls to cell phones.").

In sum, to state a claim for violation of the TCPA by use of a prerecorded voice, a plaintiff must allege facts that would support the following elements: (1) a call was made to a residential phone, (2) by the use of an automatic dialing system **or** an artificial **or** prerecorded voice, and (3) without prior express consent of the called party.[2]

The MDTCPA does not spell out the conduct that constitutes a violation of the Maryland statute but rather, in Com. Law § 14-3201(2), provides that "[a] person may not violate" the TCPA, "as implemented by the Federal Communications Commission" in "(47 C.F.R. Part 64, Subpart L)." Accordingly, allegations that would support a claim under the TCPA also would support a claim under the MDTCPA.

Here, although the amended complaint included more than the skeletal allegations needed to allege a prima facie claim of a violation of either the TCPA or the MDTCPA, when we assume the truth of all well-pleaded facts, many, if not all, of the counts alleged were sufficiently pleaded to survive a motion to dismiss. Whether the plaintiff will be able to produce sufficient evidence to persuade a court that the appellees were responsible for initiating the prerecorded calls or otherwise violating these consumer protection acts remains to be seen. But, at this juncture, we are obligated to "presume the truth of all well-

[2] The FCC ruled in 2003 that cellular phone numbers, when placed on the Do-Not-Call registry, are rebuttably presumed to be "residential" phones as that term is used in the TCPA. *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14039 (2003) ("[W]e believe it is more consistent with the overall intent of the TCPA to allow wireless subscribers to benefit from the full range of TCPA protections. . . . [W]e will presume wireless subscribers who ask to be put on the national do-not-call list to be 'residential subscribers.'").

pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Collins*, 176 Md. App. at 534 (quotation marks and citations omitted).

Worsham specifically alleged in his amended complaint that Mr. Carney himself provided the male voice in the prerecorded telemarketing calls. Thereafter, based on a subsequent telemarketing call, Mr. Worsham ordered the Activator 1000 product from an unsolicited telemarketer, and eventually placed an online order for the product only to have the order cancelled the next day by Carbro, a company for which Worsham alleges Raymond Carney is the registered agent, manager, and authorized representative. Worsham further alleged that Raymond Carney called him on April 23, 2018, and explained that his Activator 1000 order was cancelled because Worsham was on a list that Carney's companies "use to screen or filter out people who should not be sold to[.]" These allegations, which must be presumed true at this point, were sufficient to link the appellees to the alleged TCPA and MDTCPA violations.

In addition to alleging violations based upon the prerecorded voice messages, Worsham also alleged that the calls were placed in violation of the Do-Not-Call registry. The right to pursue a private cause of action against telemarketers who initiate calls to phone numbers despite their registration on the Do-Not-Call list was described in detail by the United States Court of Appeals for the Fourth Circuit in *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 649-50 (4th Cir. 2019), *cert. denied*, 140 S.Ct. 676 (2019):

> Telemarketing calls are . . . intrusive. A great many people object to these calls, which interfere with their lives, tie up their phone lines, and cause confusion and disruption on phone records. Faced with growing public criticism of abusive telephone marketing practices, Congress enacted the Telephone Consumer Protection Act of 1991. Pub. L. No. 102-243, 105 Stat.

2394 (1991) (codified at 47 U.S.C. § 227 (2012)). As Congress explained, the law was a response to Americans "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers," *id*. § 2(6), and sought to strike a balance between "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms," *id*. § 2(9). To meet these ends, the TCPA first imposed a number of restrictions on the use of automated telephone equipment, such as "robocalls." 47 U.S.C. § 227(b); *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012). For in-person telemarketing calls, on the other hand, the law opted for a consumer-driven process that would allow objecting individuals to prevent unwanted calls to their homes.

The result of the telemarketing regulations was the national Do-Not-Call registry. *See* 47 C.F.R. § 64.1200(c)(2). Within the federal government's web of indecipherable acronyms and byzantine programs, the Do-Not-Call registry stands out as a model of clarity. It means what it says. If a person wishes to no longer receive telephone solicitations, he can add his number to the list. The TCPA then restricts the telephone solicitations that can be made to that number. *See id*.; 16 C.F.R. § 310.4(b)(iii)(B) ("It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to ... initiat[e] any outbound telephone call to a person when ... [t]hat person's telephone number is on the "do-not-call" registry, maintained by the Commission."). There are limited exceptions. For instance, a call does not count as a "telephone solicitation" if the caller and the recipient have an established business relationship, *see* 16 C.F.R. § 310.2(q), or if the recipient invited the call, *see* 47 U.S.C. § 227(a)(4). Barring an exception, however, telemarketers are expected to check the list and avoid bothering those who have asked to be left alone. In addition to the national registry, companies are also expected to keep individual Do-Not-Call lists, reflecting persons who have directly told the company that they do not wish to receive further solicitations. *See* 47 C.F.R. § 64.1200(d).

The TCPA can be enforced by federal agencies, state attorneys general, and private citizens. *Mims*, 565 U.S. at 370, 132 S.Ct. 740. **Relevant to this appeal, the law allows a private right of action for violations of the Do-Not-Call registry regulations.** Specifically, claims can be brought by "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection ...." 47 U.S.C. § 227(c)(5). These private suits can seek either monetary or injunctive relief. *Id*. If damages are sought, the plaintiff is entitled to receive the greater of either his actual loss or statutory damages up to $500. *Id*. If the defendant's violation of the law was willful and knowing, those damages can be trebled, within the

> district court's discretion. *Id*. "[T]he court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph."[]
>
> **This private cause of action is a straightforward provision designed to achieve a straightforward result**. Congress enacted the law to protect against invasions of privacy that were harming people. The law empowers each person to protect his own personal rights. Violations of the law are clear, as is the remedy. **Put simply, the TCPA affords relief to those persons who, despite efforts to avoid it, have suffered an intrusion upon their domestic peace.**

(Emphasis added.)

The *Krakauer* court also observed that the elements required to support a private cause of action based upon a claimed violation of the Do-Not-Call Registry are two things initially:

> **The private right of action** in § 227(c)(5) offers many advantages for class-wide adjudication. It **requires a plaintiff to initially show two things: a number on the Do-Not-Call registry, and two calls made to that number in a year.** The damages, moreover, can be set at any amount up to $500 without any actual proof of loss. Other relevant issues, such as the existence of a business relationship between the solicitor and the recipient of the call, are likely to be proven by records kept by the defendant company.

Id. at 655 (emphasis added). *Accord Persichetti v. T-Mobile USA, Inc.*, 479 F.Supp.3d 1333, 1339 (N.D. Ga. 2020); *Wilson v. PL Phase One Operations L.P.*, 422 F.Supp.3d 971, 979 (D.Md. 2019); *Wagner v. CLC Resorts and Developments, Inc.*, 32 F.Supp.3d 1193, 1197 (M.D.Fla. 2014).

Worsham's amended complaint adequately alleged that his cell phone number was on the Do-Not-Call Registry and that two (or more) calls were placed to that number within a year offering information about the care of septic systems, a product the appellees allegedly market.

Appellees' motion to dismiss asserted, in a supporting memorandum, four reasons that the amended complaint should be dismissed, none of which have merit: (1) insufficient allegations supporting personal liability of Raymond Carney; (2) insufficient allegations linking the appellees to the phone numbers from which the offending calls were initiated; (3) a claim that appellant "opted-in to receiving phone calls" because he alleged in the amended complaint that he purchased product from the Activator1000.com website on January 18, 2017, prior to the dates of the offending telephone calls; and (4) "each count is merely a recitation of the law to which each count cites."

With respect to personal liability of Raymond Carney, the amended complaint alleged in Paragraph 32 that Raymond Carney called Worsham on one occasion to explain why his online order of an Activator 1000 product had been cancelled. And the amended complaint alleged in Paragraphs 33 and 34 that Raymond Carney's voice was used in the prerecorded messages. Despite conducting business via a limited liability company, Carney can be held personally liable for his own conduct that violated the TCPA. Moreover, it has been held that "'a seller cannot avoid liability simply by delegating placing the call to a third-party.'" *Wilson*, 422 F.Supp.3d at 979 (quoting *Hossfeld v. Government Employees Ins. Co.*, 88 F.Supp.3d 504, 510 (D.Md. 2015)).

With respect to the link between the appellees and the phone numbers that appeared on Worsham's Caller ID, Paragraph 28 alleged that the PayPal confirmation notices for the online purchase and refund of the Activator 1000 product indicated that they were on behalf of Carbro. The amended complaint also alleged in Paragraphs 15, 38(4) and 41 that the appellees transmit false or "spoofed Caller ID numbers" in their telemarketing calls, such

that there would be no easily traceable connection between the appellees and the phone numbers from which the calls purportedly originated.

With respect to the argument that Worsham "opted-in" to be called on his cell phone despite having that number listed on the Do-Not-Call registry, that argument was apparently based entirely upon the erroneous date alleged for the attempted online purchase. But Worsham corrected the date of his attempted purchases in his opposition to the motion to dismiss, as well as by filing an "amendment" to the amended complaint. He provided copies of documentation (that had been referenced in Paragraph 28) with both of those filings confirming that the attempted purchase of Activator 1000 product (and PayPal refund from Carbro) occurred in January 2018, *i.e.*, after the date of the offending phone calls. And the complaint alleged in Paragraph 45 that Worsham "had no business relationship of any kind with, and did not g[i]ve any prior permission to be solicited by any Defendant or its affiliates, agents, contractors or partners." The amended complaint adequately alleged that Worsham did not waive the protection offered by registration on the Do-Not-Call list. *See In Re Rules & Regulations*, 18 F.C.C.R. at 14043 ("Consistent with the FTC's determination, we conclude that for purposes of the national do-not-call list such express permission must be evidenced only by a signed, written agreement between the consumer and the seller which states that the consumer agrees to be contacted by this seller, including the telephone number to which the calls may be placed." (Footnote omitted.)).

Finally, with respect to the appellees' argument that the complaint should be dismissed because the separate counts merely cited laws that were allegedly violated by

the appellees' conduct, the motion to dismiss provided no explanation of any specific counts that were not adequately supported by well-pleaded factual allegations in the preceding paragraphs of the amended complaint. As we pointed out above, in reviewing the grant of a motion to dismiss, we must presume the truth of all well-pleaded facts in the complaint, including any reasonable inferences, and dismissal is proper only if we conclude after viewing the allegations in that light that plaintiff would not be entitled to relief. *Collins*, 176 Md. App. at 534.

The motion to dismiss should not have been granted. And it follows, therefore, that the discovery motion that was then denied "as moot" should not have been denied as moot.

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.