UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-24077-CIV-GOODMAN
[CONSENT CASE]

ESTRELLITA REYES,

Plaintiff,

v.

BCA FINANCIAL SERVICES, INC.,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE ORDER ON PLAINTIFF'S SUMMARY JUDGMENT MOTION

Unhappy over an Order [ECF No. 124] on Plaintiff Estrellita Reyes' summary judgment motion [ECF No. 86] and a related Order [ECF No. 128] denying its motion for reconsideration [ECF No. 125] of the summary judgment motion ruling, Defendant BCA Financial Services, Inc. now asks this Court to certify the summary judgment order under 28 U.S.C. § 1292(b) for an interlocutory appeal to the Eleventh Circuit Court of Appeals. [ECF No. 129].

There is a strong presumption against interlocutory appeals, which are reserved for exceptional cases. Because BCA has not met its heavy burden of establishing the statutory prerequisites for certification and that an immediate interlocutory appeal is

warranted, the Court **denies** the motion.

I. Procedural and Factual Background

Reyes, individually and on behalf of others similarly situated, filed this lawsuit against BCA for allegedly violating the Telephone Consumer Protection Act (the "TCPA"). The TCPA prohibits, among other things, the use of an "automatic telephone dialing system" ("ATDS") or an artificial or prerecorded voice to call a person's cellphone absent an emergency or prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an ATDS as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and then to "dial such numbers." § 227(a)(1)(A). Each TCPA violation results in damages of no less than $500, which may be trebled for willful or knowing violations. § 227(b)(3)(B)–(C).

BCA collects debts for healthcare companies. To call suspected debtors, it uses a "predictive dialer" maintained by a company named Noble Systems. BCA also accompanies some of those calls with an "interactive voice response" ("IVR"), which is an artificial or prerecorded voice that prompts the person called to indicate whether BCA has called the right number. It goes something like: "If this is Jane Doe, press 1; 'if this is a wrong number,' press 2." [ECF No. 86-1, p. 6].

The phone numbers BCA automatically dials are fed to the Noble system from a separate collection-software system called "FACS." FACS is loaded with phone

numbers supplied by BCA's healthcare clients. Those clients, in turn, received the numbers from the patients.

The parties agree that BCA uses the Noble predictive dialer to autodial phone numbers without human intervention. But facts suggest that the Noble system is incapable of generating random or sequential phone numbers (and instead dials from a fixed set of numbers supplied by separate debt-collection software).

On six occasions, and twice using an IVR, BCA called Reyes' cellphone using the Noble predictive dialer. It was not an emergency. Nor did BCA have Reyes' prior express consent. It was trying to reach a different person who had written Reyes' cellphone number on a medical consent form. Five calls went unanswered, and on the sixth call, Reyes picked up the phone, heeded the IVR prompts, and pressed two -- for the wrong number. BCA did not call Reyes again after that.

Reyes sought summary judgment on her individual TCPA claim. [ECF No. 86]. The Court has not yet ruled on the class certification motion. [ECF No. 59].

The parties did not dispute the basic facts of this case: BCA used a predictive dialer and a prerecorded or artificial voice to call Reyes' cellphone several times without her prior express consent or an emergency. But the parties vigorously debate the question of whether the Noble predictive dialer is an ATDS.

BCA argued that the Noble predictive dialer, although capable of automatically dialing a phone number without human intervention, cannot generate random or

sequential phone numbers and is therefore not an ATDS. Reyes, on the other hand, argues that such capability (or lack of capability) is inconsequential.

During the briefing on Plaintiff's summary judgment motion, the parties extensively discussed the applicability and interpretation of a relatively recent D.C. Circuit opinion: *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018), which invalidated portions of the Federal Communications Commission's 2015 order interpreting the TCPA. Noting that the Eleventh Circuit has held that FCC orders are binding on this Court, I held that earlier FCC Orders (i.e., not the 2015 one which the *ACA* Court rejected) are still binding, and so I granted summary judgment on the ATDS issue because the Noble predictive dialer, as used by BCA, was an ATDS as a matter of law. [ECF No. 124, p. 30].

BCA then filed a motion for reconsideration. [ECF No. 125]. Reyes filed an opposition response [ECF No. 127], and the Court denied the reconsideration motion [ECF No. 128]. BCA then filed the instant motion to certify the Order granting Reyes' summary judgment motion so that it may pursue an interlocutory appeal [ECF No. 129], and Reyes filed an opposition response [ECF No. 131].

II. Applicable Legal Principles and Analysis

Section 1292(b) states in pertinent part that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a **controlling question of law** as to which there is **substantial ground for difference of opinion** and that an immediate appeal from the

> order *may* **materially advance the ultimate termination of the litigation**, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]

§ 1292(b) (emphasis added).

As reflected by the portions of the statute emphasized above, the essential requirements for any § 1292(b) appeal are (1) "a controlling question of law"; (2) "a substantial ground for difference of opinion"; and (3) whether the appeal would "materially advance the ultimate termination of the litigation." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1256, 1265 (11th Cir. 2004) (vacating order certifying interlocutory appeal).

But evaluating a motion for an interlocutory appeal under § 1292 cannot be performed in a vacuum. Instead, it should analyze the application through the prism of the overall perspective invoked by courts when assessing the application.

Thus, "[a]s a matter of policy, interlocutory appeals should be reserved for **exceptional** cases . . . ; the purpose is not to review the correctness of an interim ruling." *Monroe v. Am. Int'l Grp., Inc.*, No. 04-61621-CIV, 2006 WL 8433410, at *1 (S.D. Fla. May 22, 2006) (emphasis added). Indeed, "[t]he Supreme Court has explained that only 'exceptional circumstances' can 'justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 687 F. Supp. 2d 1322, 1324 (S.D. Fla. 2009) (quoting

Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)). This is, in part, because "[t]he proper division of labor between the district courts and the court of appeals and the efficiency of judicial resolution of cases are protected by the final judgment rule, and are threatened by too expansive use of the § 1292(b) exception to it." *McFarlin*, 381 F.3d at 1259.

Moreover, the party seeking certification bears the heavy burden of establishing that all the elements of § 1292(b) are satisfied and that an immediate appeal is warranted. *U.S., ex rel. Borges v. Doctor's Care Med. Ctr., Inc.*, No. 01-8112-CIV, 2007 WL 984404, at *1 (S.D. Fla. Mar. 27, 2007). Given the heavy burden, there is "a strong presumption against interlocutory appeals." *Teblum v. Eckerd Corp. of Fla.*, No. 2:03-CV-495FTM33DNF, 2006 WL 1151816, at *4 (M.D. Fla. Apr. 28, 2006) (declining request for interlocutory certification because plaintiffs did not persuade the court that "exceptional circumstances justifying departure from the policy of postponing appellate review until after the entry of a final judgment exist").

Phrasing the overarching perspective somewhat differently but in a way that underscores the same theme, the Court in *In re Checking Account Overdraft Litigation*, No. 09-MD-02036-JLK, 2010 WL 3377592 (S.D. Fla. July 1, 2010), provided a succinct overview of the applicable circumstances: "Certification is not an appropriate vehicle for early appellate review of hard cases, and should be **denied except in rare circumstances**." *Id.* at *2 (emphasis added).

The Court's discretion to reject a § 1292(b) motion even if all the required factors are present cannot be overlooked. The "efficiency of judicial resolution of cases" is "threatened by too expansive use of the § 1292 exception." *McFarlin*, 381 F.3d at 1259. Indeed, "[b]ecause permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy." *Id.*

Therefore, even if the Court decided to issue the § 1292 certificate, the Eleventh Circuit would be under no obligation to consider the appeal. Our appellate court has candidly acknowledged that it sometimes turns down a § 1292 appeal, even though the district court issued the certification. *Id.*

To be sure, BCA contends that a controlling question of law as to which there is a substantial ground for a difference of opinion exists because it says that I erroneously concluded that the earlier FCC rulings about predictive dialers are still valid and binding. But "the mere claim that the district court's ruling is incorrect does not support a finding that there is substantial ground for difference of opinion." *Great N. Ins. Co. v. Honduras Outreach, Inc.*, No. 1:08-CV-276-JTC, 2009 WL 10670918, at *1 (N.D. Ga. Feb. 12, 2009); *see also Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 261 F. Supp. 3d 1345, 1347 (M.D. Ga. 2017) ("Neither the mere lack of authority on the issue nor the claim that the district court's ruling is incorrect constitutes a substantial ground for difference of opinion.").

Similarly, the mere fact that district courts (whose opinions are not binding

here) may not be universally aligned on an issue does necessarily mean that there exists a substantial ground for difference of opinion. *See, e.g.*, *Singh v. Daimler-Benz, AG*, 800 F. Supp. 260, 263 (E.D. Pa. 1992), *aff'd*, 9 F.3d 303 (3d Cir. 1993) (finding no substantial ground for difference of opinion despite conflicting district court opinions). Rather, "the district court has a duty to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs*, 952 F. Supp. 2d 1360, 1362 (N.D. Ga. 2013) (internal quotations omitted) (noting the procedure should be used "sparingly" and further explaining that appropriate questions are those of "pure law" -- matters the appellate court "can decide quickly and cleanly without having to study the record").

The Court acknowledges that BCA relies on two out-of-circuit district court opinions to support its view that my summary judgment Order is incorrect. But there are district court opinions in this Circuit that reach my conclusion, leaving the Court with several non-binding decisions but with those from within the Circuit as legal support. Moreover, it is difficult to see how the Eleventh Circuit could adequately address BCA's interlocutory argument without studying the record.

Given these dynamics, BCA has not established the first two (of three) prerequisites for an interlocutory appeal.

Moreover, the Court concludes that BCA has not established the third requirement either because it has not met its burden of demonstrating that an interlocutory appeal will materially advance the ultimate termination of the case. As Reyes notes in his opposition response, BCA did not itself seek summary judgment on her TCPA claims. Thus, even if (1) I were to issue the certification, (2) the Eleventh Circuit were to exercise its discretion and consider the interlocutory appeal, and (3) the appellate court were to vacate my Order granting Reyes summary judgment, the case would then still need to go to trial so that a jury could determine whether the Noble predictive dialer is an ATDS. BCA has not adequately addressed the practical point asserted by Reyes: that "the common, and predominating, question of whether Defendant's dialer constitutes an ATDS will not disappear even if the Eleventh Circuit were to rule that the FCC's 2003 and 2008 rulings regarding predictive dialers no longer bind the Court." [ECF No. 131, p. 10].

In sum, the Court denies BCA's motion for a Section 1292(b) certification.

DONE and ORDERED in Chambers in Miami, Florida, on June 8, 2018.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
All counsel of record