

2017 WL 6888702

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United States District Court, C.D. California.

Diana SOUKHAPHONH

v.

HOT TOPIC, INC.

CV 16-5124-DMG (AGRx)

|
Filed 10/19/2017

Attorneys and Law Firms

Robert Ahdoot, Tina Wolfson, Ahdoot and Wolfson PC, Los Angeles, CA, David P. Milian, Frank S. Hedin, Carey Rodriguez O'Keefe Milian Gonya LLP, Miami, FL, Meredith Shane Lierz, Ahdoot and Wolfson PC, West Hollywood, CA, for Diana Soukhaphonh.

Anne-Marie D. Dao, Arameh Zargham O'Boyle, Joshua M. Briones, E. Crystal Lopez, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Los Angeles, CA, for Hot Topic, Inc.

Opinion

Proceedings: IN CHAMBERS—ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE THIRD AMENDED ANSWER [115]

DOLLY M. GEE, UNITED STATES DISTRICT
JUDGE

*1 On July 12, 2016, Plaintiff Diana Soukhaphonh filed a Class Action Complaint against Defendant Hot Topic, Inc., asserting two causes of action that arise out of Hot Topic's transmission of a text message to Plaintiff: (1) negligent violation of the Telephone Consumer Protection Act ("TCPA"), and (2) willful violation of the TCPA. [Doc. # 1.] Hot Topic filed its original Answer on February 3, 2017 [Doc. # 42], and has since amended it twice. [Doc. ## 44, 74.] On September 15, 2017, Hot Topic filed its Motion for Leave to File a Third Amended Answer. [Doc. # 115.] That motion is now fully briefed. [Doc. ## 140, 143.]

The Court deems Hot Topic's motion appropriate for decision without oral argument. *Fed. R. Civ. P. 78(b)*;

C.D. Cal. L.R. 7-15. For the reasons discussed in this Order, the Court **DENIES** the motion.

I.

LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. "[L]eave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 607 (9th Cir. 1992). Whether leave to amend should be granted is a matter that is committed to the district court's sound discretion. *See Rich v. Shrader*, 823 F.3d 1205, 1208 (9th Cir. 2016).

II.

DISCUSSION

Hot Topic seeks leave to file an amended pleading that would alter an admission that it had made in each of its prior answers. Specifically, Hot Topic intends to delete the word "promotional" from an admission that appears in two paragraphs of the operative Second Amended Answer: "Hot Topic admits that on November 4, 2015, Plaintiff received one promotional text message to [sic] her cellular phone." *See* Second Am. Answer at ¶¶ 19, 41 [Doc. 74]; Dao Decl., Ex. B at ¶¶ 19, 41 (redlined proposed Third Amended Complaint) [Doc. # 115-2]; *see also* Answer at ¶¶ 19, 41 (making this admission) [Doc. # 42]; First Am. Answer at ¶¶ 19, 41 (same) [Doc. # 44]. In its motion, Hot Topic contends that "[o]n October 25, 2016, [it] withdrew declarations from Parvinder Singh and Jon Kosoff which mistakenly described the confirmatory, informational text message at issue in this litigation as 'promotional.'" *See* Def.'s Mem. of P. & A. re Mot. to Amend at 1 (citing Doc. ## 31, 33) [Doc. # 115-1.] Hot Topic argues that, nearly a year after it withdrew "the declarations [that it claims] form[ed] the basis of the mistaken reference to a 'promotional' text[.]" this Court should grant Hot Topic leave to delete that word from its pleading. *See id.* at 2.

Prior to filing the instant motion, Hot Topic filed a motion for summary judgment, arguing that it was not liable under the TCPA because Plaintiff gave Hot Topic her prior express consent to receive the text message. [Doc. ## 53, 53-1.] As discussed *infra*, granting Hot Topic's request would have a negative impact on Plaintiff's ability to prepare for and oppose the summary judgment motion.¹ Thus, the Court exercises its discretion to deny Hot Topic's motion because the amendment would prejudice Plaintiff and Hot Topic unduly delayed in making this request. Moreover, amending the Answer would not erase history—the fact that Hot Topic used the word “promotional” in a prior pleading and in prior declarations could still be invoked by Plaintiff to support a judicial admission argument.

A. Prejudice to Plaintiff

*2 Plaintiff contends that permitting Hot Topic to file its Third Amended Answer would prejudice her because, in the course of conducting discovery and preparing her opposition to Hot Topic's pending motion for summary judgment, she relied upon Hot Topic's admission that the text message it sent her was “promotional.” See Opp'n at 12–18. This issue concerns the legal standards applicable to Plaintiff's TCPA claims. The parties agree that whether Hot Topic may avoid liability depends in part on whether the text message constituted an “advertisement” or “telemarketing.” See *id.* at 11–12; Reply at 2. They further agree that if the text message does not fall into one or both of those categories, Hot Topic can escape liability by demonstrating that Plaintiff had provided prior express consent for the text, whereas if the text was an advertisement or telemarketing, Hot Topic would need to prove that Plaintiff provided prior express written consent for that contact. See Opp'n at 11–12; Reply at 2; see also 47 C.F.R. § 64.1200(a)(2) (providing that “[n]o person or entity may: ... [i]nitiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any [telephone number assigned to a cellular telephone service], other than a call made with the prior express written consent of the called party”). The regulations implementing the TCPA define an “advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services[.]” and they also define “telemarketing” as “the initiation of any telephone call or message for the purpose

of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” See 47 C.F.R. § 64.1200(f)(1), (12).

Plaintiff argues that she believed that although Hot Topic's position is that the text message was not an “advertisement” or “telemarketing[.]” it had conceded the “promotional” nature of the text message. See Opp'n at 11–13. Plaintiff intends to utilize Hot Topic's admission to show that Hot Topic must satisfy the higher prior express written consent standard to avoid liability, notwithstanding Hot Topic's assertions that the message is “confirmatory or informational[.]” See *id.* at 11–13; Reply at 1 (“Plaintiff has also known that [Hot Topic's] affirmative defense is based on Hot Topic's position that the text message was confirmatory or informational, rather than an advertisement triggering stricter consent requirements.”). This strategy is not wholly unreasonable, given that it is premised on precedent holding that a communication may constitute “telemarketing” for the purpose of the TCPA even if it is “informational” and “[does] not explicitly reference any property, goods, or services....” See *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012); Opp'n at 13 (citing *Chesbro*, 705 F.3d at 917–18).

Furthermore, Plaintiff argues that because of Hot Topic's admission, she did not undertake discovery on Hot Topic's purpose for sending the text message. See Opp'n at 12–13. In particular, Plaintiff contends that she “declined to subpoena third party short code administrators and data aggregators concerning Hot Topic's disclosed purpose for the registration of the short code at issue and to depose Laura Belliveau, a senior marketing manager for Hot Topic who is identified on Hot Topic's initial disclosures.” See *id.* at 13. Plaintiff claims that she also “declined to move to compel certain discovery responses from Hot Topic and to compel additional testimony from Hot Topic's 30(b)(6) witness on the subject.” See *id.* Hot Topic does not dispute these assertions, but simply argues that “[i]t is entirely unclear what impact, if any, such discovery would have on an opposition to Hot Topic's MSJ.” See Reply at 9.

Accepting Hot Topic's position could penalize Plaintiff for failing to present evidence that she did not discover *because of Hot Topic's conduct*. The Court will not fault Plaintiff for undertaking a reasonable litigation strategy in reliance on Hot Topic's admissions.

Nonetheless, Hot Topic alleges that Plaintiff would not be prejudiced by the proposed amendment because it “has repeatedly argued that the text message is informational such that only prior express consent is required to defeat her TCPA claim[.]” *See* Reply at 2. To support this contention, Hot Topic quotes excerpts from several of its filings and paraphrases the mediation brief that it served on Plaintiff on August 3, 2017. *See* Reply at 2–5, 7–9. Nonetheless, all of the quoted passages are consistent with Plaintiff’s belief that Hot Topic was arguing that it was not subject to the heightened prior express written consent requirement even though it had conceded that the text message was “promotional.” For instance, Hot Topic’s statement in its summary judgment motion that “[t]he text message did not promote, encourage, or even refer to the commercial sale of any Hot Topic merchandise” can be reasonably interpreted as an argument that a promotional message must contain an express reference to a good or service in order for the message to constitute an advertisement or telemarketing. *See* Reply at 4 (quoting Def.’s Mem. of P. & A. re Mot. for Summ. J. at 5 [Doc. # 53-1]) (emphasis in original).

*3 The Court notes, however, that Plaintiff’s reliance upon Hot Topic’s characterization of the text message as “promotional” may ultimately prove fruitless if Hot Topic demonstrates that the text does not fit the applicable definitions of “advertising” and “telemarketing.” Nonetheless, the Court cannot conclude that Plaintiff acted unreasonably when she decided not to conduct further discovery on this issue because of Hot Topic’s admissions. Thus, the prejudice Plaintiff would suffer as a result of the proposed Third Amended Answer weighs against granting Hot Topic’s motion. *Cf. Wechlser v. Hunt Health Sys., Ltd.*, 186 F. Supp. 2d 402, 416–20 (S.D.N.Y. 2002) (denying a motion to amend an answer to include a new legal theory that would have contradicted defendants’ prior admissions because the amendment would have required the plaintiff to conduct further discovery on that issue after a summary judgment motion relating thereto had already been filed and adjudicated).

B. Undue Delay

In its reply, Hot Topic concedes that it did not file the instant motion until “six weeks after learning” that it purportedly erroneously retained the adjective “promotional” in its Second Amended Answer. *See* Reply at 10. Hot Topic’s counsel suggests in her declaration

that the delay is attributable to “Hot Topic[’s] field[ing] multiple motions to compel from Plaintiff [from August through September,]” and that “Hot Topic’s case team transitioned during the time frame at issue” because the lead attorney went on maternity leave. *See* Dao Decl. at ¶ 5 [Doc. # 143-1].

Nevertheless, if Hot Topic had at the very least brought this supposed oversight to Plaintiff’s attention when Hot Topic had allegedly discovered it, then the amendment might not have hindered her ability to oppose Hot Topic’s motion for summary judgment. *See id.* at ¶¶ 2–3 (attesting that Hot Topic’s counsel did not inform Plaintiff of the alleged error until September 13, 2017). Instead, Hot Topic placed Plaintiff in the difficult position of having to determine whether to conduct further discovery less than one month before her opposition to the summary judgment motion was due. *See supra* note 1. Hot Topic does not explain why it failed to inform Plaintiff’s counsel of its intentions at an earlier time.

Furthermore, Hot Topic initially noticed the instant motion for a hearing on October 6, 2017, which was four days before Plaintiff’s stipulated October 10, 2017 deadline to file an opposition to the motion for summary judgment. The Court later continued the hearing to October 20, 2017 because Hot Topic did not comply with a Local Rule requiring motions to be filed at least 28 days before the hearing, *see* C.D. Cal. L.R. 6-1, and because the parties later stipulated to holding the hearing on October 20th. [Doc. ## 117, 126, 131.] Thus, primarily as a result of Hot Topic’s delay in bringing this motion, Plaintiff did not have the benefit of a ruling thereon until after her opposition to the summary judgment motion was due.

Therefore, the Court concludes that the undue delay factor weighs in favor of denying Hot Topic’s motion. *Cf. Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990) (affirming the denial of leave to amend in part because the moving party’s delay was “inexplicable and unjustified”).²

III.

CONCLUSION

For the foregoing reasons, this Court issues the following rulings:

1. Hot Topic's Motion for Leave to File a Third Amended Answer is **DENIED**; and
2. The October 20, 2017 hearing on Hot Topic's Motion for Leave to File a Third Amended Answer is **VACATED**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 6888702

Footnotes

- 1 Pursuant to the parties' stipulated briefing schedule on Hot Topic's summary judgment motion, the Court ordered Plaintiff to file an opposition to that motion no later than October 10, 2017. [Doc. # 123.] Plaintiff ultimately filed her opposition on October 11, 2017. [Doc. # 144.]
- 2 Because of the Court's disposition of the instant motion, it need not reach Plaintiff's other arguments offered in opposition thereto. See Opp'n at 2–11 (arguing, *inter alia*, that Hot Topic's request was made in bad faith and that the proposed amendment would be futile).

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