

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 29 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KARMEN SELF-FORBES,

No. 17-15804

Plaintiff-Appellant,

D.C. No.

2:16-cv-01088-JCM-PAL

v.

ADVANCED CALL CENTER
TECHNOLOGIES, LLC,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted August 16, 2018
San Francisco, California

Before: SCHROEDER, SILER,** and GRABER, Circuit Judges.

Plaintiff Karmen Self-Forbes challenges the district court’s decision to grant summary judgment in favor of defendant Advance Call Center Technologies, LLC (“ACT”). For the following reasons, we **reverse** and **remand**.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

In 2012, Self-Forbes opened a GE Money Bank QVC credit card account. Shortly thereafter, she defaulted on her credit card payments. As a result, GE Money Bank assigned Self-Forbes's account to ACT to collect the unpaid balance. Between January and April 2013, ACT placed 530 calls to Self-Forbes's cellphone, often calling her several times a day. Self-Forbes sued, asserting that ACT knowingly, and/or willfully, placed automated calls to her cell phone without her consent in violation of the TCPA, which prohibits any call using an automatic telephone dialing system ("ATDS") or prerecorded voice to a cellphone without prior express consent by the person being called. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

The parties filed cross-motions for summary judgment. ACT argued that Self-Forbes consented to the contact when she opened her credit card account. Moreover, ACT stated that none of its calls resulted in direct contact with Self-Forbes and that she never expressly revoked her consent. In response, Self-Forbes filed a sworn declaration stating that she had repeatedly asked an ACT representative to stop calling, but the calls continued.

The evidence revealed that ACT's call logs were partially incorrect because they mislabeled Self-Forbes's phone as a landline rather than a cellphone. Additionally, ACT's call logs indicated that, on seventeen occasions—including twice on January 23, 2013—ACT's equipment suspected that a live person had

answered the call, meaning that Self-Forbes likely answered the phone. Those calls were routed to a live agent.

In her declaration and deposition, Self-Forbes testified under oath that she received a phone call from a female agent of ACT twice in one day. Although she did not recall the exact date, Self-Forbes estimated that the call was shortly before the birth of her daughter on February 5, 2013. Self-Forbes recited in detail that she told the representative, “Please stop calling, I’ve asked you to stop calling nicely. Is this really necessary to call this many times in one day[?] I can’t even get on my phone.” ACT records confirmed that Self-Forbes was connected to a female representative on January 23, 2013, but ACT claims that the call did not result in direct contact with Self-Forbes.

Despite this conflicting evidence, the district court granted ACT’s motion for summary judgment, ruling that Self-Forbes’s declaration “merely restate[d] the allegations set forth in the complaint” and that she could not “avoid summary judgment by relying on conclusory allegations unsupported by factual data.”

We review de novo the district court’s grant of summary judgment. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). “We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.” *Id.* (quoting *Wallis v. Princess Cruises*,

Inc., 306 F.3d 827, 832 (9th Cir. 2002)). “By definition, summary judgment may be granted only when there are no disputed issues of material fact Thus, where the district court has made a factual determination, summary judgment cannot be appropriate.” *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989-90 (9th Cir. 2016) (en banc) (per curiam) (citation and internal quotation marks omitted).

We have recognized three elements for a TCPA violation: (1) the defendant called a cellular telephone number (2) using an ATDS or an artificial or prerecorded voice (3) without the recipient’s prior express consent. *See, e.g., Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). In this case, ACT does not dispute its use of an ATDS to call Self-Forbes’s cellphone. Self-Forbes does not dispute that she applied for a QVC credit card and agreed to the terms and conditions, thereby expressly consenting to phone calls for debt collection purposes. Rather, the sole issue is whether Self-Forbes orally revoked her consent as she alleges.

Although the TCPA does not explicitly grant consumers the right to revoke their prior express consent, we have recently held that consumers may revoke consent without temporal limitations. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047-48 (9th Cir. 2017).

In this case, ACT claimed that its call logs establish that it never spoke with Self-Forbes. The district court accepted ACT's claim and disregarded Self-Forbes's conflicting testimony—that she spoke with a female representative in early 2013 and told that individual to stop calling her. The district court improperly weighed the evidence and found ACT's evidence to be more credible. This factual determination—at the summary judgment stage—was premature, and the district court usurped the role of the factfinder at trial.

Self-Forbes presented sufficient evidence to establish a genuine dispute of fact as to whether she revoked her consent. Her declaration and deposition contained detailed facts—the approximate date of the alleged phone calls, what she allegedly told the ACT representative, and that the ACT agent was female—all of which were corroborated by ACT's call logs. Furthermore, ACT lacked an incentive to document Self-Forbes's alleged revocation of consent because it had erroneously classified her number as a landline rather than a cellphone. Accordingly, the district court erred in granting summary judgment.

REVERSED and REMANDED.