IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

OMAR WINSTON KHOURI, Plaintiff, v. NATIONAL GENERAL INSURANCE MARKETING, INC. & AMERICAN SELECT PARTNERS, LLC, Defendants.	)	1:20CV580

MEMORANDUM ORDER

THOMAS D. SCHROEDER, Chief District Judge.

Before the court is *pro se* Plaintiff Omar Winston Khouri's motion for default judgment against Defendant National General Insurance Marketing, Inc. ("National General") (Doc. 9)[1] and motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against Defendant American Select Partners, LLC ("American Select") (Doc. 20). Both National General and American Select filed responses in opposition to the respective motions.

[1] Khouri's motion for default judgment lacks a brief and therefore is in violation of Local Rule 7.3. Although courts must construe *pro se* complaints liberally, "generosity is not fantasy." Bender v. Suburban Hosp., Inc., 159 F.3d 186, 192 (4th Cir. 1998). The court is not permitted "to become an advocate for a *pro se* litigant or to rewrite his complaint," Williams v. Guilford Tech. Cmty. Coll. Bd. of Trustees, 117 F. Supp. 3d 708, 716 (M.D.N.C. 2015), and *pro se* parties are expected to comply with all applicable rules, see Chrisp v. Univ. of N.C.-Chapel Hill, No. 1:18CV542, 2020 WL 3950734, at *2 (M.D.N.C. July 10, 2020) (*pro se* plaintiff must comply with the Federal Rules of Civil Procedure); LHF Prods., Inc. v. Fogg, No. 1:16CV1050, 2017 WL 10978801, at *1 (M.D.N.C. June 30, 2017) (same for local rules). However, National General does not raise this as a defect.

(Docs. 11, 22.) Khouri filed a reply to National General's response. (Doc. 15). For the reasons set forth below, both of Khouri's motions will be denied.

I. BACKGROUND

The basic facts as pleaded in the complaint are as follows:[2]

Khouri, proceeding *pro se*, resides in Winston-Salem, North Carolina. (Doc. 2 ¶ 1.) On April 24, 2020, Khouri received an unsolicited phone call from American Select, which identified itself as US Healthcare. (Id. ¶ 5.) Khouri's phone number is on the federal Do Not Call Registry. (Id. ¶ 4.) American Select told Khouri the purpose of the call was to provide health insurance costs so Khouri could purchase a new health insurance plan and transferred Khouri to an American Select agent named Augustine Donahue. (Id. ¶¶ 7-8.) Donahue told Khouri that he qualified for multiple health insurance plans provided by National General. (Id. ¶ 11.) Donahue is not a North Carolina-licensed insurance agent (id. ¶ 9), but Khouri was told by Dalton Mills, an American Select supervisor, that National General allows unlicensed agents to sell their insurance products during the coronavirus pandemic (id. ¶

[2] For reasons given in Part II.A infra, the court finds that because the entry of default Khouri obtained in state court is valid in this court, the court can proceed to the merits of Khouri's default judgment motion. In this posture, the court accepts as true all well-pleaded facts in Khouri's complaint. See Harris v. Blue Ridge Health Servs., Inc., 388 F. Supp. 3d 633, 637 (M.D.N.C. 2019) ("Upon the entry of default, the defaulted party is deemed to have admitted all well-pleaded allegations of fact contained in the complaint." (citation omitted)).

10). Donahue used the credentials of Austin Edgar, a North Carolina-licensed agent registered with National General, to generate insurance quotes and attempt to make a sale. (Id. ¶ 13.) Khouri states that American Select refused to provide insurance coverage details until after receiving payment and refused to disclose the real name of its company. (Id. ¶¶ 14-15.)

Khouri brought this action against American Select and National General in the General Court of Justice, District Court Division, of Forsyth County, North Carolina, on May 19, 2020, alleging violations of the federal Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 et seq. ("TCPA"), and the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 ("UDPTA"). (Doc. 2 ¶ 16.) Khouri reports he served National General by mail on May 21. (Doc. 9 ¶ 2.) On June 23, Khouri obtained an entry of default from the Forsyth County District Court as to National General. (Id. ¶ 5.) On June 26, Defendants removed the case to this court. (Doc. 1.) National General filed an answer on July 2, and American Select filed its answer on July 10. (Docs. 5, 7.) Khouri filed his motion for default judgment against National General on July 23. (Doc. 9.) Khouri filed his motion for sanctions against American Select on September 28. (Doc. 20.) The motions are fully briefed and ready for decision.

II. ANALYSIS

A. Motion for Default Judgment

Khouri first moves for default judgment against National General. (Doc. 9.) National General opposes the motion on the ground that this court is unable to grant Khouri's request because the entry of default was entered in state court, not this court, and it has filed an answer in this court. (Doc. 11 ¶¶ 4-5.) Specifically, National General argues that the "Entry of Default obtained by plaintiff in the state court action . . . is without any force and effect in this pending Middle District action." (Id. ¶ 5.)

National General cites no case law in support of its position, and indeed its position lacks legal support. "An entry of default or default judgment in state court does not prevent removal of an action to federal court." Wasmuth v. Das, No. 1:11CV1013, 2013 WL 3461686, at *6 (M.D.N.C. July 9, 2013), report and recommendation adopted, No. 1:11CV1013, 2013 WL 4519020 (M.D.N.C. Aug. 26, 2013). "The federal court takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court." Butner v. Neustadter, 324 F.2d 783, 785 (9th Cir. 1963); accord Hawes v. Cart Prod., Inc., 386 F. Supp. 2d 681, 689 (D.S.C. 2005) ("Upon removal of a case from state to federal court, a federal court must accord full faith and credit to all valid proceedings which took place in state court prior to

removal."); 14 Moore's Federal Practice Civil § 81.04 (2020) ("After removal, the federal court will usually give effect to the state court's procedural rulings made before removal as if rendered in federal court."). Upon removal, the Federal Rules of Civil Procedure govern all civil actions. Wasmuth, 2013 WL 3461686, at *6; Fed. R. Civ. P. 81(c)(1).[3]

Indeed, the usual posture of cases such as the present is an entry of default or default judgment in state court, removal, and then a motion by the defendant to set aside the entry of default or default judgment. See, e.g., Hawes, 386 F. Supp. 2d at 689. National General has not requested that relief here. Nor has it offered any grounds to indicate that the entry of default was invalidly entered in state court. Accordingly, the court will consider the merits of Khouri's request for a default judgment.

Default is not "an absolute confession by the defendant of his liability and of the plaintiff's right to recover." Superior Performers, Inc. v. Thornton, No. 1:20CV00123, 2020 WL 6060978, at *4 (M.D.N.C. Oct. 14, 2020) (quoting Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001)). Rather, a defaulted

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[3] The Federal Rules of Civil Procedure do provide that a defendant who failed to answer or otherwise plead before the case is removed can still do so within seven days after removal. See Fed. R. Civ. P. 81(c)(2). However, this Rule does not work to extend the time to answer where, as here, an entry of default has been entered in state court. See Butner, 324 F.2d at 785 & n.3 (holding that where defendant filed answer in federal court after removal, the state court default judgment remained valid because upon removal the "federal court takes the case as it finds it").

defendant is considered to have admitted the factual allegations -- but not the conclusions of law -- contained in the complaint. Id. The court must still "determine whether the well-pleaded allegations in [the plaintiff's] complaint support the relief sought in [the] action." Id. (quoting J&J Sports Prods., Inc. v. Romenski, 845 F. Supp. 2d 703, 705 (W.D.N.C. 2012); accord 10A Wright & Miller, Federal Practice & Procedure Civil § 2688.1 (4th ed.) ("Once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action."). In order to impose default judgment, the moving party must first show that the defaulted party was properly served. Thornton, 2020 WL 6060978, at *5. Second, the court must evaluate the complaint to ensure that it states a legitimate cause of action. Id.; see also Anderson v. Found. for Advancement, Educ. & Emp. of Am. Indians, 155 F.3d 500, 506 (4th Cir. 1998) (holding that the district court erred in granting default judgment where plaintiff failed to state a claim). The court will consider each step in turn.

1. Service of Process

Federal Rule of Civil Procedure 4(h)(1)(A) allows service on a corporation consistent with Rule 4(e)(1), which permits service that "follow[s] state law for serving a summons in an action

brought in courts of general jurisdiction in the state where the district court is located or where service is made." The relevant North Carolina statute allows service on a corporation by "mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served." N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(c).

The record contains Khouri's affidavit of service showing service of the summons and complaint on National General via certified mail, return receipt requested, on May 21, 2020. (Doc. 1-1.) Further, in its notice of removal, National General states it "has been served." (Doc. 1 ¶ 3.) Given this, it appears that Khouri properly served National General.

2. Liability

Khouri alleges two causes of action against National General: a violation of the federal TCPA and a violation of North Carolina's UDTPA.

a. Telephone Consumer Protection Act

The TCPA makes it unlawful for any person "to make any call (other than a call for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii); see also 47 U.S.C. § 227(b)(3) (creating a private right of action for a violation of this

subsection). It is also unlawful for "any person" to "mak[e] or transmit[] a telephone solicitation to the telephone number of any subscriber included in [the federal Do Not Call Registry]." 47 U.S.C. § 227(c)(3)(F); see also 47 U.S.C. § 227(c)(5) (creating a private right of action).

"By its plain language, the TCPA's private right of action contemplates that a company can be held liable for calls made on its behalf, even if not placed by the company directly." Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 659 (4th Cir. 2019); 47 U.S.C. § 227(c)(5) (authorizing claims by "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity" (emphasis added)). In considering the "on behalf of" language in the TCPA, the court assumes normal agency principles apply, including vicarious liability. See Krakauer, 925 F.3d at 659-60.

Here, Khouri has failed to allege facts supporting a violation of the TCPA by National General. The complaint states that it was Defendant American Select that called Khouri and attempted to sell insurance products. (Doc. 2 ¶¶ 5-10.) There are no facts that National General directly called Khouri. Nor has Khouri pled facts sufficient to show that American Select was acting "on behalf of" National General. Under traditional agency law, an agency relationship exists when a principal "manifests assent" to an agent "that the agent shall act on the principal's behalf and subject to

the principal's control, and the agent manifests assent or otherwise consents so to act." Krakauer, 925 F.3d at 659-60 (quoting Restatement (Third) of Agency, § 1.01). Vicarious liability under the TCPA also includes principles of apparent authority and ratification. Hodgin v. UTC Fire & Sec. Americas Corp., 885 F.3d 243, 252 (4th Cir. 2018). Apparent authority exists when a "third party reasonably believes the [agent] has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency § 2.03.

The closet the complaint comes to alleging any sort of agency relationship is by stating that American Select was offering to sell National General insurance products (Doc. 2 ¶¶ 10-11) and that a representative for American Select "used the credentials" of a National General agent "in order to generate insurance quotes and attempt to make a sale" (id. ¶ 13). There are no facts showing that National General "manifest[ed] assent" to American Select for American Select to act as National General's agent. And while it might be reasonable for Khouri to believe American Select was acting on National General's behalf given American Select was attempting to sell National General insurance products, there are no facts that this "belief is traceable to [National General's] manifestations" to Khouri sufficient for apparent authority. Nor are there any facts that Khouri reasonably relied on any apparent

authority. See Auvil v. Grafton Homes, Inc., 92 F.3d 226, 230 (4th Cir. 1996) (apparent authority exists "[w]hen a principal, through his acts or omissions, causes a third party, in good faith and in the exercise of reasonable prudence, to rely on the agent's authority to act on the principal's behalf").

Because Khouri has not sufficiently alleged a violation of the TCPA by National General, default judgment on this claim will be denied.

b. North Carolina UDTPA

North Carolina's UDTPA prohibits "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1; see also id. § 75-16 (creating a private right of action for violations). To establish a violation of the UDTPA, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice (2) that was in or affecting commerce and (3) proximately caused injury. Stack v. Abbott Labs., Inc., 979 F. Supp. 2d 658, 666–67 (M.D.N.C. 2013) (citing Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001)). "An act or practice is unfair 'if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers,' and is deceptive 'if it has the capacity or tendency to deceive.'" Id. (quoting Ace Chem. Corp. v. DSI Transp., Inc., 446 S.E.2d 100, 106 (N.C. Ct. App. 1994)). "To be 'deceptive' within the meaning of § 75–1.1, a misleading act must occur under egregious or aggravating

circumstances, and the harm resulting from the alleged deceptive practice must be such that the plaintiff could not reasonably avoid it." Exclaim Mktg., LLC v. DirecTV, LLC, 134 F. Supp. 3d 1011, 1024 (E.D.N.C. 2015), aff'd, 674 F. App'x 250 (4th Cir. 2016) (citations omitted) (fact that defendant called plaintiff more than 175 times over six years, at times using false names, not deceptive).

Plaintiff has not stated specifically which "acts or practices" by National General were unfair or deceptive. Even construing the complaint liberally, as the court ought with a *pro se* party, see Erickson v. Pardus, 551 U.S. 89, 94 (2007), the court finds no facts that National General engaged in any unfair or deceptive acts. Again, it was Defendant American Select that called Khouri, "hid[ing] their real phone number" and using a false name, and "refus[ing] to provide insurance coverage details until after they received payment." (Doc. 2 ¶¶ 6, 14.) The court offers no opinion on whether these actions by American Select constitute a violation of the North Carolina UDTPA. As to the present motion, it suffices to say that Khouri has not pled facts sufficient to indicate that National General engaged in any unfair or deceptive acts.

Because Khouri has not sufficiently alleged a violation of the North Carolina UDTPA by National General, default judgment on this claim will be denied.

B. Motion for Sanctions

Khouri also moves for sanctions under Federal Rule of Civil Procedure 11 against Defendant American Select. (Doc. 20.) Specifically, Khouri takes issue with several responses in American Select's answer to Khouri's complaint. (Id. ¶¶ 2-5.)

Rule 11 requires that in any pleading, motion, or other paper presented to the court the attorney or unrepresented party certifies that the paper is not being presented for an improper purpose and has claims or defenses that are legally warranted and factually supported. Fed. R. Civ. P. 11(b).[4] The rule exists to deter and prevent litigation abuse. Armstrong v. Koury Corp., 16 F. Supp. 2d 616, 619 (M.D.N.C. 1998), aff'd, 168 F.3d 481 (4th Cir. 1999). While the court has discretion to award sanctions for violations of Rule 11, see Fed. R. Civ. P. 11(c), Rule 11 motions should be used sparingly, and sanctions should be limited to what

[4] In full, Rule 11(b) provides: "By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

is sufficient to deter repetition of the conduct, see Johnson v. Charlotte-Mecklenburg Sch. Bd. of Educ., No. 3:19CV244, 2020 WL 4700716, at *2 (W.D.N.C. Aug. 13, 2020) (citing Fed. R. Civ. P. 11(c)(4)).

Rule 11 requires counsel to "conduct a reasonable investigation of the factual and legal basis" for the claim or defense. See Dillard v. Thomasville Auto Sales, LLC, 221 F. Supp. 3d 677, 683 (M.D.N.C. 2016) (citing Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991)). "To be reasonable, the attorney's investigation must yield some factual information and some basis in law to support the claims" or defense. Id. at 683-84 (quotations and alterations omitted). Sanctions may be imposed for a denial of a factual contention that is not "warranted on the evidence." Fed. R. Civ. P. 11(b)(4). However, an attorney who denies a factual contention may plead "lack of information or belief" after a reasonable inquiry under the circumstances. 2 Moore's Federal Practice Civil § 11.11 (2020) (citing Fed. R. Civ. P. 11(b)(4)).

Khouri has four specific objections to American Select's answer that he believes merit sanctions. First, Khouri alleged in his complaint that American Select "is a Texas Corporation with a usual place of business of 6116 N. Central Expressway, Suite 1400, Dallas, Texas." (Doc. 2 ¶ 3.) American Select denied this allegation. (Doc. 7 ¶ 3.) American Select contends it is a

limited liability company, not a corporation, and the address Khouri listed is for its registered agent, not its principal place of business. (Doc. 22 at 5.) At this stage, Khouri has not demonstrated he is entitled to Rule 11 sanctions for this response.

Next, Khouri alleged in his complaint that he spoke to two American Select agents named Augustine Donahue (Doc. 2 ¶ 8) and Dalton Mills (id. ¶ 10). American Select answered that it was "without knowledge or information sufficient to form a belief as to the truth" of the allegations while admitting it was "possible" that Khouri spoke with each person. (Doc. 7 ¶¶ 8, 10.) This is a sufficient answer that can be more fully addressed during discovery and does not violate Rule 11. See Gen. Accident Ins. Co. of Am. v. Fid. & Deposit Co. of Maryland, 598 F. Supp. 1223, 1230–31 (E.D. Pa. 1984) ("Rule 11 does not contemplate that a party will conduct such a thorough investigation that discovery will be unnecessary."); Fed. R. Civ. P. 11 Advisory Committee's Note to the 1993 Amendment (noting that a party is permitted to "deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation" without violating Rule 11). Khouri's motion as to these two allegations, therefore, will be denied at this time.

Finally, Khouri alleges that American Select agent Augustine Donahue is not a licensed North Carolina insurance agent. (Doc. 2 ¶ 9.) American Select denied this allegation. (Doc. 7 ¶ 9.)

Khouri objects to this response and claims that Mr. Donahue remains unlicensed. (Doc. 20 ¶ 4; Doc. 21 at 2.) The court need not resolve the status of Mr. Donahue's licensure at this point. It suffices for the purposes of the present motion that American Select appears to have made a "reasonable investigation" and gave an answer that was reflective of that investigation. See Dillard, 221 F. Supp. 3d at 683. Should Khouri eventually demonstrate that American Select knowingly denied this allegation falsely, he may pursue another motion at a later time. His request at this time is premature and will be denied.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that Plaintiff Omar Winston Khouri's motions for default judgment (Doc. 9) and sanctions (Doc. 20) are DENIED.

/s/ Thomas D. Schroeder
United States District Judge

November 17, 2020