UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80593-CIV-HURLEY/LYNCH

JAMES KEHOE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND TRUST,

Defendant.

ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE comes before the court upon the defendant's renewed motion for summary final judgment. Because Mr. Kehoe has failed to raise a genuine issue of material fact that he has incurred actual damages as a result of the defendant's alleged violation of the Driver's Privacy Protection Act, defendant's motion for summary judgment is granted as a matter of law.

BACKGROUND

Defendant Fidelity Federal Bank and Trust ("Fidelity") is a publicly owned and locally operated savings bank. From June 1, 2000 to June 20, 2003, Fidelity purchased on a monthly basis from the State of Florida's Department of Highway Safety and Motor Vehicles ("DMV"), the names and addresses of individuals in a three county area (Palm Beach, Martin, and Broward counties) who had registered new motor vehicles and used motor vehicles less than three years old within the preceding thirty days. Fidelity paid the State of Florida one cent per each name and address provided. The State then forwarded the information electronically to a mass mailing service provider

retained by Fidelity. The mailing went to the names and addresses provided to Fidelity by the State, and contained solicitations to refinance automobile loans. During the period in question, Fidelity paid the State approximately $5,656 for the names and addresses of approximately 565,600 individuals. Plaintiff James Kehoe alleges that Fidelity purchased his personal information without his consent, but does not allege that he ever received any solicitations from Fidelity.

Fidelity contends that at no point until the filing of the complaint in this case did it know, or have reason to know, that the State had not complied with the amendment to the Driver's Privacy Protection Act (the "DPPA") 18 U.S.C. § 2721 which went into effect on June 1, 2000. The amendment requires states to obtain the express consent of the individual before the state can release personal information relating to that individual as defined by the DPPA. Florida law does not conform to the requirements of the DPPA's amendments. Contrary to the DPPA's requirements that drivers "opt-in" before the state can disclose their personal information for marketing or solicitation, Florida still permits disclosure of personal information for bulk solicitations unless drivers formally request that Florida's DMV refrain from doing so. See § 119.07(3)(aa)(12), Fla. Stat. (2003).

Mr. Kehoe is attempting to form a class to sue Fidelity for liquidated damages in the amount of $2,500 for each instance Fidelity violated the DPPA. There are two main issues for the court to resolve on the defendant's motion for summary judgment. The first issue is whether Mr. Kehoe can maintain a DPPA claim if he has suffered no actual damages. The second issue is whether Fidelity can be held liable for violating the DPPA even if it did not know that Florida had failed to obtain the actual consent of the persons whose personal information was sold.

JURISDICTION AND VENUE

This court has federal question jurisdiction over Mr. Kehoe's action pursuant to 28 U.S.C. § 1331 because his action is brought under the Driver's Privacy Protection Act, 18 U.S.C. § 2724.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in the Southern District of Florida.

DISCUSSION

I. Legal Standard for Analyzing Motions for Summary Judgment

If the motion must be converted into a motion for summary judgment, a different legal standard applies. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In determining whether summary judgment is appropriate, the facts and inferences from the facts are viewed in the light most favorable to the non-moving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. See Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of her claims, such that a reasonable jury could find in her favor. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990). In response to a properly-supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials

of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c).

"The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. See Celotex, 477 U.S. at 322. If the non-moving party fails to "make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," then the court must enter summary judgment for the moving party. Gonzalez v. Lee County Hous. Auth., 161 F.3d 1290, 1294 (11th Cir. 1998).

II. The Driver's Privacy Protection Act

The DPPA states that "[a] person who knowingly, obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter [18 U.S.C.S. §§ 272 et seq.] shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." 18 U.S.C. § 2724(a). The next section of the DPPA states that "[t]he court may award -- (1) actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b).

The DPPA only permits business solicitors to purchase drivers license information "[f]or bulk distribution for surveys, marketing or solicitations if the ***State has obtained the express consent of the person*** to whom such personal information pertains." 18 U.S.C. § 2721(b)(12) (emphasis added). Florida is not in compliance with the DPPA because it still allows drivers license

information to be purchased for "bulk distribution for surveys, marketing, or solicitations when then the department has implemented methods and procedures to ensure that: (a) ***[i]ndividuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses.***" Section 119.07(3)(aa)(12), Fla. Stat. (2003) (emphasis added).

In summary, federal law requires states to adopt an "opt-in" program where the default rule is that drivers license information may not be sold for business solicitation purposes. Florida, however, has adopted an "opt-out" program where the default rule is that license information may be sold for business solicitation purposes unless otherwise indicated by the individual licensee. The DPPA specifically requires "a State department of motor vehicles . . . [to] not knowingly disclose [drivers license information to business solicitors without their express consent]" 18 U.S.C. §§ 2721(a); 2721(b)(12). Fidelity has not disagreed with this analysis, nor has it disagreed with the argument that Florida is currently in violation of the DPPA.

III. Merits of Defendant's Motion - Necessity of Actual Damages to State a Claim Upon Which Relief Can be Granted

Nonetheless, Fidelity contends that Mr. Kehoe has failed to state a cause of action under the DPPA because he has not alleged that he has incurred any *actual* damages as a result of his license information being sold to Fidelity. Fidelity believes that the DPPA's language stating that "[t]he court may award -- (1) actual damages, but not less than liquidated damages in the amount of $2,500" means that the statutory minimum award of $2,500 per violation can be granted only where a plaintiff has shown that he has incurred actual damages. 18 U.S.C. § 2724(b). Therefore, Fidelity argues that Mr. Kehoe's failure to allege any actual damages requires the court to grant summary judgment in Fidelity's favor.

Conversely, Mr. Kehoe argues that Section 2724(b)(1) should be read in the disjunctive form.

Mr. Kehoe contends that the statute's language indicating that "[t]he court may award -- (1) actual damages, but not less than liquidated damages in the amount of $2,500" means that courts should award either $2,500 or actual damages, whichever amount is greater, but in no case should courts require actual damages as a precondition to awarding the $2,500 liquidated damages amount.

Mr. Kehoe's position was supported by the Eleventh Circuit Court of Appeals in Fitzpatrick v. IRS, 665 F.2d 327, 330-31 (11th Cir. 1982). Fitzptarick construed the damages provision of the Privacy Act. 5 U.S.C. § 552a (2004), a statute that is analogous to the DPPA. The Privacy Act specifically states that:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4). The Eleventh Circuit interpreted this provision to mean that "[t]o avoid a situation in which persons suffering injury had no provable damages and hence no incentive to sue, a $1,000 damage floor was added, and costs and attorneys' fees were included as additional elements of recovery." Fitzpatrick, 665 F.2d at 330. Therefore, in the Eleventh Circuit, it was not necessary for a plaintiff to prove actual damages before being entitled to receive the minimum statutory award under the Privacy Act.

The Fourth Circuit, however, in Doe v. Chao, 306 F.3d 170, 177 (4th Cir. 2002), held that under the Privacy Act "a person must sustain actual damages to be entitled to the statutory minimum damages award." The Supreme Court granted certiorari in the Doe case because "the Fourth

Circuit's decision requiring proof of actual damages conflicted with the views of other Circuits." Doe v. Chao, 124 S. Ct. 1204, 1207 (2004) (citing Fitzpatrick, 665 F.2d at 330-31). The Supreme Court affirmed the Fourth Circuit's opinion in Doe and held that requiring proof of actual damages under the Privacy Act "is supported by a straightforward textual analysis." Doe, 124 S. Ct. at 1208. The Supreme Court supported its holding that proof of actual damages was required to state a Privacy Act claim by contending that:

> [w]hen the statute gets to the point of guaranteeing the $1,000 minimum, it not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for "actual damages sustained." It has made specific provision, in other words, for what a victim within the limited class may recover. When the very next clause of the sentence containing the explicit provision guarantees $1,000 to a "person entitled to recovery," the simplest reading of that phrase looks back to the immediately preceding provision for recovering actual damages, which is also the Act's sole provision for recovering anything (as distinct from equitable relief). Id.

Fidelity argues that, as in the Privacy Act, the text of the DPPA also operates to confine any eligibility for the $2,500 minimum statutory award to those who have sustained actual damages. As stated before, the DPPA states that "[t]he court may award -- (1) actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b). Fidelity reads this language to indicate that courts only have the discretion to award the $2,500 statutory minimum once plaintiffs have shown that they have sustained some actual damages. In support of its position, Fidelity points out that the "actual damages" language in Section 2724 is an independent clause and that the "liquidated damages in the amount of $2,500" language is a dependent clause. Fidelity contends that the independent clause of "actual damages" is modified by the subordinate dependent clause of "but not less than liquidated damages in the amount of $2,500." Thus, Fidelity argues, the liquidated amount of $2,500 simply serves to qualify the court's discretion in awarding money to those with

actual damages, but does not allow a $2,500 recovery to those without actual damages.

Mr. Kehoe responds to Fidelity's argument by contending that Fidelity is using a "tortured analysis" to twist the meaning of an otherwise clear statute. Kehoe distinguishes the DPPA from the Supreme Court's reading of the Privacy Act by placing importance on the Privacy Act's limiting phrase of "person entitled to recovery." 5 U.S.C. § 552a(g)(4). Kehoe argues that since the DPPA does not contain the Privacy Act's language limiting the minimum statutory award to "person[s] entitled to recovery," the decision in Doe is inapposite to this case. Thus, the issue for this court to decide is whether the DPPA's failure to include any language limiting recovery to "person[s] entitled to recovery" means that plaintiffs lacking actual damages may still collect the $2,500 minimum statutory award.

The court finds that the sum of several legal principles supports Fidelity's reading of the DPPA. First, under the rule of the last antecedent, "an accepted canon of statutory construction," "when construing statutes -- qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to and including others more remote.'" In re Paschen, 296 F.3d 1203, 1209 (11th Cir. 2002). Under this rule, the qualifying language of "but not less than liquidated damages in the amount of $2,500" would apply only to the phrase "actual damages" immediately preceding it, and would not extend out as its own remedy to be awarded regardless of actual damages. See 18 U.S.C. 2724(b).

This reading of the DPPA's damages provision is supported by the language of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2520, a statute that Mr. Kehoe argues is analogous to the DPPA. Under the ECPA, Congress explicitly phrased the language of the statute to include a minimum statutory damages amount that can be rewarded absent a finding of actual

damages. The text of the ECPA states that:

> In any other action under this section, the court may assess as damages whichever is the greater of--
>
> **(A)** the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; ***or***
>
> **(B)** statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. 2520(2) (2004) (emphasis added). The ECPA provides a convincing indication that had Congress intended to provide relief to a DPPA plaintiff absent a showing of actual damages, it knew how to draft such a statute. It could have drafted the DPPA's damages provision to read: "[t]he court may award -- the greater of actual damages *or* statutory damages in the amount of $2,500." Congress, however, drafted the DPPA's damages provision to read: "the court may award -- actual damages, *but not less than* liquidated damages in the amount of $2,500." This language is designed to prevent courts from awarding less than $2,500 to plaintiffs who have demonstrated *some* form of actual damages. It is not designed to provide $2,500 to plaintiffs who have not sustained *any* actual damages.

Similarly, the language of 26 U.S.C. § 7431(c), a privacy statute proscribing unauthorized disclosure of tax return information, also establishes that Congress knew how to establish a minimum statutory damages amount that could be awarded absent a finding of actual damages. Section 7431's damages provision states that:

> In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of --
>
> **(1)** the greater of--
>
> **(A)** $1,000 for each act of unauthorized inspection or disclosure of a return or

return information with respect to which such defendant is found liable, ***or***

(B) the sum of--

(i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus

(ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages . . . .

26 U.S.C. § 7431(c) (emphasis added). Just as in the DPPA, this statute attempts to provide relief for plaintiffs whose personal information was unlawfully obtained from the government. Unlike the DPPA, however, Section 7431 clearly enumerates that either actual damages ***or*** $1,000 is to be awarded for every violation of the law. The DPPA's language does not make the clear distinction between actual damages and statutory damages made by both the ECPA and Section 7431. The plain language of the ECPA and Section 7431 establishes that Congress knew how to draft a statute providing minimum statutory damages for violations of the DPPA. The unwillingness of Congress to adopt this clear language when drafting the DPPA shows that it did not intend to allow plaintiffs without actual damages to receive the $2,500 liquidated damages award.

This conclusion is bolstered by the use of the phrase "liquidated damages" in the damages provision of the DPPA. According to Black's Law Dictionary, Seventh Edition, "liquidated damages" is defined as "an amount contractually stipulated as a ***reasonable estimation*** of ***actual damages***." Black's Law Dictionary 395 (7th ed. 1999) (emphasis added). Thus, by using the precise term "liquidated damages," Congress intended to require some showing of actual damages before allowing plaintiffs to collect the liquidated damages amount intended to reasonably estimate the amount of actual damages incurred by a DPPA plaintiff. See e.g. Spurlock v. Postmaster General, 19 Fed. Appx. 338, 340 (6th Cir. 2001) (holding that under the FMLA, liquidated damages may only be awarded upon a showing of actual damages and since "McBroom had no actual damages, she is not entitled

to any liquidated damages."). Since the privacy statutes cited above do not contain the phrase "liquidated damages," the Court finds that the DPPA's use of the term "liquidated damages" serves to bolster the conclusion that the DPPA requires proof of actual damages.

Kehoe argues that interpreting an actual damages requirement into the DPPA would send a message that there are no consequences for violations of the DPPA and would eviscerate prior rulings dealing with privacy statutes. Firstly, the privacy cases that Kehoe cites in support of his argument (Bartnicki v. Vapper, 532 U.S. 514 (2001); Desilets v. Walmart Stores, Inc., 171 F.3d 711 (1st Cir. 1999)) all address the damages provision of the ECPA. As discussed above, the ECPA is not analogous to the DPPA because it clearly authorizes an award of *either* actual damages *or* statutory damages.

Finally, Kehoe's argument that an actual damages requirement frustrates the purpose of the DPPA is also unconvincing. As the Supreme Court noted in Doe, "it is easy enough to imagine pecuniary expenses that might turn out to be reasonable in particular cases but fall well short of [the statutory minimum amount of actual damages]." Doe, 124 S. Ct. 1204, 1211 (2004). Thus, these statutory minimum amounts are designed to encourage people with minor actual damages to file complaints against offending parties. They are not designed to allow those suffering no actual damages to file claims. The court cannot read a remedy into the DPPA that does not exist.

CONCLUSION

In light of the court's: 1) consideration of the Supreme Court's decision in Doe v. Chao; 2) textual analysis of the Driver's Privacy Protection Act; 3) application of the rule of the last

antecedent; 4) examination of the text of other relevant privacy statutes; and 5) examination of the purpose of the phrase "liquidated damages" in the DPPA; the court finds that a plaintiff must prove some actual damages to qualify for a minimum liquidated damages award of $2,500 under the DPPA. Since Kehoe has not asserted that he has incurred any actual damages from Fidelity's alleged violation of the DPPA, Kehoe's claim for $2,500 in liquidated damages fails as a matter of law. As plaintiff's claim fails for lack of actual damages, the court will not consider whether the DPPA requires that Kehoe prove that Fidelity knew that Florida was not in compliance with the DPPA. Finally, as Kehoe's claim fails as a matter of law, the court denies his motion for class certification as moot. See Curtin v. United Airlines, Inc., 275 F.3d 88 (D.C. Cir. 2001).

Accordingly, for the reasons enumerated herein, it is hereby **ORDERED** and **ADJUDGED**:

1. Defendant's motion for final summary judgment [DE # 65] is **GRANTED.** A final judgment will be issued in a separate order.

2. Plaintiff's motion for class certification [DE # 26] is **DENIED** as **MOOT.**

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 14th day of June, 2004.

Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record

United States District Court

Southern District of Florida

NOTICE: Only certain Judges are E-NOTICING, so continue to provide envelopes for cases before non-participating Judges Visit the court's website www.flsd.uscourts.gov or call the Help Line (305) 523-5212 for an updated listing of participating Judges

Notice of Orders or Judgments

Date: 06/14/04

To: Roger Slade (aty)
2 S Biscayne Boulevard
Suite 2400 One Biscayne Tower
Miami, FL 33131

Re: Case Number: 9:03-cv-80593 Document Number: 107

NOTE: **If you are no longer an attorney in this case, please disregard this notice.**
Be sure to promptly notify the Clerk of Court in writing of any changes to your name, address, law firm, or fax number. This notification should be sent for each of your active cases.
If this facsimile cannot be delivered as addressed, or you have ANY problems with this fax transmission, please call the Help Line (305) 523-5212 and the problem will be rectified. Since this transmission originated from the Clerk's Office, JUDGES CHAMBERS SHOULD NOT BE CONTACTED.

Number of pages including cover sheet: 13