



## Callier v. Tip Top Capital Inc et al

2024 | Cited 0 times | W.D. Texas | April 16, 2024

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION BRANDON L CALLIER, Plaintiff, v. TIP TOP CAPITAL INC and VADIM SHTIVELMAN, Defendants.

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CAUSE NO. EP-23-CV-437-KC

ORDER ADOPTING IN PART AND REJECTING IN PART

REPORT AND RECOMMENDATION On this day, the Court considered the above-captioned case. Plaintiff filed a Motion for 9, on January 23, 2024. On February 12, 2024, the Court referred the Motion to United States Magistrate Judge Robert F. Castaneda pursuant to 28 U.S.C. § 636(b) for proposed findings of fact and recommendations. Feb. 12, 2024, Text Order. On March 22, 2024 No. 10, recommending that the Motion be granted in part and denied in part. For the reasons

below, the R&R is ADOPTED in part and REJECTED in part. I. DISCUSSION

### A. Standard

1. Report and Recommendation Parties have fourteen days from service of a Report and Recommendation of a United States Magistrate Judge to file written objections. See 28 U.S.C. § 636(b)(1)(C). 1

Over fourteen days have elapsed since all parties that have appeared were served with the R&R, and no

1 Federal district courts conduct de novo review of those portions of a report and recommendation to which a party has objected. See 28 U.S.C. § 636(b)(1)(C) shall make a de novo determination of those portions of the report . . . objections have been filed. When parties do not file written objections, courts apply to a report and recommendation. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989).

### 2. Default judgment



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affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by

for a default judgment. See Fed. R. Civ. P. 55(b); see also *N.Y. Life Ins. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). A court enters default judgment 515 F.2d

1200, 1206 (5th Cir. 1975). In assessing whether the complaint contains a sufficient basis for a default judgment, the court applies the standard governing the sufficiency of a complaint under Federal Rule of Civil Procedure 8. See *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490,

Factual allegations raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Wooten*, 788 F.3d at 498 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

establish the amount of damages. *United States ex rel. M-CO Constr., Inc. v. Shipco Gen., Inc.*,

hold an evidentiary hearing on the issue of damages. *James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993); see also *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979).

B. Analysis A recitation of the pertinent facts and procedural history may be found in the R&R. R&R 1 4. Plaintiff asserts claims against Defendants Vadim Shtivelman for violations of the Telephone Consumer Protection Act , 47

U.S.C. § 227 and 47 C.F.R. § 64.1200(c), and Section 302.101 of the Texas Business & Commerce Code. Compl. ¶¶ 60 69, ECF No. 3.

1. Claims against Tip Top Capital The Magistrate Judge recommended denying entry of default judgment against Tip Top Capital, concluding that the Court lacks personal jurisdiction over Tip Top Capital because it . After reviewing findings of fact and conclusions of law and finds that they are neither clearly erroneous nor

contrary to law. Accordingly, the Court adopts unobjected-to recommendation as to Tip Top Capital. See *Wilson*, 864 F.2d at 1221. Because Plaintiff has neither objected to the R&R nor sought leave to serve Tip Top Capital at this juncture, the claims against Tip Top Capital are dismissed.

2. Claims against Shtivelman he Magistrate Judge recommended granting the Motion in part and denying it in part. R&R 15 17. The Magistrate Judge recommended entering default judgment in the amount of \$27,500 for twenty-one TCPA violations but denying Texas law claims. R&R 15 17.

-one phone calls in violation of § 227(c) \$500 per violation

for four calls, and treble damages of \$1,500 per violation for seventeen knowing and willful calls is



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not clearly erroneous nor contrary to law, the Court adopts that unobjected-to finding. See Wilson, 864 F.2d at 1221.

The Court next considers the Magistrate Judge recommend for default judgment be denied as to his state law claims against Shtivelman because his

R&R 15 17.

As an initial matter, the Court rejects any finding that Shtivelman lacked actual notice of the claim against him Plaintiff alleges that Tip Top Capital not Shtivelman himself placed each of the phone calls, Shtivelman cannot be directly liable for those calls. Horton v. Advantage One Brokers Corp., No. 22-cv-2474, 2023 WL 4188291, at \*3 (N.D. Tex. June 5, 2023), adopted, 2023 WL 4188046 (June 26, 2023) (quoting In re Joint Pet. filed by Dish Network, LLC, 28 F.C.C. Rec. at 6582 ¶ 24 (2013)). However, several courts in the Fifth Circuit have determined that, as for TCPA claims,

Guadian v. Progressive Debt Relief, LLC, No. 23-cv-235-FM, 2023 WL 7393129, at \*4 (W.D. Tex. Nov. 8, 2023), adopted, 2023 WL 8242475 (Nov. 28, 2023) (citations omitted); see Forteza v. Pelican Inv. Holdings Grp., LLC, No. 23-cv- 401, 2023 WL 9199001, at \*6 (E.D. Tex. Dec. 27, 2023), adopted, 2024 WL 128206 (Jan. 11, 2024).

The Magistrate Judge recommended finding Shtivelman vicariously liable for Tip Top 13 14. But the Magistrate Judge did not consider whether Shtivelman could be held responsible for the section 302.101 claims under those same principles. See R&R 14 15. And there appears to be and direction of the phone calls at issue should not apply equally to all of See,

e.g., Compl. ¶¶ 45 48, 52 54. Stated differently, the same considerations that make Shtivelman liable for calls made by Tip Top Capital to Plaintiff while his telephone number was on the national do-not-call registry also render Shtivelman liable for calls placed to Plaintiff by Tip Top Capital without a valid Texas telephone solicitation registration. See R&R 13 14; Tex. Bus. & Com. Code § 302.101; Horton, 2023 WL 4188291, at \*3.

Accordingly, the Court rejects alleged violations. See R&R 15 16. Because Plaintiff sufficiently stated his section 302.101

twenty-one violations, for a total of \$105,000. Tex. Bus. & Com. Code § 302.302(a); see Mot.

10 11; Aff. Supp. Default J. ¶ 3, ECF No. 9-2.

3. Request for filing and service fees Finally, the Magistrate Judge recommended denying service fees, concluding that



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under the TCPA 16 (citing *Cunningham v. Greenstar Cap. Sols. LLC*, No. 18-cv-161, 2018 WL 4572711, at \*8 (E.D. Tex. Aug. 1, 2018)). However, Federal Rule of Civil Procedure costs 54(d)(1). Thus, o

*Harris v. Fresenius Med. Care*, No. 04-cv-4807, 2007 WL 1341439, at \*5 (S.D. Tex. May 4, 2007) (citing *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 586 (5th Cir. 2006)).

Under 28 U.S.C. § 1920, recoverable costs include: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees . . . ; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services. *Id.* (quoting 28 U.S.C. § 1920). *Mota v.*

*Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 529 (5th Cir. 2001) (first citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444 45 (1987); and then citing *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1467 69 (1st Cir. 1989)).

Courts have determined that e filing fees, so Plaintiff is entitled to recover his \$402 filing fee. , No. 22-cv- 970, 2023 WL 4303649, at \*10 (E.D. Tex. June 30, 2023) (citations omitted). But private process servers are not recoverable, absent exceptional circumstances. *Zastrow v. Hous. Auto. M. Imports Greenway, Ltd. Cypress- Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 257 (5th Cir. 1997); and then citing Plaintiff has not shown that exceptional circumstances justify awarding fees for the private process server, so he is not entitled to recover the \$150 private process server fee.

Accordingly, the Court adopts in part and rejects in part service fees and concludes that Plaintiff is entitled to recover the \$402 filing fee but not the \$150 service fee. II. CONCLUSION

Accordingly, the Court ADOPTS in part and REJECTS in part the R&R, ECF No. 10, and ORDERS 9, is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that Defendant Vadim Shtivelman SHALL PAY Plaintiff \$500 for each of the four phone calls made in violation of § 227(c); \$1,500 for each of the seventeen knowing and willful phone calls made in violation of § 227(c); and \$5,000 for each of the twenty-one phone calls made in violation of Texas Business & Commerce Code § 302.101, for a total damages award of \$132,500.

IT IS FURTHER ORDERED that Defendant Vadim Shtivelman SHALL PAY Plaintiff \$402 in costs of Court.

IT IS FURTHER ORDERED DISMISSED for defective service. The Clerk shall close the case. SO ORDERED. SIGNED this 16th day of April, 2024.



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KATHLEEN CARDONE UNITED STATES DISTRICT JUDGE

