

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JAMAL SPRYE,

*

and

*

EVELYN SPRYE, et al.

Case No. 423332-V

*

On Their Own Behalves and on Behalf
Of All Others Similarly Situated

*

Plaintiffs,

*

vs.

*

ACE MOTOR ACCEPTANCE CORP.

*

Defendant.

*

* * * * *

MEMORANDUM OPINION AND ORDER

This matter came before the Court on September 1, 2017 for hearing on Defendant’s Motion to Dismiss (Docket Entry No. 21), together with Plaintiffs’ Response and Defendant’s Reply. Plaintiffs appeared through counsel. Defendant appeared with counsel. The Court took the Motion under advisement. For the reasons below, the Court will grant the Motion.

Procedural History

This is an action under the Maryland Wiretapping and Electronic Surveillance Act, Md. Code Ann., Cts. & Jud. Proc. §§ 10-401 *et seq.*, (“Maryland Wiretapping Act” or “Act”). The original Class Action Complaint and Demand for Jury Trial was filed in this Court and alleged four causes of action: Count One alleged knowing and willful violations of the federal Telephone Consumer Protection Act (“TCPA”); Count Two generally alleged violation of the TCPA; Count Three alleged violation of the Maryland Telephone Consumer Protection Act (“MDTCPA”); and

Count Four alleged violation of the Maryland Wiretapping Act. Compl. 12-13. Ace removed the case to the United States District Court for the District of Maryland. That Court dismissed every Count except for Count Four, and remanded it to this Court. *Sprye v. Ace Motor Acceptance Corp.*, No. CV PX 16-3064, 2017 WL 1684619, at *14 (D. Md. May 3, 2017).

Plaintiffs Mr. Jamal Sprye (“Jamal”) and Ms. Evelyn Sprye (“Evelyn”) (collectively “Spryes”) have alleged that Defendant Ace Motor Acceptance Corporation (“Ace”) violated the Maryland Wiretapping Act by telephoning them from out-of-state and recording their conversations without their consent. The suit also alleged damages to a putative class of similarly situated plaintiffs, certification of which is pending. Sec. Am. Compl. 17. Upon remand, Ace filed the instant motion. The Spryes then filed an Amended and Second Amended Complaint. With each subsequent Complaint, Ace pressed the instant motion, requesting that it now be directed to the Second Amended Complaint.

A fifteen-day jury trial is set to commence on January 7, 2019. Several pretrial hearings remain scheduled and two motions remain open in this case. Discovery, including that related to class certification, has been stayed pending the outcome of the instant motion. See Docket Entry No. 61.

The Allegations in Plaintiffs’ Second Amended Complaint

The Spryes are Maryland residents. Ace is a North Carolina corporation that regularly provides sub-prime automobile loans to Maryland consumers, including consumers in Montgomery County. Sec. Am. Comp. 4. Ace assented to application of Maryland law by registering to do business in Maryland. *Id.* at 6. Ms. Patricia Sprye (“Patricia”) listed Jamal and Evelyn as references on a car loan application without their knowledge. *Id.* at 7-9. The Spryes never signed any paperwork and never agreed to be called on their cellular phones or to have

their conversations recorded. *Id.* at 8-9. When Patricia fell behind on her payments, Ace, the loan servicer, began calling the Spryes on their cellular telephones. A representative of Ace spoke to both of the Spryes twelve times between February 2013 and May 2014. There was also at least one other call from Ace to Jamal that was unanswered. *Id.* at 8-10.

Unbeknownst to the Spryes, Ace was not located in Maryland. It was Jamal's understanding from his sister, Patricia, that she had purchased her car from Ace, so he thought Ace was in Maryland. Neither Jamal nor Evelyn knew that the calls were coming from a Voice over Internet Protocol (VoIP) telephone system provided to Ace by another entity, TCN, Inc. The TCN system routes phone calls through servers in various states other than Maryland and internationally. Each of these servers backs up data from the all the others. Ace automatically has all calls made from its collection call centers recorded and later downloads them. None of these data centers are in Maryland, so at no point was any call recorded in Maryland. *Id.* Ace neither notifies recipients, including the Spryes, that the calls are recorded nor obtains consent to do so. The Spryes were in Maryland, on telephones with a Maryland area code, when they received the calls. *Id.* at 9-10. Members of the proposed class were similarly harmed. *Id.* at 13.

Standard of Review

The defense of failure to state a claim upon which relief can be granted may be raised in a motion to dismiss. Md. Rules 2-322(b)(2). In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, a trial court "must assume the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Howard Cty. v. Connolley*, 137 Md. App. 99, 114, 767 A.2d 926, 934 (2001). In ruling on a motion to dismiss, "a dismissal with prejudice is [generally] ordered in cases where the dismissal is based on an appraisal of the legal sufficiency of the claim. It touches the substantive merits of the case." *Mohiuddin v. Doctors*

Billing & Mgmt. Sols., Inc., 196 Md. App. 439, 452, 9 A.3d 859, 867 (2010). By contrast, dismissal without prejudice is appropriate where “the dismissal is based on some procedural glitch or lapse in the necessary formalities, something that does not engage the merits of *res judicata* and that can be readily rectified on the next try.” *Id.*

Discussion

On behalf of themselves and the putative class, the Spryes allege that because they did not consent to Ace’s recording of the above phone calls, Ace is liable for “numerous and multiple violations” of the Maryland Wiretapping Act. With the instant motion, Ace contends, among other things, that the Act neither reaches, nor imposes civil liability for, recordings made from out-of-state.

First enacted in 1977, The Maryland Wiretapping and Electronic Surveillance Act appears in Title 10, Evidence, of the Courts and Judicial Proceedings Article at Section 10-401 through Section 10-414. In general, the Act renders it unlawful to intercept any wire, wire, oral, or electronic communication and to disclose or use of the contents of any such communication knowing or having reason to know that the information obtained through interception that violates the Act. Md. Code Ann., Cts. & Jud. Proc. §§ 10-401 and 10-402(a). Thus, whether the conduct at issue is interception, disclosure, or use, the crux is interception. The Act defines “intercept” as “the aural or other *acquisition* of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” Md. Code Ann., Cts. & Jud. Proc. § 10-401 (emphasis added). One exception to the Act’s proscription is consent. Specifically, it is lawful to intercept a communication “where the [intercepting person] is a party to the communication and where all of the parties to the communication have given prior consent

to the interception,” Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3). It is this exception that labels Maryland a “two-party” consent state.

With regard to civil liability, Section 10-410 provides:

(a) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:

- (1) Actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;
- (2) Punitive damages; and
- (3) A reasonable attorney's fee and other litigation costs reasonably incurred.

Md. Code Ann., Cts. & Jud. Proc. § 10-410.

For Plaintiffs’ claim to be viable, the Court must be able to conclude that Maryland’s Legislature intended the Act to reach the out-of-state interception alleged here, a tall order given Maryland’s familiar rules of statutory construction. Under these rules, the Court must look at the plain meaning of the statute and “[i]f the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction.” *Gardner v. State*, 420 Md. 1, 8 (2011). And while we should “neither add nor delete language” from a statute, we must “not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs,” *Id.* Finally, “unless an intent to the contrary is expressly stated, acts of the legislature will be presumed not to have any extraterritorial effect.” *Chairman of Bd. of Trustees of Emp. Ret. Sys. v. Waldron*, 285 Md. 175, 183–84, 401 A.2d 172, 177 (1979).

On plain reading, Section 10-410 does not reach out-of-state interceptions. The section gives “any person” whose communications are intercepted a cause of action against “any person” who intercepts, discloses, or uses the communications. The section is not explicitly directed to interceptions outside Maryland, such as *Ace’s*. Given this silence, the Court must presume that the section has no extraterritorial effect. *See Waldron*, 285 Md. 175 at 183–84, 401 A.2d 172 at 177 (1979).

To overcome this presumption, Plaintiffs point to the Legislature’s 2001 amendment of Section 10-407 and *Mustafa v. State*, 323 Md. 65, 66-79 (1991) and *Perry v. State*, 357 Md. 37 (1999) and suggest that by failing to amend Section 10-410 at the same time, the Legislature evinced an intent to preserve the extraterritorial effect obviously present in the Act prior to 2001. When *Mustafa* and *Perry* were reported, the Act limited the admissibility of intercepted communications to those intercepted “by any means authorized by [the Act.]” Md. Code Ann., Cts. & Jud. Proc. § 10-407(b). Thus, in *Mustafa* and *Perry*, the Act rendered an investigative telephone call (*Mustafa*) and a co-conspirator telephone call (*Perry*) inadmissible because even though both calls were recorded outside Maryland, the recording was without the defendant’s consent. In 2001, the Legislature amended Section 10-407 to allow for admissibility of one-party-consent calls intercepted beyond Maryland’s borders under some circumstances. Md. Code Ann., Cts. & Jud. Proc. § 10-407(c)(2)(i)-(iii).

Ultimately, Plaintiffs read too much into *Mustafa* and *Perry* and the Legislature’s failure to amend Section 10-410 in 2001. Neither *Mustafa* nor *Perry* construe Section 10-410 to reach extraterritorial conduct. Instead, they were cases about the admissibility of evidence in Maryland’s courts. *Mustafa* confirmed this distinction, saying “[w]e recognize that Maryland may not ordinarily proscribe conduct occurring outside its boundaries. Quite plainly, however, it

may regulate the admissibility of evidence in its courts.” 323 Md. at 74-75. *See also Brown v. State*, No. 1900, SEPT. TERM, 2016, 2017 WL 4284731 (Md. Ct. Spec. App. Sept. 27, 2017) (citing *Mustafa* with approval). From this background, if anything can be inferred from the Legislature’s failure to amend Section 10-410 in 2001, it is that the Legislature continued not to intend extraterritorial effect, not the obverse.

Beyond the language of the Act, Plaintiffs argue that the Maryland Wiretapping Act applies under the choice-of-law principle *lex loci delicti*. Specifically, they argue that because the “last act forming liability” occurred in Maryland, *lex loci delicti* mandates that Maryland Wiretapping Act, with its two-party consent requirement, be applied to Ace’s conduct. Traditionally, however, we do not apply choice-of-law principles such as *lex loci delicti* unless there is a conflict between Maryland’s law and that of another state. *Perini/Tompkins Joint Venture v. Ace Am. Ins. Co.*, 738 F.3d 95, 101 (4th Cir. 2013) Here, there is no such conflict. As above, because Section 10-410 does not reach out-of-state conduct, Section 10-410 does not dictate, one way or the other, how many parties must consent to an interception occurring outside Maryland. Accordingly, Section 10-410 cannot conflict on this point with the laws of other states.

The Spryes also argue that because Ace is registered to do business in Maryland that it should not be able to record a telephone conversation from out-of-state, as if it were recording in Maryland. It is true that Ace agreed to abide by the laws of Maryland by doing business here. “By doing intrastate, interstate, or foreign business in this State, a foreign corporation assents to the laws of this State.” Md. Code Ann., Corps. & Ass'ns § 7-105. But this argument begs the same question. As above, the Maryland Wiretapping Act does not proscribe the interception of telephone calls when it is done out-of-state. When Ace assented to Maryland law, it did not

assent to refrain from making out-of-state interceptions because Maryland law does not prohibit it from doing so.

ORDER

For the above reasons, it is this 29th day of September, 2017, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that the defendant Ace Motor Acceptance Corp.'s Motion to Dismiss (Docket Entry No. 21) is **GRANTED**; and it is further

ORDERED, the Plaintiffs' Second Amended Class Action Complaint and Demand for Jury Trial (Docket Entry No. 69) is dismissed with prejudice.

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The Honorable Anne K. Albright
Judge
Circuit Court for Montgomery County,
Maryland~~