

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
5
6

7 AUGUST TERM, 2016

8
9 ARGUED: APRIL 4, 2017
10 DECIDED: JUNE 22, 2017
11

12 No. 16-2104-cv
13

14 ALBERTO REYES, JR.,
15 *Plaintiff-Appellant,*
16

17 *v.*
18

19 LINCOLN AUTOMOTIVE FINANCIAL SERVICES,
20 *Defendant-Appellee.**
21

22
23 Appeal from the United States District Court
24 for the Eastern District of New York.
25 No. 15 Civ. 560 – Leonard D. Wexler, *Judge.*
26

27
28 Before: WALKER, JACOBS, and PARKER, *Circuit Judges.*
29
30

* The Clerk of Court is directed to amend the caption as shown above.

1 Plaintiff-appellant Alberto Reyes, Jr., appeals a judgment of
2 the United States District Court for the Eastern District of New York
3 (Leonard D. Wexler, *J.*). Judgment was entered following the grant
4 of summary judgment to the defendant-appellee, Lincoln
5 Automotive Financial Services (“Lincoln”), on Reyes’s claim for
6 damages stemming from Lincoln’s alleged violation of the
7 Telephone Consumer Protection Act (“TCPA”), Pub. L. No. 102-243,
8 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227. Reyes leased an
9 automobile from Lincoln and, as a condition of the lease agreement,
10 consented to receive manual or automated telephone calls from
11 Lincoln. Lincoln called Reyes regularly after he defaulted on his
12 lease obligations, and continued to do so after Reyes allegedly
13 revoked his consent to be called. Reyes sued for damages under the
14 TCPA. The district court granted summary judgment for Lincoln, on
15 the basis that (1) the evidence of consent revocation was insufficient,
16 and (2) in any event the TCPA does not permit revocation when
17 consent is provided as consideration in a binding contract. We hold
18 that (1) Reyes did introduce sufficient evidence from which a jury
19 could conclude that he revoked his consent, but that (2) the TCPA
20 does not permit a consumer to revoke its consent to be called when
21 that consent forms part of a bargained-for exchange. We therefore
22 AFFIRM the judgment of the district court.

1
2 YITZCHAK ZELMAN, Marcus & Zelman, LLC,
3 Ocean, NJ, *for Plaintiffs-Appellees*.

4 JESSICA L. ELLSWORTH (Morgan L. Goodspeed, *on*
5 *the brief*), Hogan Lovells US LLP, Washington,
6 DC, *for Defendants-Appellants*.

7
8
9 JOHN M. WALKER, JR., *Circuit Judge*:

10 Plaintiff-appellant Alberto Reyes, Jr., appeals a judgment of
11 the United States District Court for the Eastern District of New York
12 (Leonard D. Wexler, *J.*). Judgment was entered following the grant
13 of summary judgment to the defendant-appellee, Lincoln
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21 lease obligations, and continued to do so after Reyes allegedly
22 revoked his consent to be called. Reyes sued for damages under the
23 TCPA. The district court granted summary judgment for Lincoln, on
24 the basis that (1) the evidence of consent revocation was insufficient,
25 and (2) in any event the TCPA does not permit revocation when

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2 that (1) Reyes did introduce sufficient evidence from which a jury
3 could conclude that he revoked his consent, but that (2) the TCPA
4 does not permit a consumer to revoke its consent to be called when
5 that consent forms part of a bargained-for exchange. We therefore
6 AFFIRM the judgment of the district court.

7 BACKGROUND

8 In 2012, Reyes leased a new Lincoln MKZ luxury sedan from a
9 Ford dealership.¹ Lincoln financed the lease. In his lease application,
10 Reyes provided several personal details, including his cellular phone
11 number. The lease itself contained a number of provisions to which
12 Reyes assented when finalizing the agreement. One provision
13 permitted Lincoln to contact Reyes, and read as follows:

14
15 You [Reyes] also expressly consent and agree to Lessor
16 [Ford], Finance Company, Holder and their affiliates,
17 agents and service providers may use written, electronic
18 or verbal means to contact you. This consent includes,
19 but is not limited to, contact by manual calling methods,
20 prerecorded or artificial voice messages, text messages,
21 emails and/or automatic telephone dialing systems. You
22 agree that Lessor, Finance Company, Holder and their
23 affiliates, agents and service providers may use any
24 email address or any telephone number you provide,

¹ "Lincoln Automotive Financial Services" is a registered trade name of Ford Motor Credit Company LLC, and not an independent company.

1 now or in the future, including a number for a cellular
2 phone or other wireless device, regardless of whether
3 you incur charges as a result.
4

5 At some point after the lease was finalized, Reyes stopped making
6 his required payments. As a result, on multiple occasions, Lincoln
7 called Reyes in an attempt to cure his default.

8 Reyes disputed his balance on the lease, and also claims that
9 he requested that Lincoln cease contacting him. Reyes asserts that on
10 June 14, 2013, he mailed a letter to Lincoln in which he wrote: "I
11 would also like to request in writing that no telephone contact be
12 made by your office to my cell phone." Lincoln contends that it
13 never received Reyes's letter, or any other request to cease its calls.
14 At his deposition, Reyes testified to mailing the letter to the P.O. box
15 listed on Lincoln's invoices and produced a copy of the letter that
16 did not bear an address or postmark and referenced an incorrect
17 account number. Despite his alleged revocation of consent, Lincoln
18 continued to call Reyes. Following the close of discovery, Lincoln's
19 attorney confirmed that Lincoln had called him 141 times with a
20 customer representative on the line, and had called him with pre-
21 recorded messages an additional 389 times.

22 On February 6, 2015, Reyes filed a complaint against Lincoln
23 in the Eastern District of New York, alleging violations of the TCPA

1 and seeking \$720,000 in damages.² On June 20, 2016, Judge Wexler
2 granted summary judgment to Lincoln, holding that (1) Reyes had
3 failed to produce sufficient evidence from which a reasonable jury
4 could conclude that he had ever revoked his consent to be contacted
5 by Lincoln, and (2) that, in any event, the TCPA does not permit a
6 party to a legally binding contract to unilaterally revoke bargained-
7 for consent to be contacted by telephone.

8 Reyes now timely appeals both rulings.

9 DISCUSSION

10 A district court's grant of summary judgment is reviewed *de*
11 *novo*. *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219,
12 1224 (2d Cir. 1994). On a motion for summary judgment, the court
13 must "resolv[e] all ambiguities and draw[] all permissible factual
14 inferences in favor of the party against whom summary judgment is
15 sought." *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010). Summary
16 judgment is appropriate only "if the movant shows that there is no
17 genuine dispute as to any material fact and that the movant is
18 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All

² Reyes also initially sought damages under the Fair Debt Collection Practices Act ("FDCPA"), but abandoned those claims prior to summary judgment because Lincoln is not a "debt collection agency" within the meaning of the FDCPA. Only his TCPA claims remain.

1 legal conclusions by a district court are reviewed *de novo*. *United*
2 *States v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013) (per curiam).

3 On appeal, Reyes contends (1) that he introduced sufficient
4 evidence to create a triable issue of fact as to whether he placed
5 Lincoln on notice of his revocation of consent; and (2) that the TCPA,
6 construed in light of its broad remedial purpose to protect
7 consumers from unwanted phone calls, does permit a party to
8 revoke consent to be called, even if that consent was given as part of
9 a contractual agreement.

10

11 **I. Whether Reyes revoked his consent to be contacted**
12 **was a triable issue of fact**

13 As a preliminary matter, we agree with Reyes that the district
14 court's finding that he did not revoke his consent to be contacted by
15 telephone was improper on summary judgment. This material issue
16 of fact was in dispute and raised a jury question. Reyes testified in a
17 sworn deposition that he mailed a letter to Lincoln revoking his
18 consent; submitted an affidavit to that effect; and introduced a copy
19 of the letter as evidence in defending Lincoln's motion for summary
20 judgment. The district court discounted this evidence as
21 "insufficient," because Reyes "does not recall the address that he
22 mailed the Letter to," and because "he has no record that the Letter
23 was actually sent to Defendant." The district court also noted that

1 Lincoln sent a letter to Reyes on December 1, 2014, stating that it had
2 never received any revocation of consent from Reyes.

3 The district court's conclusion that Reyes did not revoke his
4 consent rested on an impermissible assessment by the court of
5 Reyes's credibility. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
6 255 (1986) ("Credibility determinations, the weighing of the
7 evidence, and the drawing of legitimate inferences from the facts are
8 jury functions, not those of a judge . . . [when] he is ruling on a
9 motion for summary judgment."). Reyes introduced two separate
10 forms of sworn testimony asserting that he had mailed a letter
11 revoking his consent to be called, and Lincoln responded in turn that
12 it had never received the letter. Adverse parties commonly advance
13 "conflicting versions of the events" throughout the course of a
14 litigation. *Jeffreys v. City of N.Y.*, 426 F.3d 549, 553-54 (2d Cir. 2005)
15 (quoting *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). In such
16 instances, on summary judgment, the district court is required to
17 "resolv[e] all ambiguities and [draw] all permissible factual
18 inferences in favor of the party against whom summary judgment
19 [is] sought." *Burg*, 591 F.3d at 97. "[T]he judge must ask . . . not
20 whether . . . the evidence unmistakably favors one side or the other
21 but whether a fair-minded jury could return a verdict for the
22 plaintiff on the evidence presented." *Jeffreys*, 426 F.3d at 553 (quoting
23 *Anderson*, 477 U.S. at 252). Under this standard, the district judge

1 erred in concluding that no reasonable jury could find that Reyes
2 revoked his consent, when Reyes introduced sworn testimony to the
3 contrary.³ Whether that testimony was reliable was a question of fact
4 for the jury. *See id.*

5
6 **II. Under the TCPA a party is not able to revoke consent**
7 **that is a term in a prior contract**

8 We next turn to the district court's determination that the
9 TCPA does not permit Reyes to unilaterally revoke his consent.
10 Congress enacted the TCPA to protect consumers from
11 "[u]nrestricted telemarketing," which it determined could be "an
12 intrusive invasion of privacy." *Mims v. Arrow Fin. Servs., LLC*, 565
13 U.S. 368, 372 (2012) (internal quotation marks and citation omitted)
14 *accord Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013).
15 To mitigate this problem, the act prohibits, subject to narrow
16 exceptions not pertinent here, any person within the United States
17 from "initiat[ing] any telephone call to any residential telephone line
18 using an artificial or prerecorded voice to deliver a message without
19 the prior express consent of the called party." 47 U.S.C.
20 § 227(b)(1)(B). The TCPA also authorizes the Federal

³ Whatever impact the use of the wrong account number may be reasonably assumed to have on Reyes's attempt at revocation, the district court did not rely on that fact.

1 Communications Commission (“FCC”) to promulgate rules and
2 regulations in order to further implement the act’s provisions. 47
3 U.S.C. § 227(b)(2).

4 While the act requires that any party wishing to make live or
5 prerecorded calls obtain prior express consent, the statute is silent as
6 to whether a party that has so consented can subsequently revoke
7 that consent. Two of our sister circuit courts have ruled that a party
8 can revoke prior consent under the terms of the act. In *Gager v. Dell*
9 *Financial Services*, the Third Circuit held that the plaintiff, who
10 consented to be called in an application for a line of credit that she
11 submitted to the defendant, was permitted to later revoke that
12 consent after receiving harassing calls upon her default on the loan.
13 727 F.3d at 267-68. The court reasoned that “consent,” as defined
14 under the common law, is traditionally considered to be revocable.
15 *Id.* at 270. Moreover, permitting consumers to revoke consent would
16 further Congress’s purpose in enacting the TCPA, which was “to
17 protect consumers from unwanted automated telephone calls.” *Id.* at
18 271. The Eleventh Circuit, in *Osorio v. State Farm Bank F.S.B.*, adopted
19 the Third Circuit’s reasoning and held that the plaintiff in that case,
20 who had consented to receive calls from the defendant in an
21 application for auto insurance, could revoke her consent. 746 F.3d
22 1242, 1253 (11th Cir. 2014). In 2015, the FCC relied on these two cases
23 in ruling that “prior express consent” is revocable under the TCPA.

1 *See In the Matter of Rules & Regulations Implementing the Tel. Consumer*
2 *Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993-94 (2015) (hereinafter
3 “2015 FCC Ruling”).

4 *Gager, Osorio*, and the 2015 FCC Ruling considered a narrow
5 question: whether the TCPA allows a consumer who has freely and
6 unilaterally given his or her informed consent to be contacted can
7 later revoke that consent. *See Osorio*, 746 F.3d at 1253; *Gager*, 727
8 F.3d at 270. Reyes’s appeal presents a different question, which has
9 not been addressed by the FCC or, to our knowledge, by any federal
10 circuit court of appeal: whether the TCPA also permits a consumer
11 to unilaterally revoke his or her consent to be contacted by telephone
12 when that consent is given, not gratuitously, but as bargained-for
13 consideration in a bilateral contract.

14 Reyes contends that the same principles that the FCC and the
15 Third and Eleventh Circuits relied on in their previous rulings apply
16 to this situation as well. He argues that (1) under the common law
17 definition of the term, which Congress is presumed to have adopted
18 when it drafted the TCPA, any form of “consent” (whether
19 contractual or not) is revocable by the consenting party at any time;
20 and (2) permitting parties to revoke their consent to be called is
21 consistent with the remedial purpose of the TCPA, which was
22 designed by Congress to afford consumers broad protection from
23 harassing phone calls.

1 We agree with the district court that the TCPA does not
2 permit a party who agrees to be contacted as part of a bargained-for
3 exchange to unilaterally revoke that consent, and we decline to read
4 such a provision into the act. As an initial matter, Reyes is correct
5 that when Congress uses a term, such as “consent,” that has
6 “accumulated [a] settled meaning under . . . the common law, a
7 court must infer, unless the statute otherwise dictates, that Congress
8 means to incorporate the established meaning of th[at] term[.]”
9 *Neder v. United States*, 527 U.S. 1, 21 (1999) (citation omitted). The text
10 of the TCPA evidences no intent to deviate from common law rules
11 in defining “consent,” and the FCC and other federal appellate
12 courts have applied the common law definition of the term when
13 interpreting the act. *See Gager*, 727 F.3d at 270; 2015 FCC Ruling at
14 *7961 (holding that permitting “unwanted texts and voice calls is
15 counter . . . to common-law notions of consent”).

16 “Consent,” however, is not always revocable under the
17 common law. A distinction in this regard must be drawn between
18 tort and contract law. In tort law, “consent” is generally defined as a
19 gratuitous action, or “[a] voluntary yielding to what another
20 proposes or desires.” *Black’s Law Dictionary* (10th ed. 2014); *see also*
21 *Gager*, 727 F.3d at 270 (“Under the common law understanding of
22 consent, the basic premise of consent is that it is given voluntarily.”
23 (internal quotation marks omitted)). In *Gager* and *Osorio* the

1 plaintiffs provided such voluntary consent to be contacted by
2 furnishing their telephone numbers to businesses in connection with
3 loan and insurance applications, respectively. *See Gager*, 727 F.3d at
4 267; *Osorio*, 746 F.3d at 1247; *see also Rules and Regulations*
5 *Implementing the TCPA*, 7 F.C.C. Rcd. 8752, 8769 (1992) (ruling that
6 the “knowing[]” release of a phone number to a third party
7 constitutes “express consent” to receive telephone calls from that
8 party under the TCPA). The courts in those cases found, and the
9 2015 FCC ruling confirmed, that consent of this kind, which is not
10 given in exchange for any consideration, and which is not
11 incorporated into a binding legal agreement, may be revoked by the
12 consenting party at any time. This conclusion is well-supported by
13 common law authority, which counsels that “[u]pon termination of
14 consent its effectiveness is terminated.” RESTATEMENT (SECOND) OF
15 TORTS § 892A(5) (AM. LAW INST. 1979).

16 Reyes’s consent to be contacted by telephone, however, was
17 not provided gratuitously; it was included as an express provision of
18 a contract to lease an automobile from Lincoln. Under such
19 circumstances, “consent,” as that term is used in the TCPA, is not
20 revocable. The common law is clear that consent to another’s actions
21 can “become irrevocable” when it is provided in a legally binding
22 agreement, RESTATEMENT (SECOND) OF TORTS § 892A(5) (AM. LAW
23 INST. 1979), in which case any “attempted termination is not

1 effective,” *id.* at cmt. i. *See also* 13-67 CORBIN ON CONTRACTS § 67.1
2 (2017) (noting that “a party who is under a legal duty [to perform a
3 contractual obligation] by virtue of its assent” has the burden to
4 prove that that duty was discharged by some subsequent event,
5 such as rescission by “mutual agreement” or by the exercise of a
6 contractual right to terminate). This rule derives from the
7 requirement that every provision of a contract—including any
8 proposed modification—receive the “mutual assent” of every
9 contracting party in order to have legal effect. *Dallas Aerospace, Inc. v.*
10 *CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003) (“[F]undamental to the
11 establishment of a contract modification is proof of each element
12 requisite to the formulation of a contract, including mutual assent to
13 its terms.” (internal quotation marks and citation omitted)). It is
14 black-letter law that one party may not alter a bilateral contract by
15 revoking a term without the consent of a counterparty. *See*
16 RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. LAW INST.
17 1981) (requiring “assent by the other party” before a proposed
18 alteration to a contract becomes valid). Yet reading the TCPA’s
19 definition of “consent” to permit unilateral revocation at any time,
20 as Reyes suggests, would permit him to do just that. Absent express
21 statutory language to the contrary, we cannot conclude that
22 Congress intended to alter the common law of contracts in this way.
23 *See Neder*, 527 U.S. at 21-23.

1 Reyes also argues that his consent to be contacted is revocable
2 because that consent was not an “essential term” of his lease
3 agreement with Lincoln. This argument is meritless. In contract law,
4 “essential terms” are those terms that are necessary in order to lend
5 an agreement sufficient detail to be enforceable by a court.
6 *Brookhaven Hous. Coal. v. Solomon*, 583 F.2d 584, 593 (2d Cir. 1978) (“If
7 essential terms of an agreement are omitted or are phrased in too
8 indefinite a manner, no legally enforceable contract will result.”).
9 For example, a contract for the sale of goods must contain terms
10 such as the quantity of goods to be sold and the price at which they
11 will be purchased. But a contractual term does not need to be
12 “essential” in order to be enforced as part of a binding agreement. It
13 is a fundamental rule of contracts that parties may bind themselves
14 to any terms, so long as the basic conditions of contract formation
15 (e.g., consideration and mutual assent) are met. *Chesapeake Energy*
16 *Corp. v. Bank of N.Y. Mellon Trust Co.*, 773 F.3d 110, 114 (2d Cir. 2014)
17 (noting the common law rule that a “contract should be construed so
18 as to give full meaning and effect to *all* of its provisions”(alterations,
19 internal quotation marks and citation omitted) (emphasis added)). A
20 party who has agreed to a particular term in a valid contract cannot
21 later renege on that term or unilaterally declare it to no longer apply
22 simply because the contract could have been formed without it.
23 Contracting parties are bound to perform on the terms that they *did*

1 agree to, not what they *might* have agreed to under different
2 circumstances.

3 Reyes counters that because the TCPA is a remedial statute
4 enacted to protect consumers from unwanted telephone calls, any
5 ambiguities in its text must be construed to further that purpose.
6 *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562
7 (1987) (holding that when interpreting broad remedial statutes,
8 courts should apply a “standard of liberal construction in order to
9 accomplish [Congress’s] objects” (citation omitted)); *E.E.O.C. v.*
10 *Staten Island Sav. Bank*, 207 F.3d 144, 149 (2d Cir. 2000) (“[I]t is our
11 duty to interpret remedial statutes broadly.”). A liberal reading of an
12 ambiguous term might favor a right to revoke contractual consent.
13 But for the remedial rule of statutory interpretation to apply, the
14 statute must contain an actual ambiguity to construe in the
15 consumer’s favor, and we find no lack of clarity in the TCPA’s use of
16 the term “consent.” It was well-established at the time that Congress
17 drafted the TCPA that consent becomes irrevocable when it is
18 integrated into a binding contract, and we find no indication in the
19 statute’s text that Congress intended to deviate from this common-
20 law principle in its use of the word “consent.” *See Neder*, 527 U.S. at
21 21.

22 We are sensitive to the argument that businesses may
23 undermine the effectiveness of the TCPA by inserting “consent”

1 clauses of the type signed by Reyes into standard sales contracts,
2 thereby making revocation impossible in many instances. *See, e.g.,*
3 *Skinner v. Bluestem Brands, Inc.*, No. 3:14-CV-256-CWR-FKB, 2015 WL
4 4135269, at *3 (S.D. Miss. July 8, 2015). But this hypothetical concern,
5 if valid, is grounded in public policy considerations rather than legal
6 ones; if the abuse came to pass, it would therefore be “for
7 the Congress to resolve—not the courts.” *Atl. City Elec. Co. v. Gen.*
8 *Elec. Co.*, 312 F.2d 236, 244 (2d Cir. 1962) (en banc). We are not free to
9 substitute our own policy preferences for those of the legislature by
10 reading a right to revoke contractual consent into the TCPA where
11 Congress has provided none.

12 **CONCLUSION**

13 We have considered Reyes’s remaining arguments, and we
14 find them meritless. We therefore AFFIRM the judgment of the
15 district court.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: June 22, 2017

Docket #: 16-2104cv

Short Title: Reyes, Jr. v. Lincoln Automotive Financial S

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 15-cv-560

DC Court: EDNY (CENTRAL
ISLIP)

DC Judge: Wexler

DC Judge: Lindsay

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: June 22, 2017
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CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 15-cv-560
DC Court: EDNY (CENTRAL
ISLIP)
DC Judge: Wexler
DC Judge: Lindsay

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature