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| District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3771 | <div style="text-align: right; color: red;"> EFILED Document CO Boulder County District Court 20th JD Filing Date: Jan 4 2005 11:48AM MST Filing ID: 4879546 Review Clerk: Nancy Greschler </div> <div style="text-align: center; margin-top: 100px;"> ▲ COURT USE ONLY ▲ </div> |
| DOUGLAS M. MCKENNA, PLAINTIFF vs. DALE FINNEY and MBA FINANCIAL GROUP, INC., DEFENDANTS. | Case Number: 04CV992 Division 3 Courtroom H |
| <i>Attorney for Plaintiff: Andrew Quiat</i> <i>Attorney for Defendant: Timothy Essling</i> | ORDER |

This matter comes before the Court on Defendants Dale Finney (Finney) and MBA Financial Group, Inc.'s (MBA) Motion to Dismiss, and the responsive pleadings thereto.

PROCEDURAL HISTORY

Plaintiff filed his Complaint on October 22, 2003, naming numerous defendants in Case No. 03CV2090. By order dated June 24, 2004, the Court granted Defendants Finney and MBA's Motion to Server, and this case proceeded under Case No. 04CV992.

The Complaint contains "General Allegations" in Section 3, which states, "This is a civil action for damages and injunctive relief against the respective Defendants for multiple violations of the unsolicited facsimile advertising prohibitions of the federal Telephone Consumer Protection Act (TCPA), at 47 U.S.C. 227(b) and the regulation prescribed thereunder. Plaintiff does not allege violations of the Colorado Consumer Protection Act (CCPA).

Section 4 of the Complaint, contains "Factual Allegations with Respect to Defendants Finney and MBA." In this section, Plaintiff alleges Defendants sent unsolicited fax advertisements and references Exhibits 1 through 48 to the complaint, which are copies of the alleged unsolicited faxes. Each contains language that, in effect, advises the receiver of the fax that they may contact a toll free number to remove their name from the sender's database.¹

¹ Some state, "If we have sent you this fax in error and you would like to have your number removed from our list, call 1-800-405-5537;" others state, "If you received this fax in error and would like to have your number removed from our database, call toll-free at 1-800-663-8758;" and others state, "This fax was sent

ARGUMENT

Defendants argue (1) this Court lacks subject matter jurisdiction pursuant to the Denver District Court decision *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. et. al.*, (2) TCPA claims cannot be assigned, (3) there is no private right of action under 47 C.F.R.227(b)(3), (4) the claims are barred by the statute of limitations. Plaintiff disputes each of these claims, and provided supplemental authority to contest the validity of the decision in *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. et. al.*

STANDARD OF REVIEW

In reviewing a motion to dismiss, the court must accept all matters of material fact in the complaint as true, and view the allegations in the light most favorable to the plaintiff. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000). When the court's subject matter jurisdiction is challenged, the plaintiff has the burden of proving that jurisdiction exists, and the trial court may consider evidence outside of the complaint, when necessary to resolve the issue. *City of Boulder v. Public Service Co. of Colorado.*, 996 P.2d 198, 203 (Colo. App. 1999). If the plaintiff fails to establish that the trial court has subject matter jurisdiction, the court must dismiss the matter. *Id.*

MERITS

On September 10, 2004, this Court found in *McKenna v. Oliver, et. al.*, 03CV2099 (Boulder District Court) that it did not have subject matter jurisdiction to hear similar TCPA claims. A copy of that opinion is attached hereto and incorporated by reference into this opinion. Plaintiff in that case requested reconsideration of that decision in light of case authority submitted, which was also been submitted in this case. By order dated January 3, 2005, this Court reaffirmed its prior ruling. A copy of that order is also attached and incorporated by reference into this opinion.

As Plaintiff asserts only TCPA claims against Defendants, and not CCPA claims, and as this Court has previously found it does not have subject matter jurisdiction over TCPA claims that are based on conduct that would otherwise be lawful under the CCPA, the Court GRANTS the Motion to Dismiss.

As noted in the January 3, 2005 order, this Court recognizes that the legal question of subject matter jurisdiction in TCPA cases is unsettled. There are no Colorado appellate cases on point, and the district courts in the state are divided on the issue. *See. e.g., Consumer Crusade* finding no subject matter jurisdiction and *US Tax Law Center, Inc v. Bridge 21, Inc.*, Denver District Court Case No. 03CV9245, order dated October 7, 2004, finding, "[w]ith all due respect to my Colorado state court colleagues who have ruled otherwise," the Court had subject matter jurisdiction. Until the question is settled by the appellate process to the contrary, this Court will maintain its prior holding that it does not

have subject matter jurisdiction to hear TCPA claims that arise during the relevant time period.

The question of subject matter jurisdiction is dispositive of these claims. Therefore, the Court need not consider the other issues raised.

1-3-05

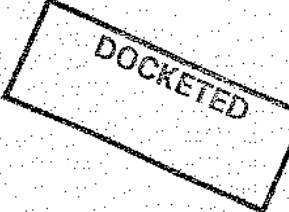


D.D. Mallard

District Court Judge

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| District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3771 | |  ▲ COURT USE ONLY ▲ |
| DOUGLAS M. MCKENNA, PLAINTIFF(S) v. STEPHEN C. OLIVER, et al., DEFENDANT(S) | | |
| Attorney(s) for Plaintiff(s): Pro se Attorney(s) for Defendant(s): Steven L. Zimmerman | | Case No: 03CV2099 Division: 3 Courtroom: H |
| RULING & ORDER | | |

This matter comes before the court on two separate motions to dismiss filed by the defendants.

I. FACTS & PROCEDURAL HISTORY

On October 23, 2003 plaintiff filed the complaint alleging defendants violated provisions of the Telephone Consumer Protection Act, 47 U.S.C. 227(b) (hereinafter 'TCPA') and Colorado Consumer Protection Act, C.R.S 6-1-702(1)(b)(I) (hereinafter 'CCPA') when they sent unsolicited fax advertisements to his assignors. All of the allegedly unsolicited faxes were sent between February 2000 and April 2002.

Plaintiff concedes that he did not personally receive any of the allegedly unsolicited faxes. Rather, he is the assignee of a number of other citizens who did receive said unsolicited faxes, and has agreed to prosecute the cases on the assignors' behalf. Plaintiff's prayer for relief seeks injunctive damages pursuant to the TCPA, monetary damages pursuant to both the TCPA and the CCPA as well as attorneys' fees pursuant to the CCPA.

On December 8, 2003, defendants filed their first motion to dismiss. Defendants assert that the plaintiff lacks standing to bring this action, is not a real party in interest, and cannot bring this action as assignee of consumer claims. Plaintiff filed a response on January 21, 2004. Defendants filed a reply on March 2, 2004. Plaintiff filed an "Additional Authority and Response to Defendants' Reply to Memorandum in Response to Motion to Dismiss Complaint" on March 15, 2004. Defendants filed a motion to strike the response to defendants reply on March 24, 2004, to which plaintiff responded on April 1, 2004. Plaintiff filed further supplemental authority on May 14, 2004. Defendant filed supplemental authority on June 21, 2004. Plaintiff filed a "Response to Defendants' Supporting Authority to Motion to Dismiss Complaint" on June 22, 2004. Plaintiff filed its "Third Supplemental Authority in Support of Plaintiff's Memorandum in Response to Motion to Dismiss Complaint," accompanied by plaintiff's proposed order memorandum, on July 28, 2004.

On July 30, 2004, defendants filed their second motion to dismiss. The crux of the second motion to dismiss was that Colorado courts lacked jurisdiction over TCPA claims for violations occurring before August 4, 2004, because Colorado had created a more limited right of action against unsolicited faxes in the CCPA and that TCPA based claims were not actionable prior to a recent legislative change to the CCPA effective in August of this year. The defendants based their argument entirely on a recent ruling out of Denver District Court, *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. et al.*, 04CV803 (Colo. Dt. Ct. Denver July 26, 2004). Plaintiff Responded on August 6, 2004, and defendants filed a reply on August 11, 2004. Plaintiff filed supplemental authority on August 17, 2004. On August 18, 2004, this court ruled that it would accept all filings prior to the date of August 18, 2004, but that from that point forward the court would not consider briefs filed without leave to file. Further, the court noted that while

supplemental authority would be accepted, argument based on that supplemental authority would not. Plaintiff filed further supplemental authority on August 27, 2004.

Having read all the appropriate filings, the court is now prepared to make its ruling. As the second motion to dismiss could render issues raised in the first motion to dismiss moot, the court will consider the second motion to dismiss first.

II. LEGAL STANDARDS FOR MOTIONS TO DISMISS

Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(5) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." C.R.C.P. 12(b)(5). Rule 12(b)(5) motions are viewed with disfavor, and "are rarely granted under our 'notice pleadings'" *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (internal quotations omitted). The purpose of notice pleading requirements is "to give notice to the defendant of the transaction or occurrence that is the subject of the plaintiff's claims." *Id.* at 1099-1100. When ruling on the motion, the court may only consider information contained within the pleadings. *Id.* at 1099. The court must accept statements of material fact in the complaint as true, and may only dismiss the complaint if the allegations in the complaint fail to present a cognizable legal claim. *Henderson v. Romer*, 910 P.2d 48, 51 (Colo. Ct. App. 1995). When a claim is barred as a matter of law, the claim may be appropriately dismissed on a motion to dismiss. *See, Lang v. Bank of Durango*, 78 P.3d 1121 (Colo. Ct. App. 2003) (upholding a motion to dismiss granted because claim was barred by the statute of frauds).

III. COLORADO AND TCPA CLAIMS

In *Consumer Crusade*, state district court Judge Martin Egelhoff ruled that because the grant of authority in the TCPA allowed state courts to close their doors to TCPA claims, it follows that the law allowed states to "adopt a different standard of conduct for private actions on the issue of fax telemarketing." *Id.* at 3. The CCPA was enacted eight years after the TCPA, and is significantly more narrow than the TCPA, i.e. under the TCPA, any unsolicited fax is actionable; under the CCPA an unsolicited fax is actionable only if the fax does not contain a toll-free number for the consumer to call to request no further faxes. The court concluded that the legislature precluded state court action pursuit of TCPA claims after enactment of the CCPA. *Id.* at 5. Judge Egelhoff noted that this interpretation was supported by the legislature's recent decision to expand the scope of the CCPA to include any violations of the TCPA as actionable under the CCPA, effective in August of 2004. *Id.*

This court is persuaded by Judge Egelhoff's reasoning, and incorporates by reference that analysis into this decision. While the court is sympathetic to the fact that prior district court decisions determined that Colorado's legislature was not required to affirmatively 'opt-in' to the TCPA, those cases did not involve analysis of the question in terms of the CCPA. This court must determine whether, by enacting a narrower right of action for unsolicited faxes, the legislature chose to preclude TCPA claims. This was not an issue previously before this court.

The court hereby finds that the applicable provision of the CCPA precludes plaintiff's TCPA claims. For this reason, the plaintiff's TCPA claims are dismissed, and the defendant's motion to dismiss TCPA claims is **GRANTED**.

IV. ASSIGNABILITY OF CCPA CLAIMS

Given that the court has ruled that TCPA claims were not recognized in Colorado courts during the time in question, the court need not address whether such claims are assignable. However, defendant's argument that CCPA claims are not assignable, and that plaintiff lacks standing to pursue those claims, must now be addressed.

Defendant does not assert that plaintiff's assignors lack standing to bring suit. Taking the allegations as true, that these assignors received unsolicited faxes on their fax machines, then the assignors had standing pursuant to C.R.S. §6-1-113. Rather, defendant's argument is based entirely on his contention that CCPA claims are not assignable under Colorado Law.

Colorado generally favors the assignment of rights pursuant to a valid contractual arrangement. Colorado law also favors transfer of rights of action. Causes of action which survive the death of the party entitled to sue may ordinarily be assigned, and under Colorado law all causes of action survive death except slander and libel. The only assignments Colorado does not allow are for claims involving matters of personal trust or confidence or for personal services.

Brown v. Gray, 227 F.3d 1278, 1294 (10th Cir. 2000) (internal citations omitted).

As did the defendant in *Gray*, this plaintiff relies heavily on the reasoning of the Colorado Court of Appeals in *Roberts and Ricscor v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993). In that case, the Colorado Court of Appeals ruled that legal malpractice claims were not assignable, because to allow such claims would pose a threat to the sanctity of the attorney client relationship. The court does not find this case to be persuasive.

The matter before this court involves sending messages to another person's communication equipment without the owner's permission. There is no protected relationship at issue in this case. Moreover, the nature of the claim involves unauthorized use of another person's property (the fax machine) to the owner's detriment (loss of time, paper and toner). This is not a claim based in personal trust and confidence between parties in a relationship; rather, it involves the unauthorized use of the property of a stranger. The court finds that the concerns at issue in *Holland & Hart* do not apply here.

Given that both the Colorado Consumer Protection Act and the assignment of claims are construed liberally, *Showpiece Homes Corp. v. Assurance Company of America*, 38 P.3d 47, 49, 51 (Colo. 2001) (CCPA is construed liberally), *Brown v. Gray*, *supra*, this court finds no reason to prohibit the assignability of CCPA claims. The defendant's motion to dismiss the CCPA claims is therefore **DENIED**.

V. CONCLUSION

For the aforementioned reasons, the defendant's motion to dismiss the plaintiff's TCPA claims is **GRANTED**, and the defendant's motion to dismiss the CCPA claims is **DENIED**.

09/10/2004



D.D. Mallard
District Court Judge

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| District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3771 | | ▲ COURT USE ONLY ▲ |
| DOUGLAS M. MCKENNA, PLAINTIFF vs STEPHEN C. OLIVER, DEFENDANT. | | |
| <i>Attorney for Plaintiff: Pro se</i> <i>Attorney for Defendant: Steven L. Zimmerman</i> | | Case Number: 03CV2099 Division 3 Courtroom H |
| ORDER | | |

This matter comes before the court on Plaintiff's Motion to Alter or Amend Findings and Judgment Regarding Ruling and Order Re Second Motion to Dismiss, and the responsive pleadings thereto.

Defendant objects to Plaintiff's motion based on procedural irregularities. The court will consider the motion as a request to reconsider, as Plaintiff, in essence, is asking the Court to reconsider its order dated September 10, 2004.

By order dated September 10, 2004, this court dismissed the TCPA claims in this case. The court discussed the decision in *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. et. al.*, a Denver District Court order dated July 26, 2004, found the reasoning in that decision persuasive, and incorporated by reference the analysis in that decision. Plaintiff claims the *Consumer Crusade* is an aberrant decision, and this court's reliance on it is unjust as it is presently subject to a Notice of Appeal.¹ Moreover, the Court did not rely on the case as precedent, but instead simply incorporated by reference its legal analysis.

In the September 10, 2004 order, this court recognized that other district court decisions have held that Colorado's legislature was not required to affirmatively "opt in" to the TCPA, and, accordingly, TCPA claims were viable in Colorado state courts. These decisions pertained to claims brought during the time period subsequent to the enactment of the Colorado Consumer Protection Act (CCPA). Those decisions construed the "if otherwise permitted by law" language in the TCPA. This Court found the legal analysis

¹ The Court notes the Notice of Appeal in the *Consumer Crusade* case was filed subsequent to this Court's order.


in *Consumer Crusade* which addressed the inconsistency between the TCPA and the CCPA provisions regarding what conduct was prohibited persuasive as to the claims at issue in this case. TCPA claims for the sending of any unsolicited fax advertisement, the conduct prohibited by the TCPA, is contrary to provisions in the CCPA, which permit that same conduct if there is a toll free number consumers can call to request no further faxes. The claims at issue here involve faxes that include a toll-free number, making them lawful under the CCPA but unlawful under the TCPA. The Court found the fact that the CCPA was enacted after the TCPA with a substantive difference in the conduct proscribed, and the fact that the legislature amended the CCPA in 2004 to track the language of the TCPA must indicate that the legislature intended the CCPA, and not the TCPA, provisions apply during the relevant time period.

This court has considered its ruling in light of Plaintiff's arguments and the recent Maryland cases submitted by Plaintiff, and hereby **AFFIRMS** its prior ruling.

It is the *difference* between the CCPA and the TCPA provisions that leads to this Court's conclusion. As noted above, during the relevant time frame, the effective date of the CCPA in 1999 until the effective date of the amendment in 2004, conduct that would be unlawful under the TCPA was lawful under the CCPA. The Maryland statute construed in *R.A. Ponte Architects Ltd. V. Investor's Alert, Inc.*, 2004 Md. LEXIS 503 and in *Levitt v. Fax.com, Inc., et.al.*, 2004 Md. LEXIS 593, did not contain similar, substantive differences.

This Court recognizes that the legal question of subject matter jurisdiction in TCPA cases is unsettled. There are no Colorado appellate cases on point, and the district courts in the state are divided on the issue. *See. e.g., Consumer Crusade* finding no subject matter jurisdiction and *US Tax Law Center, Inc v. Bridge 21, Inc.*, Denver District Court Case No. 03CV9245, order dated October 7, 2004, finding, "[w]ith all due respect to my Colorado state court colleagues who have ruled otherwise," the Court had subject matter jurisdiction. Until the question is settled by the appellate process to the contrary, this Court will maintain its prior holding that it does not have subject matter jurisdiction to hear TCPA claims that arise during the relevant time period.

1-3-05


D.D. Mallard
District Court Judge