COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA2041
Arapahoe County District Court No. 02CV3159
Honorable Timothy L. Fasing, Judge

Alvin K. Lucero, d/b/a A&N Quality Products; Douglas M. McKenna; and Mathemaesthetics, Inc.,

Plaintiffs-Appellants,

v.

Burt Buick-Pontiac-GMC Truck, Inc. d/b/a Burt Custom Finance, and d/b/a Burt Automotive Network, Inc.; Fax.com, Inc.; Kevin Katz; and Charles Martin,

Defendants-Appellees.

ORDER AFFIRMED

Division V
Opinion by: JUDGE NIETO
Roy and Criswell*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: May 26, 2005

Law Offices of Andrew L. Quiat, P.C., Andrew L. Quiat, Englewood, Colorado; Head & Associates, P.C., John F. Head, Denver, Colorado, for Plaintiffs-Appellants

White & Steele, P.C., James M. Dieterich, Denver, Colorado; Wheeler Trigg Kennedy LLP, John M. Vaught, Sean D. Baker, Michael T. Williams, Denver, Colorado; McGloin, Davenport Severson and Snow, PC, Michael J. Dommermuth, Denver, Colorado, for Defendant-Appellee Burt Buick-Pontiac-GMC Truck, Inc.

Fax.com, Inc., Kevin Katz, and Charles Martin, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3) and § 24-51-1105, C.R.S. 2004.

Plaintiffs, Alvin K. Lucero, d/b/a A&N Quality Products, Douglas M. McKenna, and Mathemaesthetics Inc., appeal the denial of their request for class certification pursuant to C.R.C.P. 23. We affirm.

Defendants, Burt Buick-Pontiac-GMC Truck, Inc., d/b/a Burt Custom Finance, and d/b/a Burt Automotive Network, Inc., Fax.com, Inc., Kevin Katz, and Charles Martin (collectively Burt), sent several thousand faxed advertisements to fax machines in the Denver metropolitan area. Plaintiffs each received one of these faxes. Plaintiffs brought this class action asserting a claim under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA), which, in relevant part, prohibits the transmission of "an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227 (b)(1)(C). The TCPA creates a private right of action to obtain actual damages or $500 in statutory damages from parties who send such unsolicited faxes. 47 U.S.C. § 227(b)(3)(B).

Plaintiffs moved for certification of the class pursuant to C.R.C.P. 23. Plaintiffs defined the class as: "All persons to whom the Defendants sent advertisements by telephone facsimile on behalf of [Burt]. Excluded from the Class are the Defendants, and the affiliates, officers, directors and control persons thereof." The trial court determined that individual issues would predominate over any issues shared by the class

because it would be necessary to inquire into each potential plaintiff's circumstance to determine whether a particular fax was unsolicited. It therefore denied the motion for class certification, certified the order as final under C.R.C.P 54(b), and plaintiffs appealed. See Levine v. Empire Sav. & Loan Ass'n, 192 Colo. 188, 557 P.2d 386 (1976)(order denying class certification certified under C.R.C.P. 54(b) is appealable).

I.

Plaintiffs contend the trial court erred in denying class certification. We disagree.

The burden of establishing the requirements for class certification is on the party seeking it. Villa Sierra Condo. Ass'n v. Field Corp., 787 P.2d 661 (Colo. App. 1990). A trial court is given broad discretion to determine whether to certify a class action and its decision will not be disturbed unless it is clearly erroneous and constitutes an abuse of discretion. Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860 (Colo. App. 1995). An abuse of discretion includes an erroneous application of the law. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

Before a court may certify a class, plaintiffs must satisfy the requirements of C.R.C.P. 23(a) and at least one of the requirements in C.R.C.P. 23(b). In this action, plaintiffs sought certification under C.R.C.P. 23(b)(3), which requires

that (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Here, plaintiffs defined the class as all persons to whom defendants sent faxed advertisements, but only persons who received unsolicited advertisements could recover damages under the TCPA. "Unsolicited advertisement" is defined in the TCPA as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). Therefore, determination of the issues in this case would require an examination of every potential class member to determine whether he or she invited or gave permission to Burt for transmission of the fax. Accordingly, as the trial court concluded, individual issues would predominate over any common issues and class certification would be improper. See Livingston v. U.S. Bank, 58 P.3d 1088 (Colo. App. 2002)(where plaintiffs alleged violations of the TCPA for sending unsolicited fax advertisements, denial of class certification was proper because the question whether individual fax recipients gave prior invitation or permission to receive the fax would predominate over any common issues); see also

Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997)(same); Forman v. Data Transfer, Inc., 164 F.R.D. 400 (Ed. Pa. 1995)(same); Carnett's Inc. v. Hammond, 610 S.E.2d 529, 532 (Ga. 2005)(same, stating, "a common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class").

Accordingly, we conclude the trial court's order was not clearly erroneous and it did not abuse its discretion in denying plaintiffs' motion for class certification.

Plaintiffs argue that the court erred in relying on Livingston v. U.S. Bank, supra, because the plaintiffs there defined their class as those "who did not, prior to receiving the facsimile advertisements, contact [the defendants] to request that they be added to the facsimile advertisement recipient database," while here the class was defined as "all persons to whom defendants sent" faxed advertisements. Livingston v. U.S. Bank, supra, 58 P.3d at 1090. We find this distinction immaterial. In both Livingston and here, it must be determined whether an individual plaintiff gave an invitation or permission to receive the fax, and this inquiry predominates over any common issues shared by the class.

Plaintiffs also argue that the trial court failed to consider the relevant factors under C.R.C.P. 23. However, the record shows that the court specifically addressed the

requirements of C.R.C.P. 23(b)(3), the subsection relied on by the plaintiffs. Because class certification requires compliance with C.R.C.P. 23(a) and one of the subsections of C.R.C.P. 23(b), the court need not have addressed the other factors of C.R.C.P. 23 once it determined that one factor had not been satisfied.

II.

Plaintiffs next contend the trial court erred in denying class certification because the trial court incorrectly interpreted the TCPA. We decline to consider these issues because they are not part of a final order.

At the hearing where the court denied class certification, it also denied plaintiffs' motion for partial summary judgment. In ruling on the summary judgment motion, the court found that plaintiffs had the burden of proof to show that the faxed advertisements were unsolicited and that Burt could assert a prior business relationship as proof of permission for the transmission of a fax advertisement. However, an order denying summary judgment is not appealable. Feiger, Collison, & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

Therefore, to the extent that plaintiffs are attempting to challenge the court's ruling denying summary judgment, we decline to address these arguments as we lack jurisdiction to review them. See Woznicki v. Musick, 94 P.3d 1243 (Colo. App.

2004)(entry of a final judgment is a jurisdictional prerequisite for appellate review of an issue).

However, we note that whether the invitation or permission issue is an element to be proved by plaintiffs or is an affirmative defense to be proved by Burt, an individual inquiry into whether all potential class members provided "prior express invitation or permission" would still be required. This inquiry would predominate over any common issues no matter which party had the burden of proof. We also note that whether or not proof of a prior business relationship is relevant or probative as to the issue of invitation or permission, the issue of invitation or permission would still predominate over any common issues.

The order is affirmed.

JUDGE ROY and JUDGE CRISWELL concur.