

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3771		
DOUGLAS M. MCKENNA, PLAINTIFF(S) v. STEPHEN C. OLIVER, et al., DEFENDANT(S)		EFILED Document CO Boulder County District Court 20th JD Filing Date: Sep 10 2004 4:38PM MDT Filing ID: 4191145 Review Clerk: Nancy Greschler
		▲ COURT USE ONLY ▲
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 Riccor 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