

Consumer Crusade v. Construction News

COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA2313
El Paso County District Court No. 04CV2709
Honorable Robert L. Lowrey, Judge

Consumer Crusade, Inc., a Colorado corporation,

Plaintiff-Appellant,

v.

Construction News Service, Inc., a Colorado corporation, and David L.
Snedaker, officer and director,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division I
Opinion by: JUDGE MÁRQUEZ
Dailey and Hume*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: March 30, 2006

Demirali Law Firm, P.C., A.M. Demirali, Denver, Colorado, for Plaintiff-
Appellant

Hogan & Hartson, L.L.P., Sean R. Gallagher, Elizabeth K. Pietsch, Denver,
Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2005.

Plaintiff, Consumer Crusade, Inc., appeals the trial court's judgment dismissing its action against defendants, Construction News Service, Inc., and its officer and director, David L. Snedaker. We affirm.

Plaintiff is the assignee of several persons or entities who claim that in 2003 they received unsolicited faxes from defendant in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Plaintiff filed this action in 2004, alleging violations of the TCPA and requesting judgment for damages, permanent injunctive relief, costs, and reasonable attorney fees.

Defendants moved to dismiss all claims pursuant to C.R.C.P. 12(b)(1) and (5), asserting that the court lacked subject matter jurisdiction over claims arising under the TCPA and that, because the claims were not assignable, plaintiff failed to state a claim upon which relief could be granted.

The trial court granted defendants' motion to dismiss on the following three grounds: (1) because under the 1999 Colorado Consumer Protection Act, Colorado declined to opt-in and effectively opted-out of the TCPA's private enforcement scheme, the court

lacked subject matter jurisdiction to hear plaintiff's claims; (2) the recovery allowed under the TCPA should be construed as a penalty and cannot be assigned under Colorado law; and (3) joinder of claims was not proper and would not be allowed. The trial court's order expressly stated:

Though a determination of assignability of claims and permissive joinder was not strictly necessary after this Court's determination that it did not have subject matter jurisdiction, a consideration of these issues was appropriate to demonstrate that under any of these three analyses, Plaintiff's claims could not go forward in this Court.

On appeal, plaintiff's opening brief asserts only that the trial court erred in concluding that it did not have subject matter jurisdiction under the TCPA. Specifically, the opening brief states: "Although this El Paso District Court spoke to other issues in its Order, the issue of subject matter jurisdiction is a threshold matter and the only basis for this appeal." And while plaintiff's opening brief attaches and incorporates an opening brief in another case on appeal, that brief addresses only issues pertaining to subject matter jurisdiction. We conclude that because plaintiff does not challenge

the trial court's alternative grounds for dismissing its claims, we must affirm the trial court's judgment.

There is a presumption that a judgment entered by the trial court is correct. Flagstaff Enters. Constr., Inc. v. Snow, 908 P.2d 1183 (Colo. App. 1995). When, as here, the trial court dismisses a complaint based upon alternative grounds, we must consider each ground. Plaintiff's failure to challenge any one of those grounds on appeal in effect requires that we accept that ruling as the law of this case. See Foxley v. Foxley, 939 P.2d 455 (Colo. App. 1996).

We also reject plaintiff's assertion in its reply brief that because the judgment of a court lacking subject matter jurisdiction is void, by virtue of the trial court's own analysis, it did not have the power to render a decision on any other issue. Even if we were to agree with plaintiff and determine that the trial court had subject matter jurisdiction, the trial court's alternative grounds for dismissal would apply, and plaintiff's case would nevertheless be dismissed.

Further, although plaintiff asserts for the first time in its reply brief that the trial court erred in concluding that its claims were not assignable and that joinder was improper, we decline to address

these issues. A defendant may not challenge the trial court's ruling for the first time in its reply brief. Foxley v. Foxley, supra; see also People v. Czemerynski, 786 P.2d 1100, 1107 (Colo. 1990)(issues not raised in appellant's original brief will not be considered when raised for the first time in the reply brief); Schempp v. Lucre Mgmt. Group, LLC, 75 P.3d 1157 (Colo. App. 2003)(an argument is not properly raised on appeal, even if addressed in reply brief, where the issue was not identified as an issue in the opening brief).

In light of our disposition above, we need not address defendants' motion to strike.

The judgment is affirmed.

JUDGE DAILEY and JUDGE HUME concur.