

US Fax, Inc. v. Data Design, Inc.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA0433
City and County of Denver District Court No. 05CV2999
Honorable Joseph E. Meyer, III, Judge

US Fax Law Center, Inc.,

Plaintiff-Appellant and Cross-Appellee,

v.

Data Design Specialists, Inc. and Eldon Totsch,

Defendants-Appellees and Cross-Appellants.

JUDGMENT AND ORDER AFFIRMED

Division II

Opinion by: JUDGE FURMAN
Rothenberg and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: December 20, 2007

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Appellants

In this case concerning facsimile transmissions of unsolicited advertisements, plaintiff, U.S. Fax Law Center, Inc. (the Center), appeals the district court's judgment dismissing its claims against defendants, Data Design Specialists, Inc. and Eldon Totsch (collectively, Data Design). Data Design cross-appeals the district court's order denying its motion for attorney fees. We affirm.

In June 2002, Data Design sent two unsolicited faxes to A/V Services, LLC. The Center, as A/V Services' assignee, filed a complaint in district court alleging Data Design violated various provisions of the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2005), and the Colorado Consumer Protection Act (CCPA), section 6-1-702, C.R.S. 2007, by sending unsolicited facsimile advertisements to A/V Services. The complaint also included claims for injunctive relief and damages on theories of negligence per se and negligence.

The district court granted Data Design's motion to dismiss the TCPA and CCPA claims pursuant to C.R.C.P. 12(b), concluding the Center lacked standing to pursue those claims because neither claim was assignable. The district court denied Data Design's motion for attorney fees and costs.

I. Motion to Dismiss

The Center contends the district court erred in granting Data Design's motion to dismiss its TCPA and CCPA claims. We disagree.

"We review a trial court's ruling on a motion to dismiss de novo. We accept as true all averments of material fact contained in the complaint and view the allegations of the complaint in the light most favorable to the plaintiff." *McKenna v. Oliver*, 159 P.3d 697, 699 (Colo. App. 2006) (citation omitted).

A. Standing for TCPA Claims

The Center contends the district court erred in concluding it lacked standing to pursue its TCPA claims because they were not assignable. We disagree.

For the reasons set forth in *U.S. Fax Law Center, Inc. v. T2 Techs., Inc.*, ___ P.3d ___ (Colo. App. No. 06CA0432, Dec. 13, 2007), and *McKenna v. Oliver*, 159 P.3d at 699-700, we conclude the district court correctly dismissed the TCPA claims asserted by the Center because they could not be assigned, and therefore the Center did not have standing to bring those claims as an assignee.

B. Standing for CCPA Claims

The Center also contends the district court erred in concluding it lacked standing to pursue its CCPA claims because they were not assignable. We disagree.

For the reasons set forth in *U.S. Fax Law Center, Inc. v. Myron Corp.*, 159 P.3d 745, 746-47 (Colo. App. 2006), we conclude the district court correctly dismissed the CCPA claims because they could not be assigned, and therefore the Center did not have standing to bring those claims as an assignee.

II. Cross-Appeal

On cross-appeal, Data Design contends the district court erred in denying its motion for attorney fees under section 13-17-201, C.R.S. 2007. We disagree.

Section 13-17-201 requires a court to award reasonable attorney fees to the defendant “[i]n all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under [C.R.C.P. 12(b)].” However, fees are available under this section only if an entire tort action, not simply certain claims in an action, is dismissed prior to trial under

C.R.C.P. 12(b). *Rector v. City & County of Denver*, 122 P.3d 1010, 1018 (Colo. App. 2005); *Berg v. Shapiro*, 36 P.3d 109, 113 (Colo. App. 2001).

The district court's order dismissing the TCPA and CCPA claims did not address the negligence or injunctive relief claims against Data Design, and those claims remained pending. The district court then accepted the Center's offer voluntarily to dismiss the remaining claims, and issued a final order, awarding costs to Data Design, but denying its motion for attorney fees because the motion to dismiss had not disposed of all the Center's claims.

Data Design contends all the Center's claims were in fact dismissed, because both the negligence and injunctive relief claims were predicated upon the TCPA and CCPA. Data Design may be correct that the claim for injunctive relief and negligence per se, which relied upon the TCPA and CCPA, were effectively dismissed when the TCPA and CCPA claims were dismissed.

However, the same is not true of the Center's claim for relief based on common law negligence in paragraph 18.3 of the complaint: "The conduct of the respective defendants constitutes an invasion of privacy, a trespass, and a conversion of the personal

property of [plaintiff's assignors].” Nothing in the record indicates that this common law negligence claim was dismissed under C.R.C.P. 12(b). Therefore, Data Design was not entitled to attorney fees under section 13-17-201. *See U.S. Fax Law Center, Inc. v. T2 Techs., Inc.*, ___ P.3d at ___.

The judgment and the order are affirmed.

JUDGE ROTHENBERG and JUDGE J. JONES concur.