

FILED

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JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

MSG JEWELERS, INC.,

Plaintiff,

v.

C & C QUALITY PRINTING, INC.,

Defendant.

Cause No. 07AC-028676 E CV

Division 39 - Tuesday

ORDER

This matter came before the Court on June 24, 2008 on cross motions for summary judgment. For the reasons herein, the Court denies Defendant’s motion and grants Plaintiff’s motion.

Findings of Fact and Conclusions of Law

This is an action originally brought by Plaintiff against Defendant alleging transmission of an unsolicited advertisement via facsimile in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. The parties have agreed to a set of Stipulated Facts for the purposes of the Plaintiff’s and Defendant’s Motions for Summary Judgments. There is no dispute that Defendant sent the fax in question to Plaintiff or that the fax is advertising material. There is also no dispute that Plaintiff previously consented to be sent advertising faxes from Defendant.

The dispute is whether an advertising fax must contain an “opt-out” notice that complies with the TCPA even when the fax is sent with the bona fide consent of the recipient. The parties have stipulated that “[t]he fax does not contain an opt-out notice as described in 47 C.F.R. 64.1200(a)(3)(iii).” Stipulated Fact No. 6. The question is thus reduced to one of statutory interpretation and is ripe for summary judgment.

1. The fax is not an “unsolicited advertisement” under the TCPA.

The TCPA defines “unsolicited advertisement” as “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)(5). Because the fax was sent to a recipient who provided prior express invitation or permission to the sender the fax is not an “unsolicited advertisement” under the statute.

2. The fax violates 47 C.F.R. 64.1200 (a)(3)(iv).

Even though the fax is not an “unsolicited advertisement” as defined by the statute, there are additional requirements that all fax advertising transmissions must meet in order to comply with the TCPA. In particular, the FCC regulations promulgated under the TCPA provide that “[a] *facsimile advertisement* that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.” 47 C.F.R. 64.1200 (a)(3)(iv) (emphasis added). An advertisement sent by facsimile can be a “facsimile advertisement” without being an “unsolicited advertisement.”

Defendant has admitted that the fax at issue is a “facsimile advertisement” (S.F.#5) and that the fax “does not contain an opt-out notice as described in 47 C.F.R. 64.1200(a)(3)(iii).” (S.F.#6). Thus, Defendant violated 47 C.F.R. 64.1200 (a)(3)(iv).

3. Standing to sue for violations of the regulations.

Having found that Defendant violated 47 C.F.R. 64.1200 (a)(3)(iv), the only remaining question is whether Plaintiff has standing to bring suit.

The TCPA provides that “[a] person or entity may . . . bring . . . an action based on a violation of . . . the regulations prescribed under this subsection.” 47 U.S.C. § 227(b)(3). The clause “this subsection” refers to subsection “b” of section 227, of Title 47 of the United States Code. Subsection 227(b)(2)(D), instructs the FCC to enact regulations regarding a “clear and conspicuous”

opt-out notice that informs people of their rights, including the right to stop faxes that are being sent with prior express permission. The FCC's regulations regarding opt-out notices were promulgated under subsection "b," which gives Plaintiff standing to sue when those regulations are violated.

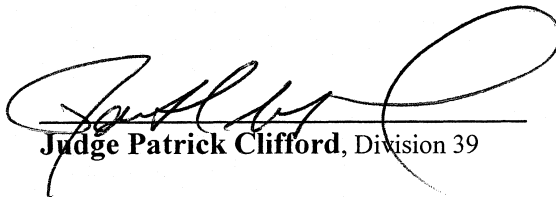
Conclusion

All advertising faxes – including those sent with the express permission of the recipient – must include a proper opt-out notice. It is not the court's job to pass judgment on the wisdom of this requirement. "The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260 (1914).

Therefore, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED. A judgment consistent with this Order shall issue separately.

IT IS SO ORDERED.

This the 17th day of July, 2008.



Judge Patrick Clifford, Division 39