

**Antollino v LaSalle Services, Inc.**

2004 NY Slip Op 30201(U)

May 12, 2004

Supreme Court, New York County

Docket Number: 0116629/2003

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: \_\_\_\_\_

PART 55

Justice

0116629/2003

ANTOLLINO, GREGORY  
VS  
LASALLE SERVICES, INC.

INDEX NO. \_\_\_\_\_

MOTION DATE 1/26/04

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to 18 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4-14</u>
<u>15-18</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FILED

MAY 11 2004

COURT

1/21

Dated:

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

GREGORY ANTOLLINO,

Plaintiff,

-against-

LASALLE SERVICES, INC., THE PECORARO  
GROUP, INC., ANDREW LAVOOT BLUESTONE,  
KOSHER CARTRIDGE, DR. PHILIP ABESSINO,  
DR. CAROLE SCHUSTER, DR. MICHAEL GENCO,  
DR. WILLIAM RICE, ACCIDENT RECOVERY  
ASSOCIATES, DR. JEAN-ROBERT DESROULEAUX,  
DORAN SUITES RESORTS, FAX.COM,  
AMERICAN MEDCARE, MEDHEALTH PLUS,  
GLOBAL MARKETING GROUP, PINNACLE  
WEALTH GROUP, LLC, JOHN DOE DEFENDANY'S  
#1-20,

Defendants,

-----X

DECISION AND ORDER

index No. 116629/03

**FILED**  
MAR 11 2003

CO

JANE S. SOLOMON, J.:

This action is brought by plaintiff Gregory Antollino under 47 USC section 227 to recover damages for unsolicited advertisements sent by defendants to his fax machine. He moves for summary judgment against three defendants, one of which is in default, and to discontinue his claims against all other named defendants. The two non-defaulting defendants cross move for judgment in their favor, and other relief.

The statute upon which this action is brought is known as the Telephone Consumer Protection Act of 1991 ("TCPA"). It provides that an "unsolicited advertisement" may not be sent by facsimile machine without the recipient's prior consent. 27

U.S.C. § 227(a) (4). The covered material is that which "advertises the commercial availability or quality of any . . . service". Id.

As to defendant LaSalle Services, Inc., service appears proper and, in light of the decision of this court in Antollino v. Hispanic Media Group USA, Inc. (Index number 127393/2002, April 28, 2003) and the recrit decision of the Appellate Term, Second Department, in Rudgayzer & Gratt v. Enine, Inc. (NYLJ, April 26, 2004, p. 19, col 1 ["Rudgayzer"]), plaintiff is entitled to judgment against it on default in the amount of \$2,000, the statutory nominal damages of \$500 for each of the four unsolicited faxes which are the subject of the complaint.

As to defendant Andrew Lavoott Bluestone, sued incorrectly as Andrew Lavoot Bluestone ("Bluestone"), plaintiff's motion is granted, and the cross-motion denied. Bluestone is an attorney who concededly sent the faxes but who contends that they are not prohibited "advertisements", and that the statute is unconstitutional based on the now overruled trial court decision in Rudgayzer.<sup>1</sup> Bluestone contends that his faxes were purely informational and do not explicitly offer services. Common sense

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<sup>1</sup> In arriving at her decision, the trial court judge in Rudgayzer (193 Misc.2d 449 [Civil Court, Kings County 2002]) adopted the reasoning articulated in the decision of the United States District Court for the Eastern District of Missouri in Missouri ex rel. Nixon v Am. Blast Fax, Inc., 196 F.Supp.2d 920 (E.D. Mo. 2002), which has since been reversed. Missouri ex rel. Nixon v Am. Blast Fax, Inc., 323 F.3d 649 (8<sup>th</sup> Cir. 2003).

however indicates that there is no other purpose for them. Each is titled "Attorney Malpractice Report<sup>®</sup>", subtitled "Free Monthly report on Attorney Malpractice issues, trends, and litigation . . . From the Law Office of Andrew Lavooott Bluestone", and which have a bold box on the bottom stating "Presented by the Law offices of Andrew Lavooott Bluestone, concentrating in Attorney Malpractice Litigation . . . Inquiries are welcome." Therefore, Antollino's motion also must be granted as against Bluestone, and Bluestone's cross-motion is denied.<sup>2</sup>

Defendant The Pecoraro Group Inc. ("Pecoraro Group"), which provides process servers and other law-related services, argues that the five faxes it admittedly sent to Antollino in 2003 are not subject to the TCPA because he had used their service in 1999. Pecoraro Group sent fax advertisements to Antollino in 2002, and he did not sue them or otherwise complain. Therefore, they claim, he impliedly consented to continue receiving faxed advertisements. Pecoraro Group maintains that had Antollino simply called and said that he no longer wished to receive the faxes, it would have stopped sending them.

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<sup>2</sup> In his opposition to plaintiff's motion (which is submitted separately from his cross-motion for summary judgment), Bluestone states that the summons and complaint were not served upon him properly. He served an answer alleging lack of personal jurisdiction as a defense, but his cross-motion makes no mention of this. Under CPLR 3211(c), a defendant who serves an answer alleging lack of personal jurisdiction has sixty days to move to dismiss on that ground, or the defense is waived.

The TCPA defines unsolicited advertisement as any advertisement "which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). Viewing Pecoraro Group's allegations in a light most favorable to it, it is undisputed that Antollino did not grant to it an express invitation or permission to send the faxes at issue. By its plain language, the statute does not provide for implied consent.

Finally, Pecoraro Group argues that the TCPA should not apply because there is a New York statute governing the transmission of unsolicited fax advertisements. See, General Business Law § 396-aa. That statute is said to be less restrictive than the TCPA. However, it provides that "[t]his section shall not apply to telefacsimile messages sent to a recipient with whom the initiator has had a prior contractual or business relationship . . ." Here, Pecoraro Group had a prior business relationship with Antollino, so the New York statute does not apply to the faxes it sent and there is no conflict with the TCPA such that preemption is an issue.

On these motions, Antollino requests judgment in the amount of the minimum statutory damages of \$500 for each offending fax. He has withdrawn his demand for treble damages available under the TCPA, and all other relief demanded in the complaint. There is no factual dispute regarding the number of

faxes he claims in the complaint to have received from each defendant. Antollino received four faxes from LaSalle Services, Inc., five from Pecoraro Group, and seven from Bluestone.

Accordingly, it hereby is

ORDERED that the motion for summary judgment by Antollino is granted, and the cross-motions by Bluestone and Pecoraro Group are denied; and it further is

ORDERED that Antollino is entitled to judgment against LaSalle Services, Inc. in the amount of \$2,000, plus costs and disbursements as taxed by the Clerk of the Court; and it further is

ORDERED that Antollino is entitled to judgment against Bluestone in the amount of \$3,500, plus costs and disbursements as taxed by the Clerk; and it further is

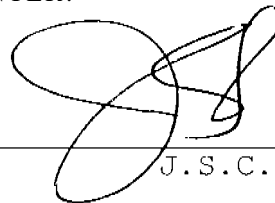
ORDERED that Antollino is entitled to judgment against Pecoraro Group in the amount of \$2,500, plus costs and disbursements as taxed by the Clerk; and it further is

ORDERED that the remainder of the complaint is severed and dismissed; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 12, 2004

ENTER:

  
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J.S.C.

5 **JANE S. SOLOMON**