

**Stern v Andrew Lavcott Bluestone**

2006 NY Slip Op 30522(U)

August 18, 2006

Supreme Court, New York County

Docket Number: 111895/05

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

Index Number : 111895/2005

STERN, PETER MARC

vs  
BLUESTONE, ANDREW LAVOOTT

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

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

MOTION DATE 2/21/06

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1-3

4-6

7-8

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.

*N.B. -- Preliminary conference is scheduled for Sept. 18, 2006 at noon.*

**FILED**

AUG 25 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8-18-06

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----x  
PETER MARC STERN,

DECISION AND ORDER

Plaintiff,

Index No. 111895/05

-against-

ANDREW LAVOOTT BLUESTONE,

Defendants.

-----x

Jane S. Solomon, J.:

Plaintiff Peter Marc Stern ("Stern") commenced this action on August 24, 2005 against defendant Andrew Lavooott Bluestone ("Bluestone") pursuant to the Telephone Consumer Protection Act of 1991, 47 USC § 227 ("TCPA"). Stern is seeking damages and injunctive relief for unsolicited advertisements sent by Bluestone to Stern's fax machine. Stern moves for partial summary judgment, injunctive relief, and dismissal and summary judgment as to Bluestone's affirmative defenses. For the reasons below, the motion is granted in part and denied in part.

Stern alleges that from November 25, 2003 through March 29, 2005, he received fourteen faxes from Bluestone on a fax machine he owns. The faxes were entitled "Attorney Malpractice Report©" and subtitled "Free monthly report on Attorney Malpractice from the Law office of Andrew Lavooott Bluestone." Bluestone's legal practice consists primarily of representing plaintiffs in attorney malpractice claims.

The faxes were authored by Bluestone and contained information regarding issues, trends and cases involving legal

malpractice claims. The faxes provided Bluestone's contact information, including a phone number and two website addresses. Bluestone obtained Stern's fax number from the *New York Lawyers Diary and Manual*.

Stern's complaint contains two causes of action. The first cause of action seeks money damages for Bluestone's alleged violation of the TCPA. In his second cause of action, Stern seeks injunctive relief as provided by the TCPA. Bluestone's affirmative defenses contend that: 1) the statute of limitations has expired; 2) plaintiff has unclean hands; 3) laches applies; and 4) the TCPA is unconstitutional as applied on the ground that the faxes were not "unsolicited advertisements" within the meaning of the TCPA.

The TCPA provides in part:

It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.

47 USC § 227(b)(1)(C)(2006). "Unsolicited advertisement" is defined as: "any 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, in writing or otherwise." *Id.* at § 227(a)(5). The statute authorizes private actions to enjoin violations and to recover actual monetary damages from such violation, or \$500 for each violation, whichever is greater. *Id.* at § 227(b)(3). A willful or knowing violation of the TCPA permits a court to award treble damages at its discretion. *Id.*

The TCPA prohibits unsolicited faxes that have the effect and purpose of advertising services, directly or indirectly. Rudgayzer & Gratt v Enine, Inc., 4 Misc 3d 4, 7 (2d Dept 2004). In enacting the TCPA, Congress aimed to prevent cost-shifting to unwilling fax recipients and the deprivation of fax machine use. Id. at 8. In Rudgayzer, the court held that an unsolicited fax that mentioned defendant's company name and contact information was an unsolicited advertisement within the meaning of the TCPA. Id. Although the fax did not explicitly invite recipients to buy services, the court reasoned that the fax had the purpose and effect of influencing fax recipients to buy the services mentioned by associating the defendant with the services. Id. at 7-8. The court noted the distinction between an unsolicited advertisement and a fax that purely provides information, but held that a fax that pitches a service under the guise of providing information about it is an advertisement. Id. at 8. The court reasoned that such a fax proposed a commercial transaction, notwithstanding that the proposal would occur when the recipient contacted the sender. Id.

The Rudgayzer decision focused on the risk that advertisers could circumvent the TCPA's prohibitions by reformatting advertising faxes to describe a product or service and to provide contact information. The identity of the sender and the nature of his business can determine whether a fax falls under the TCPA's proscriptions. Id. An unsolicited fax sent by a commercial

or professional entity could violate the TCPA, while the same fax sent by a public interest organization would not. See id. Finally, a "willful or knowing" violation of the TCPA requires only that the sender have reason to know or should have known that his conduct would violate the statute. Id. (quoting Texas v American Blast Fax, Inc., 164 F Supp 2d 892, 899 [W.D. Texas 2001]).

Similar to the fax in Rudgayzer, the faxes in the present case provide information about a service. They also include the name of Bluestone's law firm and contact information. Although the faxes do not directly offer Bluestone's services as a legal malpractice attorney, they indirectly advertise the commercial availability and quality of such services. The faxes connect Bluestone's law firm with the information provided on legal malpractice, and invite contact for further information. The websites referenced in the faxes tout Bluestone's specialization in attorney malpractice suits. The faxes have the purpose and effect of influencing recipients to procure Bluestone's services.

Bluestone contends that the faxes are purely informational and represent his efforts to help attorneys avoid malpractice. However, by including the name of his law firm and contact information, Bluestone indirectly proposes a commercial transaction. Moreover, Bluestone's professional role as an attorney specializing in legal malpractice claims supports the conclusion that the faxes advertise his services. That Bluestone sent the faxes on behalf of a for-profit law office, confirms their

commercial nature. As stated in Rudgayzer, advertisers cannot evade the TCPA's prohibitions simply by editing unsolicited faxes to exclude direct offers of goods and services.

Stern's affidavits establish that the faxes were sent to his fax machine without prior written permission, as required by the TCPA, and Bluestone also concedes that he sent them. Bluestone was served with a similar complaint for violation of the TCPA in 2003, leading to summary judgment against him in this court 2004. Antollino v LaSalle Services, Inc., NY County Index No. 116629/03 (Sup. Ct. NY County, May 21, 2004). As such, Bluestone was aware of the TCPA's proscriptions and should have known that his conduct violated the statute. Therefore, the motion for partial summary judgment on the issue of Bluestone's liability is granted. The court also finds as a matter of law that Bluestone willfully and knowingly violated the TCPA.

That part of Stern's motion seeking summary judgment dismissing the fifth affirmative defense, which challenges the constitutionality of the TCPA as applied, also is granted. The statute's constitutionality was upheld by the courts to date, and the circumstances of this case do not warrant a different result. See, e.g., Rudgayzer, 4 Misc.3d at 8-12; and Missouri ex. rel. Nixon v Blast Fax, Inc., 323 F3d 649 (8<sup>th</sup> Cir. 2003).

Likewise, Bluestone's argument that TCPA applies only to interstate calls, citing Gottlieb v Carnival Corp., 367 FSupp2d 301 (EDNY 2005), is unpersuasive, and not only because that decision

has been reversed (Gottlieb v Carnival Corp. 436 F.3d 335 [2d Cir. 2006]). In 1989, New York enacted a statute prohibiting certain commercial fax transmissions that is more lenient in some respects than the TCPA. General Business Law § 369-aa. However, Congress has not ceded the field of telecommunications to state regulation, and TCPA is not pre-empted by § 369-aa.

Stern's second cause of action is for an injunction barring Bluestone from sending further faxes. A party seeking injunctive relief under the TCPA must demonstrate a likelihood of future violations for an injunction to issue. Edwards v Emperor's Garden Restaurant, 130 P3d 1280, 1285 (Nev 2006). Here, Stern has not shown that Bluestone is likely to continue sending faxes to Stern's fax machine. Furthermore, Stern has not received a fax from Bluestone since 2005. Therefore, injunctive relief is denied.

In his second affirmative defense, Bluestone states that the action is barred by the expiration of the statute of limitations. The TCPA does not have an express statute of limitations; it authorizes a private right of action "if otherwise permitted by the laws or rules of court of a State." Bluestone contends that the present action falls under the category of "actions to enforce a penalty or forfeiture created by statute" under CPLR § 215(4), requiring a one-year statute of limitations. Bluestone points to the TCPA's treble damages provision as support that the TCPA creates a penalty.

Stern asserts that actions under the TCPA are governed

by 28 USC § 1658, which provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the enactment of [28 USC § 1658]" has a four-year statute of limitations. This has been interpreted to provide that a cause of action created by a federal statute enacted after December 1, 1990 has a four-year statute of limitations, unless otherwise specified. Jones v. R.R. Donnelly & Sons Co., 541 US 369, 382 (2004).

The New Jersey Appellate Division recently examined the statute of limitations issue in TCPA actions in Zelma v. Konokow and Konokow Assoc., 879 A2d 1185 (NJ 2005). The court held that the four-year statute of limitation authorized by 28 USC § 1658 applied to TCPA actions, absent adoption of a limitations period expressly applicable to the TCPA. Id. at 1190. The court noted that the TCPA was enacted in December 1991 and created a cause of action for its violation (id. at 1186); and it reasoned that selecting the most analogous state statute of limitations would lead to legal complexities and uncertainties that Congress had sought to eliminate with a catchall limitations period. See id. at 1189. In contrast, Nevada has taken the alternative approach by adopting the state statute of limitations for TCPA claims. See Edwards, 130 P2d at 1287. The Nevada court reasoned that 28 USC § 1658 was enacted only to aid federal courts adjudicating actions created by federal statute. Id.

This court finds the Zelma reasoning more persuasive.

The present action illustrates the complexity and uncertainty of applying a state statute of limitations. While Bluestone contends that the present case seeks to "enforce" a penalty created by statute, restricting the limitations period to one year under CPLR § 214(4); it more closely resembles a case that seeks to "recover" a penalty created by statute where a three-year statute of limitations applies. CPLR § 214(2). The TCPA expressly provides for actions to "recover for actual monetary loss" from a violation. 47 USC § 227(b)(3)(B).

Under Bluestone's CPLR § 215(4) approach, Stern's action would be time-barred as to eight of the fourteen faxes at issue, because the first fax was received in November 2003 and this action was commenced in August 2005. In contrast, under CPLR § 214(2), Stern's action would fall within the three-year statute of limitations as to all the faxes received. Nonetheless, whether the appropriate state statute of limitations is one or three years will require determining whether the action seeks to "enforce" or "recover," and what constitutes a "penalty." In enacting 28 USC § 1658, Congress sought to eliminate the confusion accompanying federal statutes with no express limitations periods. Given the TCPA's lack of an express limitations period and the inherent uncertainty in selecting an analogous state statute of limitations, 28 USC § 1658's four-year statute of limitations is appropriate for TCPA actions. Therefore, plaintiff's motion seeking dismissal and summary judgment against defendant's statute of limitations defense

is granted.

With respect to Bluestone's unclean hands defense, he must show that Stern engaged in immoral or unconscionable conduct that caused him to sustain an injury. 390 West End Associates v Baron, 274 AD2d 330, 333 (1st Dept 2000). Bluestone argues that Stern's decision to publish his fax number in the *New York Lawyers Diary and Manual* constituted express permission for lawyers to send unsolicited faxes. A fax number in a directory may be considered implicit permission, but it cannot be considered the "express" permission the TCPA requires. The plain meaning of "express" permission is clear and direct permission. See Black's Law Dictionary (8th ed., West 2004). In any event, an attorney who permits his fax number to be published in a directory of attorneys is hardly engaged in immoral or unconscionable conduct, so this affirmative defense has no merit.

Bluestone's laches defense also has no merit. Laches is an equitable defense "based on a lengthy neglect or omission to assert a right," resulting in prejudice to the defendant. See In re Linker, 23 AD3d 186, 189 (1st Dept 2005) (quoting Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 (2003)). "The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches." Id. Prejudice is demonstrated by showing injury, change of position, or some other disadvantage resulting from the delay. Id.

Here, Bluestone has not demonstrated prejudice.

Bluestone argues that Stern was obligated to communicate that he did not want to receive further faxes after the first transmissions. But a recipient has no obligation to notify an offender he is violating the TCPA. The TCPA does not require recipients of unsolicited fax advertisements to contact senders and request that they stop. Moreover, Stern never gave Bluestone prior express permission to send the initial faxes, as required by the TCPA.

Bluestone also sent faxes to Stern's fax number that were intended for another lawyer, Robert Cherofsky, who once shared the fax machine with Stern but who no longer did so when the faxes were sent. Bluestone contends that Stern had a duty to notify him that Cherofsky was no longer receiving faxes through Stern's machine. Again, Stern had no such duty, particularly where Bluestone had not obtained prior express permission to send the faxes to Cherofsky, either. Accordingly, it hereby is

ORDERED that plaintiff's motion for summary judgment is granted in part as follows:

1. Partial summary judgment is granted to plaintiff and against defendant as to liability on the first cause of action, and the issue of damages shall be determined at trial;
2. Summary judgment is denied with respect to the second cause of action, and it is dismissed;
3. Defendant's second, third, fourth, and fifth affirmative defenses are dismissed; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY on September 18, 2006 at 12 noon.

Dated: August 18, 2006

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**FILED**

AUG 25 2006

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