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

PLATKE AND PERKOWITZ, L.L.P., RSL CONSULTING, INC., DAVID GEIGER, EMPOYER SOLUTIONS INC., HDB INCORPORATED, NATIONAL EDUCATIONAL, ACCEPTANCE CORPORATION, And WEST COUNTY ENDODONTICS, LTD.	)	March 28, 2005 02AC-19041
V.	)	Division 43
IHIRE INC.COM INCORPORATED	)	

ORDER

This matter came before the Court on January 28, 2004 on Plaintiffs' Motion for Summary Judgment. The parties have filed memorandum of law and the Court has heard the arguments of both parties. For the reasons set forth below, Plaintiffs' motion is granted.

STANDARD OF REVIEW

The rationale behind summary judgments as permitted under Rule 74.04(c)(3) of the Missouri Rules of Civil Procedure is to facilitate the expeditious determination of a controversy when there is no genuine issue as to any material fact. Rockwell international, Inc. v. West Port Office Equipment Company, 606 S.W.2d 477, 479 (Mo.App. 1980). ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). All facts are construed in the light most favorable to the non-moving party. Once the moving party sets out competent evidence establishing sufficient facts to entitle him to judgment, the nonmoving party must come forth with competent evidence to demonstrate the existence of a material factual dispute. The non-moving party has the burden of refuting the facts asserted under oath

by the movant. ITT Commercial Fin. Corp. v. Mid-America Marine, 854 S.W.2d 371, 376 (1993).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action originally brought by Plaintiffs against Defendant IHire alleging transmissions of unsolicited advertisements via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Plaintiffs moved for summary judgment supported by affidavit. Factual allegations in a motion for summary judgment that are not denied are treated as admitted. Reese v. Ryan's Family Steakhouses, Inc., 19 S.W. 3d 749, 752 (Mo.App. S.D. 2000). Furthermore, if summary judgment affidavits are not contradicted by the opposing party, the matters set forth therein are deemed admitted. Fueston v. Burns and McDonnell Engineering Co., Inc., 577 S.W.2d 631, 635 (Mo.App. W.D. 1994).

The material facts are generally not in dispute, although the parties reach different conclusions on how the law applies to the undisputed facts. Plaintiffs placed ads in the newspaper or on the Internet seeking applicants for employment, and provided their fax numbers in those ads. Defendant provides services to entities like Plaintiffs who are seeking job applicants. Defendant sent a total of 20 faxes to Plaintiffs. Copies of the 20 faxes are attached to the Petition and are before the Court. Defendant did not obtain prior express permission to send the faxes at issue to any Plaintiff.

As a preliminary matter, Defendant argues that because Plaintiffs' prior Motion for Summary Judgment was denied, Plaintiffs cannot now bring another such motion. The Court does not agree, and ruled on this issue at the hearing on November 19, 2003.

The Court finds nothing in the Missouri Rules prohibits a party from bringing a second motion for summary judgment. But it is obvious that a party should not bring repetitive, duplicative motions on issues that a court has already decided. However, the Court is of the opinion that Plaintiffs' motion contains sufficient new matter to be heard. For example, Plaintiffs' current motion includes additional facts regarding the issue of "prior express permission or invitation," which is a critical determination in a TCPA claim as it represents an exemption to the statute.

Defendant also argues that Plaintiffs should not have a "second bite at the apple" because summary judgment was previously denied. Simply because one summary judgment motion was denied does not mean that a subsequent summary judgment could not be perfected

and decided in favor of Plaintiffs. Even if not fully decided in favor of Plaintiffs, such a motion could be granted in part and a number of issues of both fact and law could be decided so as to narrow the issues left to be tried. Supreme Court Rule 74.04(d). A former adjudication is only conclusive as to "questions raised directly and passed upon." Heinman v. Heinman, 845 S.W.2d 37 (Mo.App. 1992) (emphasis added). See, also, Restatement (Second) of Judgments §§ 27, comment e (1982). In this instance, the only issue decided in Plaintiffs' prior motion was the one agreed to by the parties finding that Defendant did in fact send the faxes at issue. No other issues were decided by the Court and Plaintiffs are free to raise them in a new motion.

1. **The Faxes at Issue Are Advertisements for Property, Goods, or Services.**

Defendant argues that Lutz Appellate Svcs, Inc. v. Curry, 859 F Supp. 180 (1994) stands for the proposition that "when an employer hires an employee, no one characterizes the hiring as a property sale, exchange or transaction." However, in Lutz, the faxes sent were soliciting job applicants - they were not faxes for an employment agency offering its services to the employer to help the employer find applicants. The faxes in Lutz stated "curry & taylor is now hiring ... All positions ...call today 1-800-222-8738." Lutz is wholly inapposite to the case at bar.

In addition, Lutz only addressed whether offering employment was a form of "property" and did not discuss whether it could be a "service." The St. Louis courts have previously found Lutz to be unpersuasive in this circumstance. See Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., 2001 TCPA Rep. 1040 (Mo. Cir. Ct. Aug. 28, 2001). More recently, the Eighth Circuit Court of Appeals rejected the holding of Lutz. Missouri v. Am. Blast Fax, Inc., 323 F.3d 649 at n. 6 (8th Cir. 2003).

It is clear that the faxes sent by Defendant are aimed at businesses who are looking for job applicants. Defendant is in the business of assisting employers seeking job applicants, and the faxes at issue are promoting and advertising that business. Defendant is offering to take Plaintiffs' job postings, and publicize them to a large number of potential job seekers. This is a "service" by any common sense definition.

2. **Publishing an Advertisement for Job Applicants Does Not Constitute Express Permission or Invitation to Receive Faxes Promoting Defendant's Service.**

Defendant next argues that when an employer publishes its fax number in a newspaper or on the Internet, in a posting for a job opening, Defendant is free to send advertising faxes to

that company, and that "[t]he faxes [in this case] were sent in response to the plaintiffs' employment needs." This argument fails for several reasons.

Defendant is not a job applicant -- it is a service provider. Job applicants may have been invited to send resumes. That does not equate to an invitation to a service provider such as Defendant to send faxes promoting their job advertising services.

As the St. Louis Courts have already determined, Congress enacted a specific statutory scheme, that requires "prior express permission or invitation" in order to send fax advertisements. 47 U.S.C. § 227(a)(3). The phrase "prior express permission or invitation" is not defined in the statute, but Black's Law Dictionary defines "express" as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

See also, Brentwood Travel, Inc. v. Lancer, Ltd., 2001 TCPA Rep. 1019 (Div. 45) (Mo. Cir. Aug. 15, 2001). Congress singled out unsolicited faxes for the most stringent restrictions imposing strict liability. This is wholly reasonable, given that Congress found unsolicited fax advertisements interfered with commerce, and cost the recipient both time and money. See H.R. Rep. No. 317, 102nd Cong., 1st Sess. 1991 at 10, 25. Unsolicited faxes shift the cost of advertising to the unwilling recipient. Id. at 25. They are analogous to a long distance telemarketing call made with the charges reversed or junk mail sent with postage due. As a result, the statute is explicit that obtaining "prior express invitation or permission" presents the only exception to the TCPA's comprehensive prohibition on sending unsolicited fax advertisements. Congress spoke clearly and mandated that prior permission or invitation must be "express." It has not been alleged that the "job postings" made by Plaintiffs contained express language asking for service providers such as Defendant to send faxes offering their services.

Defendant has indicated that the only way it obtained Plaintiffs' fax numbers is from those numbers being published on an Internet site or in an ad in the newspaper. Merely publishing a fax number does not equate to "prior express permission or invitation." In the Matter of the Telephone Consumer Protection Act, Memorandum Opinion and Order, 10 FCC Rcd 12391 at ¶ 37 (1995)

("We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements. Similarly, publication of one's fax number would not constitute prior express permission or invitation absent the recipient's express consent to use of the telephone facsimile number for the purpose of receiving an advertisement.") Defendant has presented no evidence of any other method whereby it obtained "prior express permission or invitation" to send these faxes, and the Court finds that Defendant did not obtain "prior express permission or invitation" to send the faxes to Plaintiffs.

The elements of the TCPA claims having been met, Plaintiffs are entitled to judgment on the issue of liability as a matter of law.

3. Willful or Knowing Violations

The TCPA provides for treble damages upon a showing that Defendant's conduct was either willful or knowing. Defendant did exactly what it set out and intended to do in sending the faxes to fax numbers mentioned in newspapers and web sites. It is also not disputed that Defendant continued sending the faxes at issue even after suit was filed in this matter. Without any doubt, this conduct is not only willful and knowing as those terms are used in the TCPA, they are wanton and intentional. Such disregard of a consumer protection statute such as the TCPA warrants the full measure of the statute's treble damages provision.

4. **Injunctive Relief**

The TCPA provides for injunctive relief to a successful plaintiff. Defendant is properly before this Court, and recognizing the role of a successful plaintiff under the private attorney general doctrine, such an injunction should prohibit not only future unsolicited faxes to Plaintiffs in this suit, but should enjoin any violation committed by Defendant against any person. Based on Defendant's admitted conduct of sending unsolicited fax advertisements to fax numbers gleaned from newspapers and web sites, the Court finds that an injunction commanding Defendant to refrain from activities in further violation of the statute is warranted. Defendant is hereby enjoined from sending or causing to be sent through any contractor or other intermediary or agent, any facsimile transmissions of any advertising or promotional materials, without obtaining prior express permission of the recipient regardless of whether that recipient is a party to this lawsuit or not. In order to insure compliance, Defendant shall maintain a written record of the express invitation or permission obtained, the date it was obtained, the

manner of acquiring the same and the person in Defendant's organization obtaining the permission. For purposes of this Court's Order, prior invitation or permission shall not include any conduct for which the Court has determined that the Defendant was liable under this Order.

CONCLUSION

Plaintiffs' Motion for Summary Judgment is granted. A separate judgment consistent with this Order issued previously.

SO ORDERED this 28 day of March 2005:

Hon. Michael T. Jamison
Circuit Court Judge, St. Louis County, Missouri
Division 43