

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

WILLIAM ADLER	*	
Plaintiff	*	CA 03-8109
v.	*	
KEVIN KATZ, et al	*	Honorable John M. Campbell
Defendants	*	Initial Conference: Jan. 16, 2004, 9:30 AM
** * * * *	*	

PLAINTIFF’S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT JEFF PAYNE’S AND DEFENDANT ROBERT BATTAGLIA’S MOTIONS TO DISMISS

The Plaintiff, William Adler, through undersigned counsel, Michael C. Worsham, Esq., responds to the separate Motions to Dismiss filed by Defendant’s Jeff Payne and Robert Battaglia. These motions are similar, and should be denied. Both Motions are untimely, failed to comply with Rule 12-I, frivolous and entirely lacking in merit, and filed by attorneys who should be disqualified from this case due to their role as a witness in the case and other conflicts of interest.

PRELIMINARY STATEMENT OF THE CASE

This suit is brought under D.C. Consumer Protection and Procedures Act, D.C. Code § 28-3904, the federal Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1) (TCPA), invasion of privacy, negligence, civil conspiracy, and aiding and abetting. These counts are based on three main components related to Defendants’ illegal actions: (1) invasive and systematic “war-dialing” of phone numbers to identify fax numbers for Defendant Fax.com’ fax number database, (2) subsequent and continued sending of unsolicited commercial “junk’ faxes to the fax numbers in Fax.com’s database without the express permission of the recipients,

including Plaintiff, and (3) fabrication of false documents and perjured testimony by Defendants Darrell Smiley and Charles Martin after Fax.com or its clients are inevitably sued for the unsolicited junk faxes.

Defendants Jeff Payne and Robert Battaglia are deeply and actively involved with the actions in (1) and (2) above, as described below.

RESPONSE TO MOTIONS TO DISMISS

1. Defendants' Motions to Dismiss Are Untimely

Defendant Robert Battaglia was served on October 31, 2003 by certified mail. Rule 12(a) (1) requires that “a defendant shall serve an answer within 20 days after being served with the summons and complaint.” Defendant Battaglia did not file either an Answer or a motion under Rule 12(b) within 20 days of the Oct. 31, 2003 service date. Battaglia did not file his Motion to Dismiss until Nov. 26, 2003 (the Motion was sent to the Court on Nov. 25, 2003 via overnight mail).

Defendant Jeff Payne was served October 24, 2003 by certified mail. An Answer or Motion was due by Nov. 13, 2003. His Motion to Dismiss was served on November 13, 2003. It appears that the Motion was not actually filed with the Clerk until Friday Nov. 14 at the earliest, or else Monday Nov. 17, 2003. Either of these days are too late. The Motions of both Defendants are untimely. Both Defendants are thus currently in default under Rule 12(a)(5), which the Clerk or Court can enter sua sponte at any time.

2. Defendants' Motions Failed to Comply With Rule 12-I

Defendants' Motion to Dismiss also fails to conform with Rule 12-I(a), which requires a moving party to “first ascertain whether other affected parties will consent to the relief sought.” before filing a motion. Defendants failed to do this, despite the fact that their same counsel attempts to comply with this very Rule in another case in this Court, *Morris v. Fax.com, et al.*, Case # CA-03-1109 (Judge Neal Kravitz), a case which also involves some of the same Defendants as in the instant case. This Court should note repeated failures by counsel to comply with Rule 12-I.

Rule 12-I(a) makes it clear that failure to comply with the rule prohibits the Court from entertaining a motion: “Only when the movant certifies in writing that despite diligent efforts consent could not be obtained, or in the case of Rule 11 motions, resolution of the disputed issues is not possible, will the Court consider the motion as a contested matter.” Defendants’ failure to comply thus prohibits this Court from even considering the Motions to Dismiss.

Another failure regards location information. Rule 10-I(b) requires in relevant part that “The 1st pleading filed by or on behalf of a party shall set forth in the caption the party’s name, full residence address.” Defendants’ Motion to Quash does not contain this location information for either Defendant Payne or Battaglia. Undersigned counsel has previously pointed out this Rule and its location information requirements to the same law firm which purports to represent Mr. Payne and Mr. Battaglia in this case.

3. Defendants Motions to Dismiss are Frivolous and Lack Merit

In addition to the procedural defects just described, on the merits, Defendants’ Motions are frivolous. Defendants purposefully misuse the FCC definition of ‘common carrier.’ Defendants also appear to seek dismissal all Counts against them, but their argument at best only addresses the statutory claims in Counts 1 to 3, and does not address common law claims for invasion of privacy and negligence in Counts 4 and 5. Thus Plaintiff need only address the motions as they relate to Plaintiffs statutory claims.

A. Jeff Payne and Robert Battaglia Have Admitted to Their Involvement With “War-dialing” to Send the Unsolicited Faxes To Plaintiff

Plaintiff Adler attached to the Complaint, and attaches again herein as Exhibit A, three Caller ID snap shots of calls made to Plaintiff by the Fax.com Defendants (Kevin Katz, Eric Wilson, Charles Martin, Darrel Smiley and Robert Battaglia) and Defendant Jeff Payne. These

calls were made at 3AM and 6 AM in the morning as part of these Defendants' attempts to identify additional fax numbers to be added to a database used by Defendants to send unsolicited faxes illegally. Defendants' systematic search for fax numbers in this manner is commonly referred to as "war-dialing." The Caller ID photos show the Virginia area code numbers from which the war-dialer calls originated, and Defendant Jeff Payne's name as the subscriber to those numbers.

War-dialing was specifically outlawed by the FCC. *See* FCC Report and Order, FCC 03-153, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 2003 FCC Lexis 3673, 68 FR 44144-01, (Released July 3, 2003). The FCC created a new regulatory subsection to address war-dialing which provides that "No person or entity may (7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line." 47 C.F.R. § 64.1200(a)(7). In a deposition taken by the Securities and Exchange Commission on January 31, 2003, Thomas Roth, Chief Financial Officer of Fax.com, also admitted to this 'war-dialing' activity used to determine whether any number is a fax number, and also admitted that the faxes sent by Fax.com are unsolicited. (A copy of the relevant deposition transcript testimony of Mr. Roth is attached herein as Exhibit B - *See* p. 17, lines 1-4: MR. KIM: So these faxes are unsolicited?; THE WITNESS: Yes.").

Importantly, Plaintiff William Adler has already sued Fax.com, Inc. and/or its clients previously in this D.C. Superior Court in the cases *Adler v. Advanced Wireless Cellular Communications, Inc.*, Case # SC-01-12944 and *Adler v. Imak Wireless Networks, Inc.* Case # SC-01-14719. Fax.com, which is paying for the defense of both Payne and Battaglia, thus knew very well of Plaintiff's obvious objection to receiving unsolicited faxes and calls. Payne and Battaglia can not proclaim ignorance that they did not know that persons generally, and Plaintiff

specifically, obviously objected to Defendants' conduct.

Jeff Payne admits to his involvement in making these war-dialer calls since 2000 as part of an agreement with Defendant Battaglia, as well as to Payne's being paid for his role and involvement in this illegal junk faxing activity. (*See* Payne Affidavit at ¶¶ 2-4, attached as Exhibit C-1). Battaglia also admits to his involvement with this illegal activity since 2000, first on behalf of Defendant Fax.com, and now through a new company Battaglia is President of called Telecom Tech Support (TTS). (*See* Battaglia Aff. at ¶¶ 2-5, attached as Exhibit C-2). Battaglia admits being paid for his role. *Id.* On information and belief, Plaintiff asserts that Battaglia has made several hundred thousand dollars for his involvement in this ongoing illegal activity. TTS is one of several companies created by the Fax.com Defendants and others to continue Fax.com's illegal war-dialing and junk faxing in light of the numerous lawsuits, class actions, and attorney general enforcement actions, and FCC's \$5.4 M Notice of Apparent (NAL) liability filed against or issued to Fax.com. (*See e.g.* In Re Fax.com, Inc., 2002 WL 1798553, 17 F.C.C.R. 15,927, 17 FCC Rcd. 15,927 (F.C.C., Aug 07, 2002) (FCC 02-226, FRN 0007-2970-47, EB-02-TC-120), which is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-226A2.pdf). This \$5.4 M fine in August 7, 2002 arose from six separate FCC citations for sending unsolicited advertisements via fax. (*See* Dec. 26, 2000 FCC citations issued to Fax.com (EB-00-TC-148, EB-00-TC-149, EB-00-TC-150, and EB-00-TC-179); May 11, 2003 citation EB-01-TC-027) and the May 31, 2001 citation EB-01-TC-028).

B. Defendants Payne and Battaglia are not FCC "Common carriers"

Defendants make the utterly meritless argument that they are 'common carriers' and therefore not liable. (*See* Payne and Battaglia Memorandums at p. 2). Defendants are not 'common carriers,' a term specifically defined by the FCC:

Common carrier: In a telecommunications context, a telecommunications company that holds itself out to the public for hire to provide communications transmission services.

Note: In the United States, such companies are usually subject to regulations by the Federal and state regulatory commissions. *Synonyms* **carrier, commercial carrier, communications common carrier.**

From *Telecommunications: Glossary of Telecommunications Terms*, Federal Standard 1073C at C-22, National Communications System Technology & Standards Division, General Services Administration, Information Technology Section (August 7, 1996) (bolding in original). A copy of this definition of “common carrier” is attached herein as Exhibit D. This definition is mandatory on all federal agencies. *Id.* at the Foreword page (Exh. D).

Payne and Battaglia are obviously not phone companies, regulated by the FCC or state utilities commission, and are not “common carriers.” The various phone companies that the Fax.com Defendants use to transmit illegal unsolicited faxes, such as Qwest, Cox Communications and Verizon¹ would be FCC common carriers. These FCC common carriers are generally not liable for TCPA fax violations, but can be liable if the carrier has “a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8770 (1992).

The distinguishing point here is that a telephone company, as a common carrier, does not usually know what its phone lines are being used for or transmitting, and therefore can not be held liable for the transmissions. If the carrier does know their phone lines are being used for illegal purpose, they can be liable. Defendants Payne and Battaglia are first off, not separate common carriers, but active and paid participants in the illegal scheme. Secondly, Payne and Battaglia know exactly what is going on, including that faxes are being sent, who they are

¹ In other litigation Fax.com has admitted to using numerous phone companies.

working for, who is paying them, and have done so for several years. Payne even specifically admits in his Affidavit to deciding that the faxes would be broadcast to “numbers [that] would be within the local area codes.” (Payne Aff. at ¶ 4, Exh. C-1). The 202 area code where Plaintiff resides is local to the particular 703-836-4906 exchange used by Payne.

The whole point of the Fax.com Defendants’ scheme is to avoid long distance toll charges by using local persons and locations as hosts for Faxcasters (computers with software and several phone lines) to first engage in war-dialing to identify new fax numbers and then to transmit commercial fax ads. Quite simply, the faxes sent to Plaintiff and others in D.C. would not have been sent without the active, willing and paid participation of Defendants Payne and Battaglia. The ‘telephone facsimile machine’ that actually sent the faxes to Plaintiff and war-dialed Plaintiff at 3 AM and 6 AM in the morning was physically located in Defendant Payne’s house in Alexandria, Virginia. Payne and Battaglia have profited from this arrangement, and likely continue to do so.

It is probable that even Kevin Katz, the President of Fax.com, who does control the company and its activities, does not know all the details or actual content of each fax broadcast or of the millions of faxes sent into D.C. and elsewhere. Katz also probably does not know the actual fax numbers of the millions of faxes sent into D.C., or anywhere else across the U.S. where Defendants send unsolicited faxes. Payne and Battaglia likewise do not know these details, not does any other single employee of Fax.com. Payne and Battaglia are liable for their personal involvement in assisting with transmission of unsolicited faxes into D.C. as described above and admitted to in their own Affidavits. Whether Payne and Battaglia also additionally participated by having designed or controlled the content of the faxes is not relevant or necessary to establishing their liability under the TCPA.

C. Defendants Payne and Battaglia are not fax service providers as defined by the FCC

The Fax.com Defendants determine the message content and where the unsolicited faxes are sent. These faxes are then sent to places including D.C. and to Plaintiff using the very Faxcaster equipment placed in Defendant Payne's Virginia residence which Payne and Battaglia arranged for Fax.com. Fax.com paid Payne and Battaglia for this assistance, and is paying their legal defense in this case. In 2002, in the face of mounting legal actions and judgments against Fax.com and its President Kevin Katz, Defendants created a new company called Telecom Tech Support to locate and host the Faxcaster computers that engage in war-dialing and transmitting unsolicited faxes. These Faxcaster computers and the phone lines connected to them are an integral part of the equipment that actually obtains and determines to whom and which numbers faxes are subsequently sent. Payne and Battaglia are thus are long-standing, integral and paid participants in establishing and maintaining the computer system used to determine where in D.C. unsolicited faxes are sent.

Despite their profitable and willing participation in this scheme, Defendants' separate Motions each make reference to each Defendant having "only acted as a service provider, as defined by the FCC, in the transmission of the faxes." (*See* Def. Memo. at 1). Recognizing the lack of merit in their "common carrier" argument, Defendants cite a footnote in an FCC order that states: "Facsimile broadcast service providers are businesses or individuals that transmit messages on behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Further

Reconsideration, 12 F.C.C.R. 4609, 4613 (April 1997).

The problem for Defendants is that they are not service providers in the sense the FCC footnote states. The FCC is referring to companies that are provided fax content and a list of fax numbers from a client, and who then use their computer and other equipment to broadcast this provided content created by the client to the fax numbers provided by the client. That is not what these Defendants here are. Defendants not only **do** determine who and where the fax messages are received, they even admit so: “Affiant Payne did not, and does not, decide which numbers to which a fax may be broadcasted, other than the numbers would be within the local area codes.” Nov. 12, 2003 Payne Aff. at ¶ 4 (emphasis added). Read without the negatives, Payne admits that he does decide what numbers within local area codes are faxed to. Payne allowed this unsolicited faxing using the Faxcaster equipment he was paid to host in his house. Whether Payne knew about or participated in sending faxes to area codes other than 202 is irrelevant, as Plaintiff Adler is not attempting to hold Payne (or Battaglia) liable for faxes sent to other area codes. Whether Payne or Battaglia acted as Fax.com employees or independent contractors while continuing to assist with transmission of unsolicited faxes is also irrelevant, as the TCPA is a strict liability statute.

Defendant Battaglia’s deeper involvement in arranging Faxcaster hosting and war-dialing and his attempt to escape liability is particularly offensive. His involvement has led to damages beyond those alleged in this suit. Attached as Exhibit E are two Oct 2002 Affidavits from persons in Maryland named Battaglia, including another Robert Battaglia, from the certified class action lawsuit *Levitt v. Fax.com, Inc.* Case # 24-C-01-2218 (Balt. City. Cir. Ct.). These Affidavits detail the horrendous and repeated problems several families have endured simply because their name happened to be Battaglia, and how they were blamed for the late night calls

made by war-dialers arranged by the Defendant Robert Battaglia. These problems including harassing calls and even death threats, all due to actions directly and unquestionably attributed to the Defendant Robert Battaglia in this suit who set up war-dialers in Maryland. These Affidavits also testify to the same invasion of privacy these late night war-dialer calls constitute as alleged by Plaintiff in this suit.

Attached as Exhibit F is the Affidavit of Richard Zelma who was also war-dialed in New Jersey by Defendant Robert Battaglia. Included in Mr. Zelma's Affidavit are the actual Verizon phone records obtained by activating Call Trace (*57) which proves the calls on April 27, 2002 and August 18, 2001 to Mr. Zelma came from lines registered to Defendant Robert Battaglia at a N.J. address. The Affidavit of Mr. Zelma speaks of Mr. Battaglia's involvement with setting up hundreds of similar computers or systems across the U.S.

If this were not enough, Fax.com is still advertising to expand its war-dialer capacity. Attached as Exhibit G are two recent pages from a web site describing in general terms how these Fax casters work, with www.fax.com listed as the contact. Attached as Exhibit H is the October 18, 2002 Affidavit of Steve Kirsch and attachments showing the data contained in an actual Fax caster used by Defendants in San Jose, California. This Fax caster was also used with lines subscribed to by Defendant Robert Battaglia (408-448-4130) and used to send unsolicited faxes. Mr. Battaglia is clearly a key person for sending unsolicited faxes out not just to Plaintiff, but throughout the U.S., and should be held responsible for his actions.

Notably, similar arguments to Defendants' have already been refuted by one federal court to look at this issue. The liability of fax broadcasters under the TCPA was addressed by the U.S. District Court for the Western District of Texas in *State of Texas v. American Blast Fax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000). The defendant in *American Blast Fax* argued that it could not

be held liable under the TCPA “because it merely broadcasts the advertisement for its customers.” The U.S. District Court said,

While the FCC has authority to enforce the TCPA and “prescribe regulations implementing the requirements” of the TCPA, see 47 U.S.C. §§227(b)(2) and (f)(7), the last time the Court checked, Congress did not give the FCC complete power to determine who is liable under the statute. Until that time, the Court will follow the language provided by Congress, which states that “[i]t shall be unlawful for any person within the United States to use any telephone facsimile machine . . . to send an unsolicited advertisement to a telephone facsimile machine.” 47 U.S.C. sec 227(b)(1)(C) (emphasis added). The TCPA places no further restriction on who is liable under this section. . .

Id. at 1089. The opinion also states: “Similarly, the FCC’s implementing regulations provide ‘[n]o person may . . . use a telephone facsimile machine’ to send unsolicited advertisements. 47 C.F.R. §64.1200(a)(3) (emphasis added). The regulations nowhere exempt from liability businesses that solicit fax advertisers, provide fax advertising databases and then send third party faxes.” *Id.* at n. 4. The court summarized the allegations in the pleadings related to the defendant’s conduct, and noted that, “According to the State, Blastfax’s business centers around using a fax machine to send unsolicited advertisements - the precise conduct outlawed by the TCPA.”

In summary, for at least three years Defendants Payne and Battaglia have knowingly and willingly assisted the Fax.com Defendants to both war-dial D.C. numbers to identify new fax numbers and to send illegal unsolicited faxes to numbers identified as fax numbers. They have personally profited from their involvement. They show no sign of having stopped this illegal activity. They now wish this Court to endorse their activities assisting the illegal transmission of faxes into D.C.

4. Defendants’ Counsel Should be Disqualified

Attorney Edwin H. Staples, Peter F. Axelrad, and the Annapolis law firm of Council, Baradel, Kosmerl & Nolan have entered an appearance in this case. Mr. Staples and Axelrad are allegedly participants in some of the improper actions alleged in this suit (*see* Amended Complaint ¶ 38-47), and will be called as fact witnesses at trial, and potentially deposed. D.C. Rule of Professional Conduct 3.7 prohibits a lawyer from participating as counsel in which the lawyer is likely to be a necessary witness. Here this is not just likely, it is dead certain. There are other reasons that should disqualify this firm from being counsel in this case related to conflicts among the numerous Defendants. Plaintiff has already requested counsel to disqualify themselves, and will soon file a separate Motion to Disqualify Counsel which will go into more detail on this issue.

It is troubling that the same counsel continues to enter appearances for Defendants when they should not have entered for any Defendants in this case. For now the Court need not resolve the disqualification of counsel to decide Payne and Battaglia's Motions to Dismiss.

CONCLUSION

Defendants' Motions to Dismiss are untimely, fail to comply with Rule 12-I, are utterly lacking in merit, and were filed by counsel who should be disqualified from in this case. Plaintiff requests that these motions be denied. Plaintiff further requests that the Court consider sanctions under the Court's own prerogative, as is provided for by Rule 11(c)(1)(B).

Respectfully submitted,

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November 29, 2003

CERTIFICATE OF SERVICE

I certify that on November 29, 2003 a copy of this Response was served via prepaid first class mail on: Council, Baradel, Kosmerl & Nolan, P.A., 125 West Street, Fourth Floor, P.O. Box 2289, Annapolis, Maryland, 21404-2289.

Michael C. Worsham, Esq.