

COUNTY COURT, JEFFERSON COUNTY, STATE OF COLORADO Court Address: 100 Jefferson County Parkway Golden, Colorado 80401	
Plaintiff: USA TAX LAW CENTER, Inc. v. Defendant: CAPITAL ARBITRATION, Inc.	Δ Δ Court Use Only
<hr/> <div style="text-align: right;"> Case No.: 03-C-014825 Division D Ctrm: 3D. </div>	
ORDER	

BEFORE ME is defendant Capital Arbitration, Inc.'s motion to dismiss filed on January 5, 2004. Plaintiff USA Tax Law Center, Inc. filed a response on January 22, 2004, to which defendant replied on February 3, 2004. For the reasons stated below, the motion is **GRANTED**.

I. Background

Plaintiff filed a complaint on August 26, 2003, alleging a violation of the Telephone Consumer Privacy Act ("TCPA"), 47 U.S.C. § 227, against the defendant.¹ Plaintiff contends

¹ In addition to the statutory violation, plaintiffs assert that the defendant's conduct constitutes negligence, invasion of privacy, a trespass, and a conversion of personal property. However, plaintiff's complaint does not list individual claims for relief, and it is unclear whether they seek redress for these proposed causes of action. Nonetheless, I find a claim for relief under § 227(b)(3) of the TCPA is the only appropriate cause of action for defendant's alleged conduct.

Blumberg No. 5716
DEFENDANT'S EXHIBIT
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that its assignor, Sign-A-Rama, received an unsolicited fax advertisement ("fax") sent by or on behalf of defendant in violation of § 227(b)(3)(c) of the TCPA. Plaintiff claims ownership through proper assignment of all causes of action available to Sign-A-Rama in conjunction with defendant's alleged act.

Plaintiff seeks damages in the amount of \$500.00, or \$1,500.00 upon a determination of willful or knowing conduct, pursuant to § 227(b)(3) of the TCPA. Plaintiff also seeks to enjoin the defendant from sending future unsolicited fax advertisements under that same subsection.

Pursuant to C.R.C.P. 307, I granted the parties permission to file dispositive motions in this case. Defendant filed such motion seeking dismissal of plaintiff's complaint under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction.

II. The TCPA

Section 227(b)(1)(C) of the TCPA states, "[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

Section 227 (b)(3) permits an individual or entity to bring in state court –

- (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
- (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or
- (C) both such actions."

Additionally, § 227 (b)(3) allows for treble damages upon a finding that the defendant willfully or knowingly violated the statute.

In light of the foregoing history, I construe § 227(b)(3) to create a right of action intended to protect the privacy interests of the individual harmed by the illegal transmission of unsolicited faxes. Therefore, the common law principles regarding the assignability of an individual's right of privacy claim apply to this case.

B.

The general rule is that assignability and descendibility go hand in hand. *Home Ins. Co. v. Atchison*, 34 P. 281 (Colo. 1893). If a right of action survives the death of the party entitled to sue and passes to his personal representative, it may be assigned; if it does not, the converse is true. *Olmstead v. Allstate Ins. Co.*, 320 F.Supp. 1076 (D. Colo. 1971). Choses in action in tort for damage to property are transferable and may be assigned. *Ford v. Summertree Lane Ltd. Liability Co.*, 56 P.3d 1206 (Colo. App. 2002). However, personal torts not based upon an injury to property or connected with a contractual relation are intangible assets that do not survive the life of the individual claiming injury. See *Stanley v. Petherbridge*, 42 P.2d 609 (Colo. 1935).

Colorado case law has yet to address the assignability of a right of privacy claim. However, other jurisdictions hold that a right of privacy claim does not survive upon the death of the person and therefore it is not assignable. See *Melvin v. Reid*, 297 P.91 (Cal. App. 1931)(right of privacy is purely personal action and does not survive, but dies with the person); *Nicholas v. Nicholas*, 83 P.3d 214 (Kan. 2004)(except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded); See *Young v. That Was The Week That Was a/k/a TW-3, et. al.*, 423 F.2d 265 (6th Cir. 1969)(decedent's heirs had no right of action for invasion of decedent's privacy); See *Shibley v.*

Time, Inc., 321 N.E.2d 791 (Ohio Com.Pl. 1974)(privacy claim is a peculiarly personal one that cannot be assigned and does not survive death).

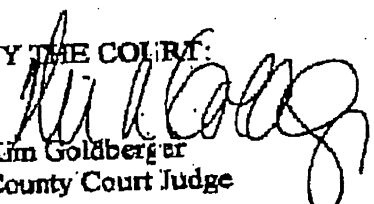
Accordingly, I find that Sign-A-Rama's private right of action created under the TCPA is not assignable to plaintiff.

IT IS THEREFORE ORDERED THAT plaintiff's case is DISMISSED.

I find neither parties' claims to be substantially frivolous, groundless, or vexatious under C.R.S. § 13-17-101, *et seq.*, and award no attorney fees in this case.

March 31st, 2004.

BY THE COURT:


Kim Goldberger
County Court Judge

I certify that I have mailed a copy of this order to the parties this 1st Day of April 1, 2004

Tamara Bartholomew-Tripp

Tamara Bartholomew-Tripp
Division Clerk ITM