COLORADO COURT OF APPEALS

Court of Appeals No.: 05CA1671
Arapahoe County District Court No. 04CV91
Honorable Timothy L. Fasing, Judge

USA Tax Law Center, Inc., d/b/a US Fax Law Center, Inc.,

Plaintiff-Appellant,

v.

MBA Financial Group, Inc.,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE ROY
Loeb and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: January 18, 2007

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Douglas A. Turner, P.C., Douglas A. Turner, Golden, Colorado, for Defendant-Appellee

Plaintiff, USA Tax Law Center, Inc., doing business as US Fax Law Center, Inc. (the Center), appeals the judgment dismissing its complaint against defendant, MBA Financial Group, Inc. (MBA), for lack of standing. We affirm.

In 2002, MBA sent unsolicited telephone facsimile advertisements to Colorado residents, allegedly in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2006). While the Center was not a recipient of the advertisements, some recipients assigned their TCPA and other claims to the Center. The Center then filed a complaint alleging violations of the TCPA and sought statutory damages.

The TCPA, as pertinent here, prohibits the use of any telephone facsimile machine to send unsolicited advertisements to another such machine and creates a private cause of action for the recipients of unsolicited telephone facsimile advertisements to request damages and injunctive relief. 47 U.S.C. § 227(b)(1)(C).

MBA filed a motion to dismiss pursuant to C.R.C.P. 12(c) and (d), contending that violations of the TCPA are not assignable and, therefore, the Center lacked standing to bring the action as an assignee. The trial court granted the motion, concluding that the

TCPA is penal in nature and, as such, alleged violations are not assignable. This appeal followed.

I.

The Center first asserts that federal law, rather than Colorado law, governs the issue of assignments under the TCPA. We disagree.

We review statutory interpretation de novo. Vigil v. Franklin, 103 P.3d 322 (Colo. 2004). When interpreting a statute, we first look to its language, which we construe as written if that language is clear and unambiguous. However, if the language is ambiguous, we may rely on legislative history to discern the legislature's intent. City of Aurora v. Bd. of County Comm'rs, 919 P.2d 198 (Colo. 1996). We must construe statutory provisions in their entirety and give effect to every word contained therein. Bd. of County Comm'rs v. Vail Assocs., Inc., 19 P.3d 1263 (Colo. 2001).

The preemption doctrine is derived from the Supremacy Clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Specifically, federal law preempts state law

> when Congress expresses a clear intent to preempt state law; when there is outright or actual conflict between federal and state law; when compliance with both federal and state law is physically impossible; when there is an implicit barrier within federal law to state regulation in a particular area; when federal legislation is so comprehensive as to occupy the entire field of regulation; or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Middleton v. Hartman, 45 P.3d 721, 731 (Colo. 2002) (quoting State v. The Mill, 887 P.2d 993, 1004 (Colo. 1994)). However, an analysis of federal preemption issues begins with the basic assumption that Congress did not intend to displace state law as it is anticipated that state and federal law will peaceably coexist. Middleton v. Hartman, supra.

Here, the TCPA does not address the issue of assignment of claims. With regard to choice of law, the TCPA states: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State . . . ."

47 U.S.C. § 227(b)(3) (emphasis added). The TCPA also provides: "[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits . . . the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements . . . ." 47 U.S.C. § 227(e)(1)(A) (emphasis added).

The language of the statute makes it clear that Congress did not intend to "occupy the field" or to promote national uniformity as to the transmission of telephone facsimiles as it expressly does not preempt state regulation that differs from federal regulation. The TCPA carries no implication that Congress intended to preempt state law. If Congress intended to preempt state law, it could easily have said so. Moreover, the legislative history shows Congressional intent to facilitate state regulation of unsolicited telephone facsimile advertisements. See Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

Thus, we conclude that Colorado law governs the issue of assignments under the TCPA.

II.

The Center next asserts that it has standing as an assignee under state law. We disagree.

The standard under C.R.C.P. 12(c) for a motion for judgment on the pleadings is essentially consistent with that employed in resolving a motion to dismiss for failure to state a claim, and the rulings are likewise reviewed de novo. Bedard v. Martin, 100 P.3d 584 (Colo. App. 2004). Judgment on the pleadings is appropriate if a movant is entitled to judgment as a matter of law after the court construes the allegations of the pleadings strictly against the movant. Tripp v. Parga, 847 P.2d 165 (Colo. App. 1992). Rendering judgment on the pleadings is not favored. McLaughlin v. Niles Co., 88 Colo. 202, 294 P. 954 (1930).

Generally, Colorado law favors the assignability of claims. Roberts v. Holland & Hart, 857 P.2d 492 (Colo. App. 1993). But causes of action for invasion of privacy are an exception and are not assignable. US Fax Law Ctr., Inc. v. iHire, Inc., 362 F. Supp. 2d 1248 (D. Colo. 2005) (iHire I); Seidl v. Greentree Mortgage Co., 30 F. Supp. 2d 1292, 1302 (D. Colo. 1998); Restatement (Second) of Torts § 652I cmt. a (1977) ("The right protected by the action for invasion

of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable . . . .").

Without a proper assignment, there is no transfer of rights or property, and, as such, the case should be dismissed because the plaintiff cannot claim any injury in fact and no relief can be afforded. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977); Espinosa v. Perez, ___ P.3d. ___ (Colo. App. No. 04CA1939, Nov. 16, 2006).

In iHire I, the plaintiff brought an action in a Colorado state court as an assignee of various commercial entities that had received unsolicited telephone facsimile advertisements from iHire in violation of the TCPA and the Colorado Consumer Protection Act (CCPA). The action was removed to federal district court based on diversity jurisdiction. That court applied Colorado law and concluded, inter alia, that claims under the TCPA are in the nature of privacy claims and therefore cannot be assigned. The court reasoned:

> Under well-established law, a cause of action for invasion of privacy is not assignable and cannot be maintained by persons other than the individual whose privacy is invaded.

> The TCPA is designed to protect privacy interests.
>
> Indeed, eight federal district courts in nine decisions since August 2002 have found that the TCPA exists to protect privacy interests and thus, claims alleging violations of its provisions by transmission of unsolicited facsimiles trigger insurance coverage or other relief that is available for invasions of the right to privacy . . . .
>
> . . . And because the claims are privacy claims, the claims cannot be assigned.

iHire I, supra, 362 F. Supp. 2d at 1252-53 (citations omitted).

Accordingly, the court ruled that the plaintiff lacked standing to bring an action for the receipt of unsolicited telephone facsimile advertisements in violation of the TCPA. iHire I, supra; see also US Fax Law Ctr., Inc. v. iHire, Inc., 374 F. Supp. 2d 924 (D. Colo. 2005) (holding that an action for violation of the CCPA provision prohibiting unsolicited faxes is also not assignable). Two divisions of this court, in McKenna v. Oliver, ___ P.3d ___ (Colo. App. No. 05CA0298, Sept. 7, 2006), and U.S. Fax Law Center, Inc. v. Myron Corp., ___ P.3d ___ (Colo. App. No. 05CA1426, Nov. 2, 2006), agreed with the rationale and analysis of iHire I.

The Center contends iHire I and its progeny were wrongly decided because, based on the legislative history of the TCPA, the

statute does not create a privacy tort. However, the Center does not cite any authority for this proposition, and legislative authority supports the opposite conclusion. For example, according to a Senate Report, "[t]he purposes of the [TCPA] are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile . . . machines and automatic dialers." S. Rep. No. 102-178, at 1, 1991 U.S.C.C.A.N. 1968, 1968 (1991). We also note that the Center's complaint alleges that "[v]iolations of the statute (TCPA) by the Defendant constitute[] . . . an[] <u>invasion of privacy</u>, a trespass, and a conversion of personal property of [the Center]." (Emphasis added.)

Thus, we conclude that the claim relating to receipt of unsolicited telephone facsimiles under 47 U.S.C. § 227 is, at its core, a breach of the right of privacy tort and, as such, cannot be assigned.

III.

The Center next asserts that 47 U.S.C. § 227 claims are assignable because they survive the death of the claimant and

survivability and assignability go hand in hand. In support of this argument, the Center cites Home Insurance Co. v. Atchison, T. & S.F. R.R., 19 Colo. 46, 34 P. 281 (1893), for the general rule that assignability and survivability go hand in hand, and § 13-20-101(1), C.R.S. 2006, the Colorado Survival Statute. As relevant here, § 13-20-101(1) states:

> All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed; and, in tort actions based upon personal injury, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death and shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after date of death.

(Emphasis added.) See also Espinosa v. Perez, supra. A "personal injury" means "[a]ny invasion of a personal right." Black's Law Dictionary 802 (8th ed. 2004). This includes privacy claims.

Here, because the Center does not seek to recover "loss of earnings and expenses," but instead seeks statutory damages, such claims would not survive under § 13-20-101(1).

We conclude, along with the other divisions of this court that the federal district court's reasoning in iHire I, supra, is persuasive as applied to the facts of this case.

Accordingly, we hold that an action based upon the receipt of unsolicited telephone facsimile advertisements by individuals in violation of the TCPA is not assignable because such an action is in the nature of a violation of the right to privacy. Because the Center is an assignee, the Center lacks standing to bring these federal claims. Thus, the trial court correctly dismissed the Center's claims based on lack of standing. Given our conclusion, we need not address whether TCPA claims are not assignable because they are penal in nature.

The judgment is affirmed.

JUDGE LOEB and JUDGE ROMÁN concur.