

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

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CIVIL DIVISION

DAVID GOLDBERG,

Plaintiff,

v.

EMPIRE MORTGAGE, INC., et al.,

Defendants.

ON COMPUTER
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Case No. 04CVH03-3435

Judge Schneider

DECISION (1) GRANTING THIRD-PARTY DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED CERTIFICATE OF SERVICE, FILED SEPTEMBER 7, 2004, AND (2) GRANTING THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED SEPTEMBER 14, 2004 (Case Terminated)

Rendered this 6 day of December, 2004.

Schneider, C., J.

FILED
CLERK OF COURTS
2004 DEC -7 AM 9:14
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO

I. Motion for Leave to File

On September 7, 2004, third-party defendant Mark Linder filed his motion for leave to file an amended certificate of service. Linder argues that "[t]he date of the certificate of service inadvertently stated in his answer was August 25, 2004 when the date should be August 26, 2004." This motion is unopposed. For good cause shown, this motion is warranted.

II. Summary Judgment

A party seeking summary judgment must demonstrate that

- (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion,

and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Welco Indus., Inc. v. Applied Cos. (1993), 67 Ohio St. 3d 344, 346 (brackets in original) (quoting Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327); see Hicks v. Leffler (Franklin 1997), 119 Ohio App. 3d 424, 427 (citing Bastic v. Connor (1988), 37 Ohio St. 3d 144). In this regard, "the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." Dresher v. Burt (1996), 75 Ohio St. 3d 280, 292 (emphasis in original); see Hicks, 119 Ohio App. 3d at 427 (citing Dresher, 75 Ohio St. 3d at 293).

Civ. R. 56(E) provides in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See Mathis v. Cleveland Public Library (1984), 9 Ohio St. 3d 199; Hoffman v. Davidson (1987), 31 Ohio St. 3d 60. Moreover, "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which it bears the burden of production at trial." Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108, 111. Additionally, the factual dispute must be "material." Buckeye Union Ins., 68 Ohio App. 3d at 22 (citing Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242) ("If one's case is supported by only a 'scintilla' of evidence, or if his evidence is 'merely colorable' or not 'significantly probative,' summary judgment should be entered."). However, "a moving

party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove his case. The assertion must be backed by some evidence" Dresher, 75 Ohio St. 3d at 293 (emphasis in original) (distinguishing Celotex Corp. v. Catrett (1986), 477 U.S. 317).

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III. Enforcement of a Settlement Agreement

"It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and enforceable by either party. . . . Further, settlement agreements are highly favored in the law." Continental W. Condominium Unit Owners Ass'n v. Howard E. Ferguson, Inc. (1996), 74 Ohio St. 3d 501, 502 (citing Spercel v. Sterling Indus. (1972), 31 Ohio St. 2d 36, 38; State ex rel. Wright v. Weyandt (1977), 50 Ohio St. 2d 194); see Bolen v. Young (Franklin 1982), 8 Ohio App. 3d 36, 37 ("The general rule is that, where the parties to an action voluntarily enter into a settlement agreement in the presence of the trial court, the agreement is a binding contract and may be enforced.") (citing Spercel, 31 Ohio St. 2d 36).

If "the trial judge is advised of the settlement agreement but does not know the content thereof, then the settlement agreement can be enforced only if the parties are found to have entered into a binding contract." Boster v. C&M Serv., Inc. (Franklin 1994), 93 Ohio App. 3d 523, 525 (citing Bolen, 8 Ohio App. 3d 36). However, "[i]n the absence of allegations of fraud, duress, undue influence, or of any factual dispute concerning the existence of the terms of a settlement agreement, a court is not bound to conduct an evidentiary hearing prior to signing a journal entry reflecting the settlement agreement."

Mack v. Polson Rubber Co. (1984), 14 Ohio St. 3d 34 (syllabus); see United States Fid. & Guar. Corp. v. BOHM-NBBJ, Inc. (Franklin 1995), 104 Ohio App. 3d 381, 384 (quoting Mack, 14 Ohio St. 3d 34 (syllabus)); Spercel, 31 Ohio St. 2d 36 (syllabus, para. 2) (“In order to effect a rescission of a binding settlement agreement entered into in the presence of the court, a party must file a motion to set the agreement aside; and, in the absence of such motion, a trial court may properly sign a journal entry reflecting the settlement agreement.”).

III. Discussion of Summary-Judgment Motion

On September 14, 2004, third-party defendant Mark Linder filed his motion for summary judgment on defendant Empire Mortgage’s third-party complaint against him (which was raised as part of Empire Mortgage’s counterclaim). Linder argues that defendant does “not qualify as one who may file a third party complaint because there is no liability to be passed on” and so did not comply with Civ. R. 14(A); that the settlement agreement concerns case no. 03CVH12-14250, and so Judge Connor retains jurisdiction over the present action; and that res judicata and estoppel apply.

Empire Mortgage’s third-party complaint alleges that “Third Party Defendant Linder misrepresented that he maintained the facsimile machine on which he received unwanted faxes from the Counterclaimant”; that “the Counterclaimant did not know of this misrepresentation and did not learn of the same until Defendant Linder sent the correspondence attached as Exhibit A [e-mail dated May 3, 2004]”; and that “Counterclaimant is entitled to re[s]ci[s]sion of the agreement attached hereto as Exhibit C [‘Settlement Agreement and Release’] based upon the failure of Third Party Defendant

Linder to disclose and/or the misrepresentations as set forth in Exhibit B [complaint in case no. 03CVH12-14250] that he maintained a facsimile machine and received transmissions on the same.” (Plaintiffs’ claims have been settled.)

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In this regard, third-party defendant Linder is entitled to summary judgment as a matter of law.

First, settlement agreements are “valid and enforceable” contracts and “are highly favored in the law.” Defendant was represented by counsel at the time the settlement agreement was being negotiated and was agreed to and is bound to honor a valid settlement agreement.

Second, Linder has presented evidence that he did not make misrepresentations to Empire. In his affidavit, attorney John W. Ferron states that he “personally informed Mr. Janowicz that Mr. Linder had received all of the faxed transmissions at his place of employment” and “that OCSEA had a computer server for faxes that receives and distributes incoming faxes to recipients by email”; that Ferron “made it clear to him that Mr. Linder had received Empire’s faxes at his place of employment, OCSEA, over its equipment and telephone lines”; that “Mr. Janowicz never asked me who owned the telephone lines over which Empire’s faxes were received at OCSEA”; that Ferron and Ferron & Associates never made false or misleading representations to Janowicz; and that defendants never made “any informal request for information or engage in any formal discovery in the Jelen/Linderr class action lawsuit” but “chose . . . to enter into a settlement agreement forever resolving all issues in the case.” (Ferron affidavit, paras. 5, 6, 8-10, 12, 13.) However, Empire presents no evidence that Linder made any

misrepresentations. “When a motion for summary judgment is made and supported as provided in Civ.R. 56, the nonmoving party may not rest on the mere allegations of her pleading, but her response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue.” State ex rel. Burnes v. Athens Cty. Clerk of Cts. (1998), 83 Ohio St. 3d 523, 524 (per curiam) (citing Mootispaw v. Eckstein (1996), 76 Ohio St. 3d 383, 385; Civ.R. 56(E)).

Third, Empire fails to demonstrate that Linder had a duty to disclose that he “received the alleged transmissions by way of a lap top computer and that Defendant [Linder] neither owned nor was responsible for the payment of the telephone lines by which the transmissions were allegedly sent.” Empire cites no legal authority which has held that ownership of or payment for telephone lines and/or computer is material as to the definition of a “consumer” under O.R.C. 1345.01(D) or as a prerequisite to applying 42 U.S.C. § 227 (“TCPA”). O.R.C. 1345.01(D) merely states, “Consumer’ means a person who engages in a consumer transaction with a supplier.” Likewise, 42 U.S.C. § 227(b)(1)(C) states that it is unlawful “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”

In its previous (and now moot) motion to dismiss, Empire cites Aronson v. Bright-Teeth Now L.L.C. (Allegheny C.P. 2002), 57 Pa. D. & C. 4th 1, aff’d 824 A.2d 320, for the holding that the TCPA does not apply to e-mail transmissions and in support of Empire’s argument that “[t]he transmissions at issue were not automatically transcribed onto paper, only becoming so after Plaintiffs elected to press the print button” and that “a lap top

computer is not a "telephone facsimile machine." However, in the present case, Empire's messages were not e-mail "spam" messages sent to OCSEA's e-mail system but were messages sent to fax numbers and machines. The fact that OCSEA's employees have individual, dedicated fax numbers and lines and that OCSEA's "telephone facsimile machine" does not "automatically" print the faxed message on paper but gives the recipient the option of printing out the message is immaterial. 42 U.S.C. § 227(a)(2) merely states that "[t]he term 'telephone facsimile machine' means equipment which has the capacity . . . to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." (Emphasis added.) Furthermore, 42 U.S.C. § 227's rationale is concerned with, but not limited to, the use of a recipient's paper and ink. See Grady v. Lenders Interactive Serv. (Cuyahoga App., Aug. 12, 2004), No. 83966, 2004 Ohio App. LEXIS 3843, at *7-9 ("Unsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages"). See also Jemiola v. XYZ Corp. (Cuyahoga C.P. 2003), 126 Ohio Misc. 2d 68, 73 ("As remedial laws, the TCPA and CSPA must be liberally construed to protect the rights and interests of the plaintiff and the general public.").

Even if a computer itself were not a "telephone facsimile machine" under 42 U.S.C. § 227(a)(2), Empire cites no legal authority which has held that a machine/system which receives faxed messages is not a "telephone facsimile machine" because individuals receive the messages via individual, dedicated fax numbers/lines or access the faxed messages via a computer display or because the machines do not "automatically" print the faxed messages on paper. In any event, a decision by an out-of-state court is not

binding authority on this Court.

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Fourth, Empire concedes that its claims against Linder do not seek contribution or indemnity and so do not comprise a proper third-party complaint. Empire “does not dispute that the claims at issue in this action are for neither contribution [n]or indemnity, which means that Defendant Linder is not a proper third party defendant pursuant to Civ. R. 14” but argues that “Defendant Linder was properly made a party to this action pursuant to Civ. R. 13(H).” However, Empire has neither sought nor obtained leave to add Linder as a party-defendant.

Fifth, Linder has failed to show that this Court lacks jurisdiction over the third-party claim against Linder. Linder cites Spencer, 31 Ohio St. 2d 36, and Mack, 14 Ohio St. 3d 34, for his argument that “when, alleging a breach of a settlement agreement Defendants are required to seek relief under the case number that created the terms of the settlement agreement.” However, neither Spencer nor Mack contains such a holding regarding a case’s number. See Spencer, 31 Ohio St. 2d at 40 (merely holding that “[i]n an action for accounting and royalties a settlement agreement entered into between the parties in the presence of the court constitutes a binding contract, even though not reduced to writing; and where a party enters into such an agreement he must, if he seeks rescission, file a motion to set it aside”); Mack, 14 Ohio St. 3d at 36 (applying Spencer to a case in which the settlement agreement was entered into outside the presence of the court).

Linder also cites Hill v. Briggs (Franklin 1996), 111 Ohio App. 3d 405, 409, for his argument that “[w]hen an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the trial court retains jurisdiction.” However, Hill

concerned a situation in which an entry dismissing the case with prejudice was effectively a conditional dismissal because "there was a question of whether the matter was actually settled and, thus, we find that the court had jurisdiction to consider a [Civ. R. 60(B)] motion to vacate its Loc.R. 25.03 dismissal." *Id.* In the present case, the existence of the settlement agreement is not at issue. Likewise, Loc. R. 31.01 is inapplicable because Linder has not shown that the present case is a "refiled case" for purposes of that rule.

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As such, Linder has failed to cite any applicable legal-authority which has held that this Court lacks jurisdiction to decide the present case on the ground that Judge Connor retains jurisdiction over the present case because the settlement agreement concerns case no. 03CVH12-14250. Nonetheless, as previously discussed, Linder is entitled to summary judgment on the merits.

Thus, Linder's motion is warranted.

IV. Conclusion

Therefore, third-party defendant Linder's motion for summary judgment is GRANTED. Linder shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse party pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.

THE STATE OF OHIO }
Franklin County, ss }

I, JOHN O'GRADY, Clerk
OF THE COURT OF COMMON
PLEAS, WITHIN AND FOR
SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FORE-
GOING IS TRULY TAKEN AND COPIED FROM THE
ORIGINAL decision
NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COUNTY
THIS 12 DAY OF May A.D. 2006

JOHN O'GRADY, Clerk

By S. Harper Deputy

CHARLES A. SCHNEIDER, JUDGE

Copies to:

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