

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

BOB COLEMAN, et al.

PLAINTIFF

VS

AMERICAN BLAST FAX, et al.

DEFENDANT



MARCH 14, 2001

DATE

00AC-005196

CASE NUMBER

32

TEAM/DIVISION

JUDGMENT AND ORDER

The parties filed cross motions for Summary Judgment which were argued on January 25, 2001. Defendant's Motion for Summary Judgment was denied and Plaintiff's Motion for Summary Judgment was granted in part as to the liability of Defendant American Blast Fax. The parties were given additional time to brief the issues of vicarious liability of customer defendants and submit affidavits as to damages. Plaintiffs were granted leave to file responses until March 2, 2001 at which time the matter was taken under submission.

The parties agree to the following facts: Defendant American Blast Fax is in the business of sending advertising via facsimile machines. Co-defendants have hired American Blast Fax for this purpose. Plaintiffs have received unsolicited faxes from defendant American Blast Fax which included advertising of the customer defendants. On January 25, 2001 this Court issued an order finding defendant American Blast Fax in violation of the TCPA which prohibits the sending of unsolicited faxes. The parties agreed to submit the issue of damages by affidavit. The only other issue remaining is the liability of the customer defendants.

Plaintiffs argue defendant American Blast Fax was acting as the agent of its customers and therefore the customers are liable under the theory of respondeat superior. Defendants argue

that at best American Blast Fax is an independent contractor and cannot bind the principle. The parties agree customer defendants paid defendant American Blast Fax to send the advertising via facsimile machine. No evidence was produced to indicate customer defendants gave any directions to defendant American Blast Fax as to how it would perform the job. Clearly customer defendants paid for a service which, when performed, violated the TCPA. The fact that they did not know who would receive the faxes or when they would be sent is the specific conduct targeted by the TCPA.

The question of whether the TCPA prohibits customers from contracting for the service was clarified by the FCC in a 1995 opinion. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 1995 WL 464817, 10 F.C.C.R. 12,391 (F.C.C.1995). The Commission was asked to clarify who had responsibility for compliance with the ban on unsolicited facsimile advertising. Did it lie with the entity or entities on whose behalf such messages are sent or with service providers? The Commission issued its decision that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements. The opinion makes clear the customer defendants are liable for their conduct. Summary Judgment is appropriate as to the customer defendants.

Plaintiffs also seek a permanent injunction as to defendant American Blast Fax. Plaintiffs also point out in their pleadings that a similiar suit is currently pending in Federal Court seeking the same relief. This suit was brought by the Attorney General on behalf of the public and seeks to enjoin American Blast Fax from sending unsolicited faxes. Based on this suit the request to make the injunction permanent as to all defendants is denied.

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiffs have and recover from

the defendant American Blast Fax the following sums:

In Cause Number 00AC-005196, Plaintiff Bob Coleman the sum of \$2,000.00; Plaintiff Cheryl Coleman the sum of \$6,000.00; Plaintiff Robert Novell the sum of \$2,000.00; Plaintiff RSL Consulting, Inc. the sum of \$3,500.

In Cause Number 00AC-005197, Plaintiff National Educational Acceptance \$8,000.00; Plaintiff Marvin Greenberg the sum of \$500.00; Plaintiff David Protte the sum of \$2,500; Plaintiff Schraut Heating and Cooling, Inc. the sum of \$2,000.00; Plaintiff Dan Bichet the sum of \$500.00; Plaintiff Davis Keller and Wiggins, L P the sum of \$1,000.00.

In Cause Number 00AC- 005198, Plaintiff David Harjoe the sum of \$3,500.00; Plaintiff Membership Consultants, Inc. the sum of \$4,000.00; Plaintiff Marilyn Margulis the sum of \$500.00; Plaintiff Binder Design, Inc. the sum of \$ 4,000.00.

In Cause Number 00AC-0051979, Plaintiff All Blast Party, Inc. the sum of \$1,000.00; Plaintiff Jeffrey Rhone the sum of \$8,500.00; Plaintiff Sheryl Miller the sum of \$2,500.00.

In Cause Number 00AC-00519200, Plaintiff Riverview Realtors, Inc. the sum of \$1,000.00; Plaintiff Micro Engineering, Inc. the sum of \$500.00; Plaintiff Bob Stakenas the sum of \$4,000.00; Plaintiff John Olson the sum of \$2,000.00; Plaintiff Eric Rhone the sum of \$500.00; Plaintiff Jim Gans the sum of \$4,000.00.

IT IS FURTHER ORDERED that plaintiff Richard Gans have and recover of defendant Cox Industrial Equipment Co., Inc. in Cause Number 00AC-002536 the sum of \$500.00

IT IS FURTHER ORDERED that plaintiffs have and recover of the defendant Advanced Digital Telemarketing in Cause Number 00AC-013004 the following sums:

Plaintiff Membership Consultants, Inc. the sum of \$1,000.00; Plaintiff Jim Gans the sum of


\$500.00; Plaintiff Bruce Waxman the sum of \$1,000.00; Plaintiff Binder Design, Inc. The sum of \$1,500.00; Plaintiff John Olsen the sum of \$500.00; Plaintiff Bob Coleman the sum of \$500.00; Plaintiff Richard Gans the sum of \$1,500.00; Plaintiff Jeffrey Rhone the sum of \$1,000.00; Plaintiff David Harjoe the sum of \$500.00; Plaintiff Bob Stakenas the sum of \$1,000.00.

IT IS FURTHER ORDERED that plaintiff Dave Keller have and recover of defendant The Breve Company, Inc. the sum of \$500.00.

IT IS FURTHER ORDERED that plaintiffs have and recover from defendant Richard Townsend d/b/a/ Financial Strategies Group, the following sums:

Plaintiff Bob Coleman the sum of \$1,000.00; Plaintiff Cheryl Coleman Realtors the sum of \$3,000.00; Plaintiff National Educational Acceptance Corp. the sum of \$1,500.00; Plaintiff Marily Margulis the sum of \$500.00; Plaintiff Jeffrey Rhone the sum of \$500.00; Plaintiff Bruce Waxman the sum of \$500.00; Plaintiff Davis Keller Wiggins the sum of \$500.00; Plaintiff David Protte the sum of \$500.00; Plaintiff Richard Gans the sum of \$500.00; Plaintiff Jim Gans the sum of \$500.00; Plaintiff Suzon Pogue the sum of \$1,000.00; Plaintiff Dan Bichet the sum of \$500.00.

SO ORDERED


Judge 3/21/01