In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

HOOPS & ASSOCIATES, P.C., a Missouri corporation, individually and as Class Representative,	)	No. ED96391
Respondent,	)	
vs.	)	Appeal from the Circuit Court of St. Louis County
FINANCIAL SOLUTIONS AND ASSOCIATES, INC.	)	
and	)	
MICHAEL G. GRIMES,	)	
Appellants.	)	Honorable Steven H. Goldman
	)	Filed: November 15, 2011

Michael G. Grimes (hereinafter, "Grimes"), the president and sole shareholder of Financial Solutions and Associates, Inc. (hereinafter, "Financial Solutions"), appeals the trial court's grant of summary judgment in favor of Hoops & Associates, P.C. (hereinafter, "Hoops"). Grimes raises two points on appeal, claiming the trial court erred in finding him personally liable for violations of the federal Telephone Consumer Protection Act (hereinafter, "TCPA"), 47 U.S.C. Section 227, and that class certification was improper because the class was unable to be ascertained or identified. We reverse and remand.

It is well-settled that when considering a grant of summary judgment, we review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Co., 854 S.W.2d 371, 376 (Mo. banc 1993). "Our review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those employed by the trial court to determine the propriety of sustaining the motion initially." Id. A summary judgment movant has the burden of proof to establish a legal right to judgment flowing from facts about which there is no genuine dispute. Id. at 378. "The moving party bears the burden of establishing a right to judgment as a matter of law." Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 580 (Mo. banc 2006).

A "defending" party may establish a right to summary judgment by showing: (1) facts negating any one of the claimant's elements; (2) the nonmovant has not been able to produce, or will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any of the claimant's elements; or (3) there is no genuine dispute as to the existence of facts necessary to support the movant's properly pleaded affirmative defense. ITT Commercial Fin. Corp., 854 S.W.2d at 381. The nonmovant must show by affidavits, depositions, answers to interrogatories, or admissions on file that one or more of the material facts shown by the movant to be without any genuine dispute is, in fact, genuinely disputed. Id. A "genuine issue" exists where the record contains competent materials that establish a plausible, but contradictory, version of the movant's essential facts. Id. at 382.

The facts in the light most favorable to Grimes, the nonmoving party, are as follows: Grimes is the president of Financial Solutions and owns one hundred percent of its stock. In March 2005, Financial Solutions contracted with ActiveCore Technologies to

send faxes to potential clients in the Saint Louis area. ActiveCore Technologies represented to Financial Solutions that the potential clients had consented to receipt of the faxes. ActiveCore Technologies then sent two faxes to each of the potential clients on behalf of Financial Solutions.

Hoops was one of the potential clients who received the two faxes from ActiveCore Technologies. Hoops brought this case against Financial Solutions and Grimes, individually, alleging violations of the TCPA, the Missouri Merchandising Practices Act, and conversion.[1] Hoops also sought class certification in order to be the named plaintiff representing all of the other potential clients who received faxes from ActiveCore Technologies.

The trial court certified the class of all of the potential clients who received the fax blasts from ActiveCore Technologies. The trial court then granted summary judgment in favor of Hoops, finding Financial Solutions violated the TCPA. The trial court further held Grimes fifty-one percent personally liable.

In his first point on appeal, Grimes claims the trial court erred in entering summary judgment against him personally because there were genuine issues of material fact and law concerning whether his actions amounted to "tortious conduct." Grimes argues that he did not knowingly violate the TCPA and therefore, there was a genuine issue of material fact precluding summary judgment.

Pursuant to the TCPA, it is unlawful for any person or entity "to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. Section 227(b)(1)(C). "Any material advertising the commercial availability or quality of any

[1] Prior to the commencement of this case, Hoops was one of the plaintiffs in All American Painting, LLC v. Financial Solutions and Associates, Inc., 315 S.W.3d 719 (Mo. banc 2010), but Hoops voluntarily dismissed that claim. Hoops then filed this cause of action and sought class certification.

property, goods, or services which is transmitted to any person without that person's prior express invitation or permission" is an "unsolicited advertisement." 47 U.S.C. Section 227(a)(4). Accordingly, the TCPA is violated when a person or entity sends "material advertising the commercial availability or quality of property, goods, or services to a facsimile machine without the recipient's prior express invitation or permission." All American Painting, LLC v. Financial Solutions and Associates, Inc., 315 S.W.3d 719, 722 (Mo. banc 2010).

There is a private cause of action for any person or entity who receives an advertisement in violation of the TCPA, including relief in the form of statutory damages in the amount of $500 for each violation and injunctive relief for additional violations. 47 U.S.C. Section 227(b)(3)(A)-(B). In the trial court's discretion, the statutory damages may be trebled in instances where the defendant has "willfully or knowingly" violated the TCPA. 47 U.S.C. Section 227(b)(3).

With regard to Financial Solutions' involvement by faxing potential clients, all of the facts needed to recover under the TCPA were admitted and there were no genuine issues of material fact precluding entering summary judgment against Financial Solutions. However, Grimes contends that there are genuine issues of material fact that are not admitted regarding his knowing violation of the TCPA sufficient to subject him to personal liability.

The issue of personal liability under the TCPA for a corporate officer was examined in Texas v. American Blastfax, Inc., et al., 164 F.Supp.2d 892 (W.D. Tex. 2001). American Blastfax recognized the general rule that "if a corporation is found to have violated a federal statute, its officers will not be personally liable solely because of their

status as officers." Id. at 897. "However, if the officer directly participated in or authorized the statutory violations, even though acting on behalf of the corporation, he [or she] may be personally liable." Id. American Blastfax applied these principles of personal liability of a corporate officer under the TCPA, finding "[i]ndividuals who directly (and here, knowingly and willfully) violate the TCPA should not escape liability solely because they are corporate officers." Id. at 898.

In American Blastfax, the corporate officers were put on notice by the State of Texas that they were violating the TCPA each time they sent an unsolicited fax. Id. at 895. Those corporate officers recognized their actions could result in substantial fees for their corporation, but they chose to ignore those consequences and continued to send unsolicited faxes. Id. The corporate officers had actual knowledge they were violating the TCPA. The court found the corporate officers jointly and severally liable for TCPA violations. Id. at 903.

Following the rationale set forth in American Blastfax, this Court finds it is premature to enter summary judgment in favor of Hoops and finding Grimes personally liable for the actions taken by Financial Solutions. In this case, Hoops contends that Grimes was more than merely the corporate officer. Hoops asserts that Grimes' high level of involvement in creating the advertisement and contacting ActiveCore Technologies on behalf of Financial Solutions to send the faxes to potential customers subjects him to personal liability.

Grimes contradicts Hoops' allegations, stating that he had no knowledge the faxes would violate the TCPA. Further, Grimes states he specifically averred ActiveCore Technologies informed Financial Solutions that the fax recipients consented to receiving

the faxed advertisement, denying Hoops' statement of uncontroverted fact. Grimes submitted an affidavit in support of their response, stating he was assured by ActiveCore Technologies the fax recipients consented to receiving the faxes.

Based upon our standard of review, this Court must view the evidence in the light most favorable to Grimes, the party against whom summary judgment was entered. ITT Commercial Fin. Corp., 854 S.W.2d at 376. Grimes' affidavit included factual statements of his personal knowledge, which would be admissible at trial. Rule 74.04(e). While his testimony and factual knowledge may be challenged at trial, it is inappropriate for the trial court to make credibility determinations in a summary judgment proceeding. Hughes v. Bodine Aluminum, Inc., 328 S.W.3d 353, 357 (Mo. App. E.D. 2010).

Grimes disputes that he had actual knowledge that the actions taken by Financial Solutions violated the TCPA. Grimes argues the trial court should not have entered summary judgment because there were factual issues remaining. We agree. The disputed factual allegations preclude entry of summary judgment. *See also* Kopff, et al., v. Battaglia, et al., 425 F.Supp.2d 76, 93 (D.C. Cir. 2006)(denying individual's motion to dismiss TCPA claims because of a factual dispute regarding individual's actual notice of the allegedly unlawful activity). At this stage in the litigation, we determine Grimes presented a genuine issue of material fact, thereby precluding the entry of summary judgment. Point granted.

Grimes' first point on appeal is dispositive. Accordingly, there is no need to address the viability of class certification.[2]

[2] Class certification is subject to modification or "Rule 52.08(c)(1) provides for de-certification before a decision on the merits." Karen S. Little, L.L.C. v. Drury Inns, Inc., 306 S.W.3d 577, 580 (Mo. App. E.D. 2010).

The trial court's grant of summary judgment is reversed.

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GEORGE W. DRAPER III, Sp.Judge

Patricia L. Cohen, P.J., and
Robert M. Clayton III, J., concur