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**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

NATIONAL EDUCATIONAL ACCEPTANCE, INC., Plaintiff,

v.

SMARTFORCE, INC., Defendant.

Cause No. 01AC-2849

Division 41

Decided June 21, 2002

DISPOSITION:

At a damages hearing, the court rejected defendant's argument of failure to mitigate.

SYNOPSIS:

Plaintiff received six fax transmissions from defendant and subsequently brought suit under 47 U.S.C. § 227, alleging six violations of that statute. The court previously found for plaintiff on the issue of liability under the statute, and defendant raised failure to mitigate damages at the damages stage. The court rejected a mitigation of damages defense as a matter of law with respect to TCPA statutory damage awards.

SUBSEQUENT HISTORY:

none

PRIOR HISTORY:

none

CITED BY:

► *Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus.*, No. 02AC-008228 N CV (Mo. Cir. July 3, 2003).

APPEARANCES:

Max G. Margulis, Margulis Law Group, Chesterfield, Missouri for National Educational Acceptance, Inc.

Eric F. Kayira, Robert L. Rodenbush, Lathrop & Gage, LC, St. Louis, Missouri for Smartforce, Inc.

JUDGES:

Michael D. Burton

HOLDINGS:

[1] **Mitigation of damages**

Mitigation of damages is not applicable to a statute such as the TCPA which specifies fixed mandatory damages.

[2] **Mitigation of damages**

Each fax is independently actionable, and like the serial commission of torts, not the proper subject of the defense of mitigation.

[3] **Mitigation of damages**

Since each transmission is independently wrongful, and since the damages mandated by the TCPA are statutory, mitigation does not apply in the context of unsolicited facsimile advertisements under the TCPA.

OPINION:

[*1] **JUDGMENT AND ORDER**

This matter originally came before the Court on May 1, 2002, on the parties' cross Motions for Summary Judgment. At that time the Court denied Defendants motion and granted Plaintiff's motion with regard to liability. Liability having been established, Defendant's affirmative defense of mitigation of damages is now before the court.

This is an action originally brought by Plaintiff against Defendant Smartforce, Inc., ("Smartforce"), alleging transmissions of unsolicited advertisements via facsimile in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The parties

have stipulated to a set of facts which establish the relevant facts. Between the dates of February 22, 2000 to April 4, 2000, inclusive, Defendant sent six (6) facsimile transmissions to Plaintiff at (314) 576-6314. Defendant operates a website at which visitors were able to obtain information about computer courseware products by entering information in a registration form screen on the website. Plaintiff visited that website and provided information about himself, including his fax number. Plaintiff [*2] received no verbal or written notice of Defendant's intended use of the information collected by the website other than the text on the SmartCertify website and its registration form screen. The parties also stipulated that the damages for each fax found to have been sent by Defendant in violation of the provisions of the TCPA is \$500 (Five Hundred dollars).

Defendant argues that Plaintiff had a duty to mitigate his damages by requesting Defendant to refrain from sending faxes to Plaintiff. Plaintiff argues that every person has a right to expect all other persons to comply with the law, and that there is no duty to mitigate damages in this context. In providing its fax number, Plaintiff expected that it would be used only for legally permissible purposes.

An individual cannot ignore an opportunity to stem the continuing increase in damages from an injury and recover the same from a defendant. *Cline v. City of St. Joseph*, 245 S.W.2d 695 (Mo.App. 1952). He has the responsibility to mitigate the recovery of further damages. Mitigation applies only once an injury is sustained; the issue of mitigation can only be raised in the context of damages. Prior to the assessment of liability, consideration of mitigation is improper. *Evinger v. Thompson*, 265 S.W.2d 726 (Mo. banc 1954).

[*1] In the context of the TCPA, damages are mandated. Defendant's argument of mitigation is not applicable to a statute such as the TCPA which specifies fixed mandatory damages, The Court must abide by the plain words of the statute and award the mandatory statutory damages. "If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Congress, and it is [*3] the province of the courts to enforce, not to make, the laws." *United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260 (1914).

Defendant cannot apply the concept of mitigation of damages to the commission of a series of *independently*

wrongful acts. This represents a seemingly new form of mitigation – one that stands for the proposition that a plaintiff must presume that a defendant will commit another unlawful act and must take steps before that act is done. Mitigation does not excuse the consequences of a harm intentionally inflicted merely because the person injured neglected to take precautions to avoid or mitigate the damages. [*2] Each fax is independently actionable, and like the serial commission of torts, not the proper subject of the defense of mitigation.

[*3] Finally, in the context of unsolicited faxes, there are no ongoing damages to be mitigated. The Court finds, as a matter of law, that the defendant is presumed to know the law. That finding, without more, prevents the Court from concluding that Plaintiff in this matter had any duty to inform the Defendant of the law and the consequences for its violation or be barred from recovery thereunder. Since each transmission is independently wrongful, and since the damages mandated by the TCPA are statutory, the Court finds that mitigation does not apply in the context of unsolicited facsimile advertisements under the TCPA.

CONCLUSION

The statute mandates \$500 in statutory damages for each violation. The facts set forth at the prior hearing established six faxes were sent to Plaintiff in violation of the statute.

[*4] WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover from Defendant Smartforce, Inc. a judgment in the amount of THREE THOUSAND DOLLARS (\$3,000) plus costs.

SO ORDERED:

/S/ Judge Michael D. Burton,

Judge Division 41

Entered this 21st day of June, 2002.

cc: Attorneys of Record

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