

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

PRICOM ASPHALT SEALCOATING, INC., d.b.a. AMERICAN ASPHALT & SEALCOATING, et al.,	:	O P I N I O N
	:	CASE NO. 2008-G-2854
Plaintiffs-Appellants,	:	
-vs-	:	
GRANT FURNAS, d.b.a. PROMARK SERVICES, LLC,	:	
	:	
Defendant-Appellee.		

Civil Appeal from the Court of Common Pleas, Case No. 07 P 000378.

Judgment: Appeal dismissed.

Robert J. Willis, Petronzio & Schneier Co., L.P.A., 5001 Mayfield Road, #201,
Lyndhurst, OH 44124 (For Plaintiffs-Appellants).

William C. Hofstetter, 155 Main Street, Chardon, OH 44024 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Pricom Asphalt Sealcoating, Inc., d.b.a. American Asphalt & Sealcoating, and James Browske, appeal from the judgment of the Geauga County Court of Common Pleas granting them treble damages for ten violations of Section 227, Title 47, U.S. Code, the Telephone Consumer Protection Act ("TCPA"). Pricom and Mr. Browske contend the trial court entered judgment against the wrong party. Finding ourselves without jurisdiction, we dismiss the appeal.

{¶2} Pricom is a business in Chesterland, Geauga County, Ohio; Mr. Broske lives and works in Portage County, Ohio. Commencing in 2005, and ending in 2007, Pricom received seven, and Mr. Broske three, unsolicited facsimiles from “Promark Services,” or “Promark Services, LLC,” which appears to be a brokerage specializing in the buying or selling of accounting practices. Four of these unsolicited faxes were signed or sent by “Grant,” or “Grant Furnas.” According to the complaint, Mr. Furnas and/or Promark are situated in Louisville, Kentucky.

{¶3} April 16, 2007, Pricom and Mr. Broske filed their complaint against “Grant Furnas d.b.a. Promark Services, LLC,” alleging that his sending of the unsolicited faxes constituted violations of the TCPA. The TCPA authorizes parties to bring a private cause of action in state courts for violations of the TCPA. See, e.g., Section 227(b)(3), Title 47, U.S. Code; see also, *Compoli v. AVT Corp.* (N.D. Ohio, 2000), 116 F.Supp.2d 926, 927-928. Violations of the TCPA constitute congressionally created torts. *Larry v. VSB Financial Consulting, Inc.* (Ala.Civ.App. 2005), 910 So.2d 1280, 1283. The purpose of Congress in enacting the private cause of action under the TCPA was to make it as simple and inexpensive as possible for injured parties to recover damages for violations of the act. *Compoli* at 928, fn.2. When committed by a tortfeasor operating from a foreign jurisdiction, personal jurisdiction in the Ohio courts is appropriate under R.C. 2307.382(A)(4) or (6).

{¶4} Damages in the amount of actual monetary loss, or five hundred dollars, whichever is greater, may be awarded for each violation of the TCPA, Section 227(b)(3)(B), Title 47, U.S. Code; and, if the violation was done “willfully,” then treble damages may be allowed. Section 227(b)(3)(C), Title 47, U.S. Code. “The definition of

the term 'willfully' is merely that the defendant acted voluntarily, under its own free will, and regardless of whether the defendant knew it was acting in violation of the statute. See, e.g., Section 312(f)(1), Title 47, U.S. Code; *Smith v. Wade* (1983), 461 U.S. 30, 41, ***." *Jemiola v. XYZ Corp.* (2003), 126 Ohio Misc.2d 68, 2003-Ohio-7321, at ¶23.

{¶5} June 29, 2007, Mr. Furnas filed a motion to dismiss, pursuant to Civ.R. 12(B)(6). The basis of his motion was that he did not have sufficient contacts with the state of Ohio to contemplate personal jurisdiction being exercised over him by its courts. July 18, 2007, Pricom and Mr. Broske filed their brief in opposition to the motion to dismiss. July 25, 2007, the trial court filed its judgment entry denying the motion to dismiss.

{¶6} August 8, 2007, counsel for Mr. Furnas sent a letter to the trial court, copied to counsel for Pricom and Mr. Broske, reiterating his client's position that the trial court lacked personal jurisdiction over him, and refusing to participate further in the proceedings. As a result, Mr. Furnas never answered the complaint.

{¶7} September 27, 2007, Pricom and Mr. Broske filed for default judgment. October 10, 2007, the trial court filed a judgment entry, finding it had insufficient evidence before it regarding damages, and setting the matter for hearing on damages December 19, 2007. Pricom and Mr. Broske did not attend the December 19 hearing; and, by a judgment entry filed December 20, 2007, the trial court noted it had insufficient information before it to consider whether the claims of Mr. Broske (a resident of Portage County) were properly before it. It further denied the motion for default judgment.

{¶8} February 27, 2008, the trial court filed a judgment entry, setting the matter for trial July 9, 2008. Trial went forward that date, with Pricom's principal, Todd Tornstrom, and Mr. Browske, testifying. The unsolicited faxes, and a letter from Pricom and Mr. Browske's counsel to Promark Services, LLC, suggesting settlement of Mr. Browske's claims, were admitted into evidence.

{¶9} July 22, 2008, the trial court filed its judgment entry, finding in favor of Pricom in the amount of \$10,500, against "Promark Services, LLC," and in favor of Mr. Browske in the amount of \$4,500, against "Promark Services, LLC." The trial court further ordered Promark to pay the costs of the action.

{¶10} August 19, 2008, Pricom and Mr. Browske timely noticed this appeal, assigning a single error:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY GRANTING APPELLANTS JUDGMENT AGAINST A NON-DEFENDANT TO THE LAW SUIT ***.

{¶12} The trial court entered judgment against Promark Services, LLC. However, it did not enter judgment for, or against, Mr. Furnas, who is a named defendant in the complaint. Consequently, the claims set forth against him remain pending below. The trial court's judgment does not contain the requisite Civ.R. 54(B) language making a judgment which fails to resolve all claims final and appealable. Thus, we lack jurisdiction under the Ohio Constitution to hear this matter, presently. See, e.g., *Burton Industries v. Fiederer*, 11th Dist. No. 2004-L-011, 2005-Ohio-1793, at ¶20-23 (per Rice, J.).

{¶13} The appeal is dismissed.

{¶14} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶15} I respectfully dissent and would affirm the judgment of the lower court.

{¶16} The lower court's judgment settled all the pending claims in this case and constitutes a final order for purposes of this appeal.

{¶17} The judgment of the lower court against Promark Services, LLC should stand. Sufficient notice of Promark Services, LLC's potential liability was provided in the Complaint, which identified Promark Services as a "d.b.a." of Grant Furnas. Similarly in the body of the Complaint, the plaintiffs asserted that "Defendant was doing business as 'Promark Services, LLC'." Although inartfully drafted, the pleadings, to which no Answer was filed, delineate the interconnecting status of Furnas and Promark.

{¶18} The case was ultimately tried before the trial judge and all parties had the opportunity to present evidence. The defendant elected not to participate at trial. The trial court concluded that Promark was liable to plaintiff Pricom Asphalt Sealcoating, Inc. in the amount of \$10,500 and to plaintiff James Broske in the amount of \$4,500. This judgment is supported by competent and credible evidence and should be affirmed.