

2016 WL 4591831

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

Shaun Fauley, Plaintiff,

v.

Drug Depot, Inc., et al Defendants.

No. 15 C 10735

|

Signed 08/31/2016

Attorneys and Law Firms

[Brian J. Wanca](#), [Glenn L. Hara](#), [Ross Michael Good](#),
[Ryan M. Kelly](#), Anderson & Wanca, Rolling Meadows,
IL, for Plaintiff.

[David A. Wheeler](#), [Douglas F. McMeyer](#), Chapman
Spingola, LLP, [Amy Rapoport Gibson](#), [Lindsay P. Lollo](#),
Aronberg Goldgehn Davis & Garmisa, Chicago, IL, for
Defendants.

ORDER

[Virginia M. Kendall](#), United States District Court Judge,
Northern District of Illinois

*1 Defendant Drug Depot, Inc., d/b/a APS Pharmacy's
("APS") motion to dismiss Plaintiff Shaun Fauley's class
action complaint is denied. (Dkt. No. 40.)

BACKGROUND

The Court takes the following allegations from the
Complaint and treats them as true for the purposes of
the Defendant's motion. See [Gillard v. Proven Methods
Seminars, LLC](#), 388 Fed.Appx. 549, 550 (7th Cir. 2010).

Fauley alleges that APS sent facsimile transmissions
of unsolicited advertisements to him and other class
members, including one transmission that was sent to
him personally on September 30, 2013, in violation of the
Telephone Consumer Prevention Act of 1991 ("TCPA"),
as amended by the Junk Fax Prevention Act of 2005, [47
U.S.C. § 227](#) ("JPFA").¹ (*Id.* at ¶¶ 2, 11; see also Dkt. No.

1-1.) The facsimile included information for products that
ASP could provide to Fauley's veterinarian business. (*See*
Dkt. No. 1 at ¶ 14.) Fauley further alleges that he, and
on information and belief at least forty other recipients
of similar faxes, never consented to receiving the faxes
and had no reasonable means to avoid receipt of the
unauthorized faxes. (*Id.* at ¶¶ 16-17.) Fauley states that
APS has been sending similar faxes for a period of four
years before the filing of the present action and continues
to do so to present. (*Id.* at ¶ 32.) Fauley and the putative
class members allegedly suffered a variety of damages
due to APS's actions including loss of paper and toner
consumed in the printing of the faxes, loss of use of their
telephone lines and fax machine during receipt of the
unsolicited faxes, loss of time, and loss of privacy. (*Id.* at
¶ 36.)

Following a stay pending the Supreme Court's decision in
[Spokeo, Inc. v. Robins](#), 136 S. Ct. 1540 (2016), as revised
(May 24, 2016), APS filed the present motion to dismiss
Fauley's Complaint on Rule 12(b)(1) grounds for lack of
subject matter jurisdiction. (*See* Dkt. No. 40.)

LEGAL STANDARD

*2 Rule 12(b)(1) allows dismissal for "lack of subject-
matter jurisdiction" of claims asserted in a complaint. In
analyzing a motion under Rule 12(b)(1), this Court must
"accept as true all well-pleaded factual allegations and
draw all reasonable inferences in favor of the plaintiff."
[Evers v. Astrue](#), 536 F.3d 651, 656 (7th Cir. 2008) (quoting
[Long v. Shorebank Dev. Corp.](#), 182 F.3d 548, 554 (7th
Cir. 1999)). When a party raises the issue of subject
matter jurisdiction, the Court "may properly look beyond
the jurisdictional allegations of the complaint and view
whatever evidence has been submitted on the issue to
determine whether in fact subject matter jurisdiction
exists." *Id.* at 656-57.

DISCUSSION

APS moves to dismiss the Complaint contending that
Fauley failed to allege that he suffered a concrete injury-
in-fact as required for Article III standing. "Article
III of the Constitution limits federal judicial power to
certain 'cases' and 'controversies,' and the 'irreducible
constitutional minimum' of standing contains three

elements.” *Silha v. ACT, Inc.*, 807 F.3d 169, 172-73 (7th Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992) (internal citations and quotation marks omitted)). To establish Article III standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 172-73 (internal quotation marks omitted). “The plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing the required elements of standing.” *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 691 (7th Cir. 2015) (internal quotation marks omitted).

APS contends that the Complaint fails to state a concrete injury.² (See Dkt. No. 40 at 8.) APS argues that the Complaint falls short in two distinct ways: first, that Fauley does not allege sufficient facts to show that he actually received the subject fax (and therefore cannot show that he suffered injury due to it), and second, that Fauley fails to allege that he “suffered any actual injury as a result of the single-page fax.” (Dkt. No. 40 at 8.) APS’s first contention is contrary to the allegations in this case. Not only does the Complaint specifically allege that Fauley received an unsolicited fax on or about September 30, see Dkt. No. 1 at ¶ 11, the subject fax is also attached as an exhibit to the Complaint. (Dkt. No. 1-1.) The attached fax includes a time stamp dated September 30, 2013 and was clearly sent by APS. (*Id.*) Moreover, to the extent that APS contends that the attached fax was not sent to Fauley, such factual issues are best addressed at the summary judgment stage. See, e.g., *Jelinek v. Kroger Co.*, No. 12 C 6411, 2013 WL 9576734, at *1 (N.D. Ill. Apr. 10, 2013). Based on the allegations set forth in the Complaint and taking all allegations therein as true for the purposes of this motion, Fauley has sufficiently alleged that he received an unsolicited fax from APS.

*3 APS next argues, citing to *Spokeo*, that Fauley failed to allege that he suffered an actual injury through receipt of the unsolicited fax. In that case, the plaintiff filed a class action under the Fair Credit Reporting Act (“FCRA”) after learning that searches on Spokeo’s web site returned inaccurate information about him. *Spokeo*, 136 S.Ct. at 1546. Spokeo argued that the plaintiff failed to allege any injury in fact as a result of the publication of the inaccurate information and sought to dismiss the case. The Ninth

Circuit rejected the argument finding that the plaintiff’s statutory rights had been violated through Spokeo’s mishandling of his individualized information. *Id.* The Supreme Court vacated the Ninth Circuit’s decision, holding that the Ninth Circuit had not sufficiently considered whether the alleged violations of the FCRA caused concrete injury as required for Article III standing. *Id.* The Court remanded the case to the Ninth Circuit without taking any position as to whether the alleged harm met the concreteness requirement, but held that a plaintiff generally “cannot satisfy the demands of Article III by alleging a bare procedural violation.”³ *Id.* at 1549.

Based on that holding, APS contends that the Complaint should be dismissed as it alleges nothing more than a procedural violation of the TCPA. (See Dkt. No. 40 at 10.) However, Fauley clearly alleges additional, real harm, including loss of paper and toner consumed in the printing of the fax, loss of use of his telephone line and fax machine during receipt of the unsolicited fax, and loss of time receiving, reviewing, and disposing of the fax. (Dkt. No. at ¶ 36.) Such allegations are sufficiently “real” to meet the concreteness requirement under *Spokeo*. See, e.g., *Palm Beach*, 781 F.3d at 1252 (“Here, it is indisputable that Palm Beach Golf’s fax machine was occupied during B2B’s successful transmission of the unsolicited fax advertisement. Because Palm Beach Golf has suffered a cognizable, particularized, and personal injury, it has Article III standing.”); *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544 (6th Cir. 2014) (rejecting motion to dismiss on standing grounds and holding that “unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients’ time and impede the free flow of commerce.”); *G.M. Sign Inc. v. Stealth Sec. Sys., Inc.*, No. 14 C 09249, 2015 WL 9268416, at *3 (N.D. Ill. Dec. 21, 2015); *R. Rudnick & Co. v. G.F. Prot., Inc.*, No. 08 C 1856, 2009 WL 112380, at *3 (N.D. Ill. Jan. 15, 2009).

In support of its motion to dismiss, APS first contends that Fauley should be required to allege the actual cost of receiving the fax “in terms of time, toner, and machine use.” (See Dkt. No. 54.) However, APS fails to cite to any authority indicating that such facts are necessary at the pleading stage or under the notice pleading standard. Second, APS argues that the cases that Fauley relies upon, specifically *Imhoff* and *Palm Beach*, are inapposite because they were decided pre-*Spokeo* and “did not

analyze how occupying a fax line creates a concrete injury, or how much time or toner actually creates an injury that can withstand Article III scrutiny.” (Dkt. No. 54 at 4.) Yet, *Imhoff* and *Palm Beach* each specifically addressed the issues of concrete and particularized harm as required by *Spokeo*. See *Palm Beach*, 781 F.3d at 1253; *Imhoff*, 792 F.3d at 633. In addition, not only does APS fail to provide any case law in support of its position that there must be a specific amount of time or toner lost to confer Article III standing, but such *de minimus* harm arguments do not undermine Article III standing. See, e.g., *R. Rudnick*, 2009 WL 112380, at *2 (“GFP also argues that there is no substantial injury to consumers here because each fax page is inexpensive, costing the consumer only a sheet of paper and some toner or ink. This argument misses the point.”); *Brodsky v. HumanaDental Ins. Co.*, No. 10-C-3233, 2011 WL 529302, at *7 (N.D. Ill. Feb. 8, 2011); *Garrett v. Rangle Dental Lab.*, No. 10 C 1315, 2010 WL 3034709, at *1 (N.D. Ill. Aug. 3, 2010) (holding that the “alleged loss is *de minimus* and can be remedied by his TCPA claim.”); *Rossario's Fine Jewelry, Inc. v. Paddock Publications, Inc.*, 443 F. Supp. 2d 976, 978 (N.D. Ill. 2006) (same). Third, APS's position that there is no injury in connection with the occupancy of Fauley's telephone line because “[g]enerally, the cost associated with telephone

fax line[s] are] fixed,” see Dkt. No. 54 at 4, is rejected because this argument was presented for the first time in APS's Reply brief and because such factual disputes are better considered at the summary judgment stage. See *Eberhardt v. Brown*, 580 Fed.Appx. 490, 491 (7th Cir. 2014) (parties waive arguments that they raise for the first time in a reply brief). On the other hand, because businesses do not have privacy interests in seclusion or solitude, see, e.g., *Maxum Indem. Co. v. Eclipse Mfg. Co.*, No. 06 C 4946, 2013 WL 5993389, at *7 (N.D. Ill. Nov. 12, 2013) (collecting cases), Fauley's allegation that the fax, that was sent to his business, constitutes an invasion of privacy does not allege injury as required under Article III.⁴ Nevertheless, given his other allegations, Fauley has sufficiently alleged both concrete and particularized harm as required for Article III standing.⁵

*4 For the reasons stated above, APS's motion to dismiss is denied.

All Citations

--- F.Supp.3d ----, 2016 WL 4591831

Footnotes

- 1 In pertinent part, the TCPA makes it unlawful to use “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless— (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient; (ii) the sender obtained the number of the telephone facsimile machine through— (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution....” 47 U.S.C. § 227(b)(C). Evidence that a plaintiff published its fax number in the course of conducting its business does not amount to consent under the TCPA. See, e.g., *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1161 (N.D. Ill. 2009) (citing legislative history). The TCPA defines the term “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5)
- 2 Although not entirely clear from the briefing, APS does not appear to dispute any of the other requirements for standing, including whether Fauley's alleged injury is sufficiently particularized. (See Dkt. No. 40 at 8; see also Dkt. No. 50 at 4 (Fauley noting that APS does not dispute that particularized requirement).) Because APS refers to the requirement in passing in its briefing and in the event that APS intended to make such an argument, it is rejected. “For an injury to be particularized, it must affect the plaintiff in a personal and individual way.” *Spokeo*, 136 S. Ct. at 1548 (quotations and citations omitted). Here, Fauley's allegation that his fax machine was occupied by the transmission of the unsolicited fax, among his other allegations of harm, is sufficient to meet the particularized injury requirement. See *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015); *Imhoff Inv., L.L.C. v. Alfocchino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015).
- 3 The Court did note exceptions to that rule, holding that “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” and that in such cases a plaintiff “need not allege any *additional* harm beyond the one Congress has identified.” *Id.* at 1549 (emphasis in original) (citing *Federal Election*

Comm'n v. Akins, 524 U.S. 11, 20–25 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III)).

- 4 APS makes a number of undeveloped and perfunctory arguments that need not be considered. For example, APS states that it generally "receives permission prior to sending faxes." (Dkt. No. 40 at 3.) However, APS does not provide any evidence of its seeking permission to send the subject fax in this case. Another example is APS's contention that Fauley's claims for conversion and lost time are meritless because Fauley is a serial filer. (See Dkt. No. 54 at 5-6.) While Fauley does have a number of similar cases pending before other courts, see Dkt. No. 40 at 4 n. 1, APS fails to explain how his filing numerous cases somehow undermines his legal claims in the present action. Such limited and perfunctory arguments are deemed waived. See *Ripberger v. Corizon, Inc.*, 773 F.3d 871, 879 (7th Cir. 2014).
- 5 Because Fauley has sufficiently alleged concrete and particularized harm and because APS did not present a developed argument regarding whether it had Fauley's express permission to send the fax, the Court need not address whether Fauley could have also satisfied the Article III standing prerequisites through his allegation that the opt-out language on the fax was non-compliant with Federal Communications Commission's requirements. (See Dkt. No. 1 at ¶¶ 31-32 (Complaint alleging non-compliance to preclude APS from asserting any prior express permission or invitation).)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.