Docket No. 15-56900

In the

United States Court of Appeals

For the

Ninth Circuit

EDMUND PIETZAK, individually and on behalf of all others similarly situated and ERIN HUDSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION and HELLOWORLD, INC.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:15-cv-05527-R-JEM · Honorable Manuel L. Real

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2, Appellants submit the following statement of jurisdiction:

1. **District Court's Jurisdiction.** The District Court had jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331, as this case alleges a violation of a Federal statute: 47 U.S.C. § 227 *et seq.* Further, the District Court had jurisdiction over the underlying action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332.

2. **Appellate Jurisdiction.** This Court's jurisdiction exists pursuant to 28 U.S.C. § 1291, as this appeal is from a final judgment entered on November 17, 2015, following grant of Defendant Microsoft Corporation's motion to dismiss without leave to amend. Appellants' Notice of Appeal was timely filed on December 10, 2015, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

STANDARD OF REVIEW

The District Court's denial of leave to amend Plaintiffs' complaint is reviewed under the abuse of discretion standard. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008). A denial of leave to amend is reviewed "strictly" "in light of the strong policy permitting amendment." *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995) (citing *National Abortion Fed'n v. Operation Rescue*, 8 F.3d 680, 681 (9th Cir. 1993)). "Dismissal

without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Manzarek*, 519 F.3d at 1034; *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991).

An order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1127 (9th Cir. 2012). On review, this Court must "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs." *Gompper v. Visx, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where all parties in a case enter a joint stipulation pursuant to Federal Rule of Civil Procedure 15(a)(2) allowing Plaintiffs to file an amended complaint in lieu of opposing Defendants' motions to dismiss Plaintiffs' original complaint, did the District Court abuse its discretion in denying the joint stipulation and closing the case without addressing Plaintiffs' First Amended Complaint? E.R. 6-10.

2. Whether the District Court abused its discretion by dismissing the Plaintiffs' original complaint without leave to amend where (1) all parties stipulated to allowing Plaintiffs to file an amended pleading in lieu of filing an opposition to Defendants' motions to dismiss the original complaint; (2) Plaintiffs

had not previously amended their pleadings; and (3) the First Amended Complaint was not futile? E.R. 1-10; 18-86; 90-92.

STATEMENT OF THE CASE

This appeal arises from a putative class action filed by two consumers who received a series of marketing text messages from Defendants without providing Defendants with prior express written consent. E.R. 104-109. Defendants posted solicitations on popular social media websites, such as Facebook, Twitter, Instagram, and YouTube inviting consumers to send a text message to SMS short code 29502 with various keywords. E.R. 95-96; 119-130. These social media posts did not disclose that, by sending a text message to the advertised SMS short code, consumers' mobile telephone numbers would be stored by Defendants for the purpose of later sending advertisements directly to consumers' mobile phones. E.R. 95-97; 119-139. Defendants then sent repeated commercial text messages marketing Microsoft products to the mobile phone numbers stored by Defendants. E.R. 96-97; 105-109; 130-136. These marketing text messages were sent *en masse* to thousands of consumers at a time. E.R. 120, ¶ 65; 144, ¶ 128. Plaintiffs allege that at no point in time did Plaintiffs provide Defendants the prior express written consent required by the Telephone Consumer Protection Act ("TCPA"). E.R. 95; 97; 104-109; 117-118; 1120; 127; 130-131; 135-136; 144.

Plaintiffs filed their initial complaint on July 21, 2015, and alleged violations of the TCPA and California Business and Professions Code § 17200. E.R. 143-146. On September 23, 2015, Defendant Microsoft filed a Notice of Motion and Motion to Dismiss Plaintiffs' Complaint. E.R. 152-153 (Docket Entries 17 & 19). On that same day, Defendant HelloWorld filed a Motion for Joinder in Microsoft's Motion to Dismiss. E.R. 153 (Docket Entry 21). The hearing on Defendants' motions was set for November 16, 2015. E.R. 152-153. Pursuant to the Local Rules of the Central District of California, the resulting deadline for Plaintiffs' opposition to Defendants' motions to dismiss was October 26, 2015. C.D. Cal. Local Rule 7-9 (setting deadline for opposing papers 21 days prior to the motion hearing date). On October 23, 2015 – prior to Plaintiffs' deadline to oppose Defendants' motions to dismiss – all parties filed a Joint Stipulation reflecting their agreement allowing Plaintiffs to file a First Amended Complaint. E.R. 90-93.

Despite Federal Rule of Civil Procedure 15(a)(2) not requiring leave of the District Court to file an amended pleading when all parties provide written consent, Judge Real's clerk requested the parties to file a Proposed Order in connection with the October 23, 2015, Joint Stipulation. *See generally* E.R. 87-89 (Notice of Lodging and Proposed Order Granting Parties' Stipulation). Without any

explanation or analysis, on November 5, 2015,[1] Judge Real entered an Order denying the parties' Joint Stipulation. E.R. 6-8. The only statement on the issue was a hand-written note and docket entry text that states, "No good cause shown." E.R. 6-8, 153.

Pursuant to the parties' Joint Stipulation, Plaintiffs agreed to file their First Amended Complaint "on or before the Hearing Date [November 16, 2015]." E.R. 91-92. Regardless of the parties' Joint Stipulation, Judge Real entered a Scheduling Notice on November 10, 2015, taking Defendants' motions to dismiss under submission. E.R. 153 (Docket Entry 27). Two days later, and pursuant to the parties' Joint Stipulation, Plaintiffs filed their First Amended Complaint on November 12, 2015. E.R. 18.

Five days after Plaintiffs filed their First Amended Complaint, the District Court entered an Order granting Microsoft's motion to dismiss and HelloWorld's joinder. E.R. 1-5. The Order found that Plaintiffs' original complaint failed to state a claim under the TCPA and that Plaintiffs lacked standing to bring a claim under California Business and Professions Code § 17200. E.R. 2-4. Judge Real's Order then dismissed Plaintiffs' original complaint without leave to amend. E.R.

[1] The "Date Filed" column of the Docket erroneously states October 13, 2015. E.R. 153. The "Docket Text" column correctly identifies the entry date of November 5, 2015. *Id.* For reference, Judge Real dated the hand-written note on the Order denying the Joint Stipulation October 30, 2015 (E.R. 6), and the Joint Stipulation was not filed until October 23, 2015. E.R. 90.

4-5. Nowhere does the Order address the parties' Joint Stipulation allowing Plaintiffs to file a Frist Amended Complaint or the First Amended Complaint that was filed five days earlier. E.R. 1-5.

In light of the confusion as to whether the case was still open in light of the District Court's dismissal of the original complaint with prejudice after a First Amended Complaint was filed, Defendants filed a motion to dismiss the First Amended Complaint on November 30, 2015. E.R. 154. Then, on December 4, 2015, the District Court cleared up any confusion as to the status of the case by entering a Notice To Filer Of Deficiencies into the Docket, stating that the "Case is CLOSED." E.R. 154; *see also* E.R. 17.

Plaintiffs filed their Notice of Appeal on December 10, 2015. E.R. 11. After the parties fully briefed Defendants' motions to dismiss the First Amended Complaint, Judge Real issued an Order denying Defendants' motions to dismiss the First Amended Complaint as moot because the case was closed and was currently on appeal before this Court. E.R. 9-10.

SUMMARY OF ARGUMENT

When a party is entitled to file an amended pleading pursuant to the Federal Rules of Civil Procedure, a district court abuses its discretion when it denies that party leave to file the amended pleading. *Dollonne v. Ventura Unified Sch. Dist.*,

272 Fed. Appx. 613, 615 (9th Cir. 2008); *Allwaste*, 65 F.3d at 1530-31 (9th Cir. 1995).

Here, Defendants filed motions to dismiss Plaintiffs' original complaint. E.R. 151-153. In lieu of Plaintiffs opposing Defendants' motions, all parties to the action filed a Joint Stipulation allowing Plaintiffs to file a First Amended Complaint. E.R. 90-93; 153. Thus, pursuant to Rule 15(a)(2), Plaintiff was entitled to file an amended pleading without leave of the District Court. Fed. R. Civ. P. 15(a)(2) ("[A] party may amend its pleading only with the opposing party's written consent *or* the court's leave.") (emphasis added).

Rather than allowing Plaintiffs to file its stipulated-to First Amended Complaint, Judge Real denied the stipulation, stating that "no good cause" had been shown. E.R. 6-8; 153. Accordingly, the District Court abused its discretion by refusing to grant Plaintiffs leave to amend their complaint despite their entitlement to under Rule 15(a)(2). The District Court further erred in applying the "good cause" standard applicable to a decision on whether to grant a party leave to amend its pleadings under Rule 16 rather than Rule 15(a)'s liberal standard favoring leave to amend. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-608 (9th Cir. 1992).

After denying the parties' Joint Stipulation and refusing to provide Plaintiffs an opportunity to amend its complaint, the Judge Real issued an Order dismissing

without leave to amend Plaintiffs' original complaint. E.R. 1-5. The District Court again abused its discretion in denying Plaintiffs' leave to amend after dismissing their original complaint; the factual record demonstrates that, to the extent there are any deficiencies in the original complaint, they can be cured by the First Amended Complaint.

As the District Court abused its discretion by denying Plaintiffs the opportunity to amend their complaint, Plaintiffs respectfully request that this Court reverse this decision and remand the matter with instructions to permit the Plaintiffs to file a First Amended Complaint.

ARGUMENT

A. It Is Improper And An Abuse Of Discretion For A District Court To Deny Plaintiffs The Opportunity To Amend Their Pleadings When All Parties In The Case File A Stipulation Permitting Plaintiffs To Amend Their Complaint

Pursuant to Federal Rule of Civil Procedure 15, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) permits amendment of the pleadings with the opposing parties' written consent. Leave of the District Court is required by Rule 15(a)(2) in the alternative when the parties have not provided written consent. Fed. R. Civ. P. 15(a)(2) (may amend "with the opposing party's written consent *or* the court's leave") (emphasis added).

In this case, all parties filed a Joint Stipulation permitting Plaintiffs to file a First Amended Complaint instead of filing an opposition to Defendants' motions to dismiss the original complaint. E.R. 90-93. Thus, Plaintiffs had the opposing parties' written consent to amend their pleading and, pursuant to Rule 15(a)(2), were permitted to amend their complaint. By denying Plaintiffs leave to amend their complaint despite their entitlement to do so under Rule 15(a), the District Court abused its discretion. *Dollonne v. Ventura Unified Sch. Dist.*, 272 Fed. Appx. 613, 615 (9th Cir. 2008) (finding an abuse of discretion after Judge Real dismissed a plaintiff's complaint without leave to amend despite Rule 15(a) entitling that plaintiff to amend her complaint, noting that "[a] district court abuses its discretion if it bases its denial on an inaccurate view of the law"); *Allwaste*, 65 F.3d at 1530-31 (finding that the district court abused its discretion where it denied leave to amend a complaint despite plaintiffs' entitlement to do so under Rule 15(a)).

Even if Plaintiffs required leave of the District Court – which they did not under Rule 15(a)(2) – to file their First Amended Complaint, the District Court applied the wrong standard. Rule 15(a) is limited by Rule 16 in that, once a district court has established a pretrial scheduling order pursuant to Rule 16, Rule 16's standards control rather than Rule 15(a)'s standard. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-608 (9th Cir. 1992). Under Rule 15(a), where

the Court's discretion is required, "Rule 15 advises the court that 'leave shall be freely given when justice so requires.' This policy is 'to be applied with extreme liberality.'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). On the other hand, Rule 16 requires "good cause" to be shown to modify a schedule entered by the District Court, including amending pleadings after a date specified in the District Court's scheduling order. *Mammoth Recreations*, 975 F.2d at 608.

Here, Judge Real had not yet entered a Scheduling Order and there was no deadline to amend the pleadings entered by the District Court in this case. E.R. 151-155. Therefore, to the District Court was permitted to exercise discretion over whether to allow amendment to the pleadings, Rule 15(a)'s extremely liberal standard of granting leave to amend applied rather than Rule 16's "good cause" standard. *Eminence Capital*, 316 F.3d at 1051; *Mammoth Recreations*, 975 F.2d at 607-608. However, in denying the parties' Joint Stipulation allowing Plaintiffs to file a First Amended Complaint, Judge Real's basis for denial was that no "good cause" was shown. E.R. 6-8, 153.

Under Rule 15(a)(2), Plaintiffs were permitted to file their First Amended Complaint because they had the written consent of both Defendants in the case. E.R. 90-93. Leave of the District Court was not required. Fed. R. Civ. P. 15(a)(2).

The District Court abused its discretion by denying Plaintiffs leave to file the stipulated-to First Amended Complaint. To the extent the District Court's discretion was required for Plaintiffs to file their First Amended Complaint, the District Court abused that discretion by applying the "good cause" standard rather than Rule 15(a)'s liberal standard of freely granting leave to amend. E.R. 6-8, 153; *Mammoth Recreations*, 975 F.2d at 607-608.

B. Plaintiffs' First Amended Complaint Is Not Futile

Plaintiffs' original complaint should not have been dismissed without leave to amend because Plaintiffs' First Amended Complaint is not futile. "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467 (9th Cir. 1991). "A complaint should not be dismissed without leave unless amendment would be futile." *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014).

In reviewing a District Court's dismissal without leave to amend, this Court looks at five factors to ascertain whether the denial of leave was an abuse of discretion: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Ecological Rights Foundation v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir.

2013) (quoting *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011)).

In the underlying case, the Joint Stipulation consenting to Plaintiffs filing their First Amended Complaint was agreed to by all parties and was filed three months after the case was first filed and just one month after Defendants first responded to the initial complaint. E.R. 151-153. Accordingly, the "undue delay," "prejudice to the opposing party," and "whether the plaintiff has previously amended the complaint" factors all support leave to amend. There is nothing in the record below or in Judge Real's Order dismissing Plaintiffs' original complaint that supports a conclusion that Plaintiffs are seeking to file their First Amended Complaint in bad faith. E.R. 1-5. Therefore, the only potentially relevant factor in the analysis as to whether Plaintiffs should have been provided leave to amend their complaint is whether the First Amended Complaint would be futile.

The First Amended Complaint is not futile because it adequately pleads violations of the Telephone Consumer Protection Act, California Unfair Business Practices Act, and common law conversion. The TCPA prohibits the use of an "automatic telephone dialing machine" to place certain calls to cellular telephones without the recipient's "prior express consent." 47 U.S.C. § 227(b)(1). Text messages sent to mobile phones constitute "calls" regulated under the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). Congress

delegated implementing authority over the TCPA to the Federal Communications Commission ("FCC"). *Id.* at 953 (citing 47 U.S.C. § 227(b)(2)).

Effective October 16, 2013, the FCC added an express *written* consent requirement "that include[] or introduce[] an advertisement or constitute telemarketing." 47 C.F.R. § 64.1200(a)(2) (emphasis added); *see Meyer v. Bebe Stores, Inc.*, Case No. 14-cv-00267-YGR, 2015 U.S. Dist. LEXIS 12060, at *9-10 (N.D. Cal. Feb. 2, 2015). The FCC expressly defines the term "prior express written consent:"

> The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

47 C.F.R. § 64.1200(f)(8). To obtain a consumer's "prior express written consent," the FCC regulations contain two additional requirements:

The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

47 C.F.R. § 64.1200(f)(8)(i)(A)-(B).

Plaintiffs' First Amended Complaint is not futile because it adequately pleads a violation of the TCPA. Plaintiffs allege that they sent initial text messages in response to misleading social media posts that led Plaintiffs to believe they would be entitled to discounts they would otherwise not be eligible to receive without first sending the requested text message or that they would be entered into a contest to win a prize that they would not otherwise be eligible to win without first sending a text message with the keyword advertised in Defendants' social media post. E.R. 30-39. Plaintiffs' First Amended Complaint, especially when "construe[d] [] in the light most favorable" to Plaintiffs, *OSU Student Alliance v. Ray*, 669 F.3d 1053, 1061 (9th Cir. 2012), adequately pleads violations of the TCPA for at least four distinct reasons:

1. Defendants did not obtain an express agreement in writing, bearing Plaintiffs' signatures. E.R. 19; 21; 30-39; 48-65; 68-70; 78-79.
2. Any written agreement Defendants could possibly point to (i.e., Plaintiffs' text message containing a keyword such as "SURPRISE" or "GAMER") does not contain "a clear and conspicuous" authorization for Defendants to deliver or cause to be delivered advertisements using an automatic telephone dialing system. E.R. 20-21; 30-39; 50-65.

3. Any possible written agreement (i.e., the text messages from Plaintiffs with a keyword) does not include the telephone number to which Plaintiffs authorized any such advertisements. E.R. 30-39; 50-65.

4. There is no disclosure to Plaintiffs anywhere, let alone in any written agreement, that Plaintiffs are not required to enter into any agreement as a condition of purchasing any goods or services. E.R. 19; 21; 30-39; 48-65; 68-70; 78-79.

Because Plaintiffs' First Amended Complaint adequately pleads a violation of the TCPA, it also adequately pleads a violation of California's Unfair Business Practices Act, which prohibits any business practice "forbidden by law." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999). Plaintiffs also adequately plead a common law conversion claim. Plaintiffs' First Amended Complaint alleges that Plaintiffs had ownership or the right to possess the exclusive use of their mobile phones and the use of those phones' data and that Defendants' wrongful acts interfered with their possession of their mobile phones and the phones' associated data. E.R. 30-39; *see Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (Cal. App. 1998).

The District Court's dismissal of Plaintiffs' original complaint without leave to amend was an abuse of discretion. None of the five factors, including and especially futility, considered by this Court in analyzing whether Judge Real's

denial of Plaintiffs' opportunity to amend their complaint counsel in favor of dismissal without leave to amend. Plaintiffs should have been permitted to file their First Amended Complaint.

CONCLUSION AND SUMMARY OF RELIEF REQUESTED

The District Court abused its discretion by denying Plaintiffs leave to file a First Amended Complaint despite the parties' filing of a stipulation pursuant to Federal Rule of Civil Procedure 15(a)(2) allowing Plaintiffs to file a First Amended Complaint. Further, the District Court abused its discretion by granting Defendants' motions to dismiss the original complaint without leave to amend. Accordingly, Plaintiffs respectfully request that this Court reverse this decision and remand the matter with instructions to permit the Plaintiffs to file a First Amended Complaint. If deemed appropriate, the Court should designate that the case be reassigned on remand. *See Mason-Ealy v. City of Pomona*, 557 F. App'x 675, 677 (9th Cir. 2014).

Dated: May 20, 2016

Respectfully submitted,

BERGER & HIPSKIND LLP

/s/ Daniel P. Hipskind
Daniel P. Hipskind
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,661 words, excluding the parts of the brief exempted by Fed. R. App. P. 23(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2013, using proportionally-spaced, 14-point Times New Roman.

Dated: May 20, 2016

BERGER & HIPSKIND LLP

/s/ Daniel P. Hipskind
Daniel P. Hipskind

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellants hereby state that there are no known related cases.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent