Smith v. Rocky Brands

Circuit Court of the Fourteenth Judicial Circuit of Florida, Holmes County

September 12, 2023, Decided; September 12, 2023, Filed

30-2023-CA-000111-CAAM

Reporter
2023 Fla. Cir. LEXIS 1053 *

RUBY SMITH, individually and on behalf of all others similarly situated, Plaintiff, v. ROCKY BRANDS, INC. d/b/a GEORGIA BOOT, Defendant.

Judges: **[*1]** Russell S. Robert, Judge.

Opinion by: Russell S. Robert

Opinion

ORDER DENYING MOTION TO DISMISS

THIS CAUSE came before the Court on August 14, 2023 for hearing after notice on the Defendant Rocky Brands Inc.'s Motion to Dismiss Class Action Complaint filed on May 31, 2023. The Court having considered the Motion to Dismiss, the Defendant's Supplement to Motion to Dismiss filed on August 7, 2023, the Plaintiff Ruby Smith's Opposition in Response filed on August 9, 2023, the Plaintiff's Notice of Supplemental Authority filed on September 5, 2023, the arguments presented at the hearing, and Plaintiff's Class Action Complaint filed on April 10, 2023, the Court finds, and orders as follows.

1. The Plaintiff's Class Action Complaint asserts a putative class action pursuant to the Florida Telephone Solicitation Act ("FTSA") of Florida Statutes §501.059.

2. The Defendant's Motion to Dismiss asserts the Plaintiff has failed to establish that she has standing to bring her Class Action Complaint under the FTSA. Additionally, the Defendant argues the Class Action Complaint must be dismissed based on an amendment to the FTSA effective on May 25, 2023.

3. The Plaintiff's Class Action Complaint alleges that for at least the **[*2]** past year, the Defendant "bombarded" her with telephonic sales calls on her cellular telephone number, including three specific texts in October 2022, in violation of the FTSA. The Plaintiff alleges these calls caused her harm including actual damages, inconvenience, invasion of privacy, aggravation, annoyance, and violation of her statutory privacy rights.

4. "When standing is raised as an issue, the trial court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Alachua Cnty. v. Scharps, 855 So. 2d 195, 198 (Fla. 1st DCA 2003)*.

5. "Standing to maintain a lawsuit depends on whether the party has a personal stake in the outcome of the proceeding, such as an injury that may be redressed by the suit. When considering standing, the trial court must accept all the material allegations as true, and construe them in favor of the challenged party. Standing should not be confused with the merits of a claim." *Sun States Utilities, Inc. v. Destin Water Users, Inc., 696 So. 2d 944, 945 n. 1 (Fla. 1st DCA 1997)*.

6. Standing is one of the requirements for class certification. "A threshold inquiry in a motion for class certification is whether the class representative has standing to represent the putative class members." *Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 116 (Fla.*

2011). "To satisfy the standing requirement for **[*3]** a class action claim, the class representative must illustrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation. In deciding if a party has alleged a justiciable case or controversy, the trial court is not required to determine the merits of the case. The proof required is proof of the elements of *standing*, not proof directed to the elements of the case or to the ultimate merits of the case. Rather, the trial court must determine if the class representative has alleged sufficient facts to establish a legal issue for the court's resolution. *Id. at 116-117* (internal citations and quotations omitted).

7. "A case or controversy exists if a party alleges an actual or legal injury. An actual injury includes an economic injury for which the relief sought will grant redress. That injury must be distinct and palpable, not abstract or hypothetical." Id. (internal citations and quotations omitted).

8. Statutory damages may be an economic injury sufficient to establish standing. In *Sosa*, the plaintiff alleged Safeway violated Sections 627.840(3)(b) and 627.835 of the Florida Statutes relating to premium finance company practices. **[*4]** The Florida Supreme Court reasoned that if Sosa proved Safeway violated Section 627.840, Safeway would owe Sosa and the members of the class the damage award allocated under Section 627.835, and that was an economic injury for which Sosa and the other class members could seek redress. *Id. at 116-117*.

9. Florida state courts have required a "concrete injury" or injury-in-fact for standing in federal consumer protection causes of action. See *Pet Supermarket Inc. v. Eldridge, 360 So.3d 1201 (Fla. 3d DCA 2023)*. Eldridge concerned the Telephone Consumer Protection Act 42 U.S.C. §227(b) ("TCPA") and standing was resolved on summary judgment. See also *Saleh v. Miami Gardens Square One, Inc., 353 So. 3d 1253 (Fla. 3d DCA 2023)* (Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. §1681c(g)(1)); *Southam v. Red Wing Shoe Co., Inc., 343 So.3d 106 (Fla. 4th DCA 2022)* rev. den. *2022 WL 16848677 (Fla. Nov. 10, 2022)* (also FACTA).

10. However, the most recent opinion on standing based on the FTSA is *Muccio v. Glob. Motivation, Inc., No. 23-10081, 2023 WL 5499968, at *1 (11th Cir. Aug. 25, 2023)*, in which the federal court stated that the receipt of an unwanted text caused a concrete injury.

11. Before that case was issued, the Eleventh Circuit revisited standing for a TCPA cause of action. As recognized in *DARREK CULBERTSON, Plaintiff, v. PRO CUSTOM SOLAR LLC, Defendant., No. 8:22-CV-2252-CEH-JSS, 2023 WL 5749228, at *4 (M.D. Fla. Sept. 6, 2023)*, the issue of standing in TCPA cases was clarified by the Eleventh Circuit in its *en banc* opinion in *Drazen v. Pinto, 74 F.4th 1336 (11th Cir. 2023)* ("*Drazen II*"), which was issued after the Fourth District's opinion in Pet Supermarket Inc. v. Eldridge. In *Drazen II*, the Eleventh Circuit held that consumers who received single unwanted, illegal telemarketing text messages from a **[*5]** web-hosting company suffered a concrete injury in fact, as required to have standing for a TCPA cause of action.

12. Last month, following its decision in Drazen II, the Eleventh Circuit ruled in *Muccio v. Glob. Motivation, Inc.* that a plaintiff had standing to bring a claim under the FTSA because receipt of an unwanted text message causes a concrete injury under the FTSA. "We [] explained [in *Drazen II*] "the Constitution empowers Congress to decide what degree of harm is enough so long as that harm is similar in kind to a traditional harm." *Drazen v. Pinto,*

--- F.4th ----, No. 21-10199, slip op. at 17, (11th Cir. July 24, 2023) (en banc) (*Drazen II*). "[T]he harm associated with an unwanted text message shares a close relationship with the harm underlying the tort of intrusion upon seclusion." Id. at 17. As a result, "the receipt of an unwanted text message causes a concrete injury." Id. at 18. And, like Congress did with the TCPA, the Florida Legislature "has used its lawmaking powers to recognize a lower quantum of injury necessary to bring a claim under the [FTSA]." Id."

13. A statutory violation may be sufficient to confer standing even without an additional showing of harm. In *Laughlin v. Household Bank, Ltd., 969 So.2d 509 (Fla. 1st DCA 2007)*, the First District ruled that a plaintiff was not required to prove actual damages, but only a violation of one of the prohibited practices **[*6]** in the Florida Consumer Collection Practices Act of Fla. Stat.§559.72 (2001). This has also been applied to claims under the Fair Debt Collection Practices Act of 15 U.S.C. §1692a *et seq.* and *Fla. Stat. §559.72*. See *Meyer v. Fay Servicing, LLC, 385 F.Supp.3d 1235 (M.D. Fla. 2019)*; *Shallenburg v. PNC Bank, N.A., Case No.: 8:18-cv-2225-T-36TGW, 2020 WL 555447 (M.D. Fla. Feb. 4, 2020)*.

14. The Court declines to grant the Defendant's Motion to Dismiss for lack of standing at this stage of the case, finding this issue is more properly examined on the Plaintiff's Motion for Class Certification.

15. With respect to the Defendant's second ground for its Motion to Dismiss, *Section 501.059(10)(c) of the Florida Statutes*, as amended in May 2023, provides:

> Before the commencement of any action for damages under this section for text message solicitations, the called party must notify the telephone solicitor that the called party does not wish to receive text messages from the telephone solicitor by replying "STOP" to the number from which the called party received text messages from the telephone solicitor. Within 15 days after receipt of such notice, the telephone solicitor shall cease sending text message solicitations to the called party and may not send text messages to the called party thereafter, except that the telephone solicitor may send the called party a text message to confirm receipt of the notice. The called **[*7]** party may bring an action under this section only if the called party does not consent to receive text messages from the telephone solicitor and the telephone solicitor continues to send text messages to the called party 15 days after the called party provided notice to the telephone solicitor to cease such text messages.

16. Section 2, ch. 2023-150, provides that "[t]he amendments made by this act apply to any suit filed on or after the effective date of this act and to any putative class action not certified on or before the effective date of this act."

17. The courts have addressed other statutory amendments requiring pre-suit notice. In 2021, the Florida Legislature enacted *Section 627.70152 of the Florida Statutes*, which added a required pre-suit notice of intent to litigate as a condition precedent to filing suit on a property damage insurance contract. Retroactive application of this statutory requirement was recently addressed in *Cole v. Universal Property & Casualty Ins. Co., 363 So. 3d 1089 (Fla. 4th DCA 2023)*. The court held that even though the policy was issued−and the damage occurred−before the enactment of *Section 627.70152*, the statute applied. The case itself was filed after the effective date of the new statute.

18. However, the Court finds it would be improper to apply the amendment to *Section*

501.059 of the Florida Statutes to a case filed before the legislation **[*8]** was passed into law. The Court agrees with the reasoning in Pearson v. Scottsdale Ins. Co., No. 8:22-CV-1530-SDM-AEP, 2023 WL 4419725, at *2, note 2 (M.D. Fla. July 10, 2023) (emphasis added)[1] , which cites to *Cole* and

§672.70152 as well as *Menendez v. Progressive Express Ins. Co., 35 So. 3d 873 (Fla. 2010)* (in which the Florida Supreme Court ruled that the pre-suit notice requirement of Florida's Motor Vehicle No-Fault Law, §627.736(11) (2001), was not procedural but substantive and could not be applied retroactively):

A mind inclined to conceptual clarity might hesitate at the parties' and the Florida courts' use of "retroactivity" to describe a pre-suit notice requirement. As defined in Black's Law Dictionary (11th ed. 2019), "retroactivity" means "extending in scope or effect to matters that have occurred in the past." Even if a policy was issued "in the past," the requirement of pre-suit notice applies to any action for breach of the policy, a prospective occurrence not "in the past." Quoted by Black's Law Dictionary (11th ed. 2019), T.C. Hartley isolates the pertinent distinction:

> 'Retroactivity' is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity,' consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. **[*9]** The second concept, which will be referred to as 'quasi-retroactivity,' occurs when a new rule of law is applied to an act or transaction in the process of completion.... [T]he foundation of these concepts is the distinction between completed and pending transactions...."
>
> T.C. Hartley, *The Foundations of European Community Law* 129 (1981).

Under this formulation, Florida's pre-suit notice requirement is "quasi-retroactive" because the requirement imposes a prospective requirement (pre-suit notice) on a "pending transaction" (an insurance contract charging the insurer with a duty that the insurer has allegedly failed to perform). Of course, if a statute requiring pre-suit notice purported to subject to dismissal an action filed before the statute became effective, the statute would have "true retroactivity" (but would likely violate, among other things, the rights of due process and access to the courts). Similarly, if a statute purported to prohibit an insurer's charging a deductible to cover a certain peril (such as a broken windshield), the statute would have "true retroactivity" (but would likely amount to a constitutional impairment of contract). Neither type of retroactivity is immune **[*10]** from scrutiny. But a pre-suit notice requirement, which disturbs nothing within the four corners of the policy and instead imposes a prospective obligation in the event of a lawsuit, might not warrant the visceral repugnance conjured by "true retroactivity."

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[1] A state court may properly adopt a federal court's logic and reasoning and its conclusion regarding a Florida state law issue. "Appellant reminds us that the decision of the Ninth Circuit Court of Appeals in the *Cable Vision [Inc., et al. v. KUTV, Inc., the KLIX Corporation et al., 335 F.2d 348 (9th Cir. 1964)]* case is not binding on this Court, and importunes us to disagree with the conclusion therein reached. While it is readily conceded that decisions of federal courts are not binding on state courts as regards questions of law which are exclusively within state court jurisdiction, it is our view that the force of the logic and reason expressed in the *Cable Vision* decision is inescapable. We therefore adopt the reasoning and conclusions reached by the Ninth Circuit Court of Appeals in the *Cable Vision* case as applicable to the case sub judice, and on the basis of such application we affirm the decree appealed." *Herald Pub. Co. v. Fla. Antennavision, Inc., 173 So. 2d 469, 474-75 (Fla. 1st DCA 1965)*.

19. The Court declines to dismiss this case based on retroactive application of *Section 501.059(10) (c), of the Florida Statutes* to this case which was filed before the legislation was enacted.

It is, therefore,

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Class Action Complaint is denied. **[*11]** The Defendant shall file a responsive pleading within twenty (20) days of the date of this Order.

DONE AND ORDERED on this Tuesday, September 12, 2023 in Bonifay, Holmes County, Florida.

/s/ Russell S. Robert

Russell S. Robert, Judge

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