FOURTH DIVISION
August 31, 2017

No. 1-16-1129

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CE DESIGN LTD., an Illinois corporation, individually and as the representative of a class of similarly-situated persons,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 08 CH 24965
ERNIDA, LLC,	)	
	)	Honorable Peter J. Flynn,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Circuit court properly entered summary judgment in favor of defendant in Telephone Consumer Protection Act class action. By purchasing advertising program and including contact information in industry trade directory, plaintiff affirmatively invited and expressly consented to contact from businesses in commercial construction industry, including contact by receipt of facsimile transmission.

¶ 2 Plaintiff, CE Design Ltd., brought a class action against defendant, Ernida, LLC for damages under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 (Supp. III 2004), conversion, and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq*. (West 2005), based on an alleged unsolicited

facsimile transmission (fax) that plaintiff received from defendant. The circuit court entered summary judgment in favor of defendant based principally on this court's decision in *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572. We agree with the thorough and careful reasoning of the trial court and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Factual Background

¶ 5 On June 20, 2005, defendant sent a fax to plaintiff after obtaining plaintiff's fax number from the then-current edition of the Blue Book, a well-established directory of commercial construction businesses whose purpose is to " 'bring buyers and sellers together within the commercial construction industry.' " *Speedway Crane*, 2015 IL App (1st) 132572, ¶ 27. At the time, defendant was a small kitchen supply company. Plaintiff was an engineering consulting firm that provided engineering, architectural, and surveying services. Both parties had ceased operating by 2010. Plaintiff currently exists only as a professional class plaintiff filing these TCPA claims.

¶ 6 On July 11, 2008, plaintiff sued defendant. Plaintiff represents a class of 1,851 fax recipients who allege that defendant violated the TCPA by sending its June 2005 fax. The class was certified on April 4, 2012.

¶ 7 B. *Speedway Crane*

¶ 8 On August 26, 2013, the circuit court stayed this action, pending this court's decision in *Speedway Crane*, 2015 IL App (1st) 132572. *Speedway Crane* was a virtually identical case involving the same plaintiff and a fax sent to plaintiff by a different defendant. That fax was sent on June 27, 2005—one week before the fax sent by defendant here. *Id*. ¶ 1. Like defendant here, the defendant in *Speedway Crane* was a business operating in the Illinois commercial

construction industry. *Id.* And this case, like *Speedway Crane*, involves "[t]he version of the TCPA that was in effect in June 2005" (*id.* ¶ 1 n.1), the 2004 version of the TCPA. See 47 U.S.C. § 227 (Supp. III 2004).[1]

¶ 9 This court issued its opinion in *Speedway Crane* on June 18, 2015. We affirmed the grant of summary judgment against plaintiff. We rejected plaintiff's TCPA claim and concluded that "plaintiff gave its prior express permission, as that phrase is understood under the TCPA, to receive faxed advertisements from Blue Book customers." *Id.* ¶ 31. We additionally concluded that plaintiff had an established business relationship with the defendant because "plaintiff could reasonably expect that its established business relationship with the Blue Book would extend to Blue Book customers because the purpose of the Blue Book is to increase contact and exposure to other businesses in commercial construction." *Id.* ¶ 48.

¶ 10 Based on this court's opinion in *Speedway Crane*, the trial court in the instant case lifted the stay, granted summary judgment in favor of defendant on the TCPA claim, and dismissed all remaining counts of the complaint. Plaintiff appeals.

¶ 11 II. ANALYSIS

¶ 12 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c)

[1] As we noted in *Speedway Crane*, 2015 IL App (1st) 132572, ¶ 1 n.1, the facsimile-advertising provisions of the 2004 version of the TCPA were overridden by the passage of another federal law, the Junk Fax Act, in July 2005, but that amendatory change had no effect on the decision in *Speedway Crane*, nor does it affect our analysis, because the faxes at issue both there and here were in June 2005, when the relevant provisions of the 2004 version of the TCPA were still in effect.

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(West 2012). We review *de novo* a circuit court's order granting summary judgment. *Speedway Crane*, 2015 IL App (1st) 132572, ¶ 20.

¶ 13 As here, the conduct at issue in *Speedway Crane* involved plaintiff's dissemination of its business contact information in the Blue Book. *Id*. ¶ 5. Noting the [Federal Communication Commission (FCC)]'s explanation that "when a number is listed in a trade publication or directory, '[e]xpress permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements,' we concluded that "our traditional understanding of the meaning of 'express invitation or permission' is more nuanced in the context of industry directories." *Id*. ¶ 24-25 (quoting *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14129 (2003). We decided that "[t]he proper inquiry [was] whether Blue Book customers, as a group, expect to receive ads and understand that they are agreeing to receive them." *Id*. ¶ 26; see also *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 727 (7th Cir. 2011) (demonstrating that the relevant consideration is whether Blue Book "customers" expect to receive advertisements). We also stated that "an objective standard must necessarily govern this inquiry." *Speedway Crane*, 2015 IL App (1st) 132572, ¶ 26.

¶ 14 Based on the facts of the case, we concluded as follows:

> "[P]laintiff took significantly greater steps to ensure that its contact information would be available to Blue Book customers than ordinary free-listed users. By choosing to submit its contact information, highlighting it in an advertising program, and voluntarily providing its fax number, plaintiff not only understood that Blue Book customers would use that information to contact it, but

affirmatively invited contact from Blue Book customers, including by fax." *Id.* ¶ 31.

¶ 15 As we mentioned above, *Speedway Crane* was a nearly identical case involving the same plaintiff and a fax sent within a week of the one sent in this case. Still, we must consider a plaintiff's consent to receive a facsimile advertisement on a case-by-case basis. *Id.* ¶ 24 (quoting *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14129 (2003) (""In interpreting the TCPA as it applies to membership in a trade association, the FCC has explained, 'it [is] appropriate to treat the issue of consent regarding unsolicited facsimile advertisements on a case-by-case basis.' ").

¶ 16 Having no meaningful way to distinguish its own status as a Blue Book customer there versus its status here, plaintiff seeks to avoid the holding in *Speedway Crane* by focusing on *defendant's* status. Plaintiff argues that *Speedway Crane* does not apply because, in that case, both the defendant and plaintiff were Blue Book customers, but defendant here was not itself a *customer*, only a *user* of the Blue Book. We agree with the trial court that this is not a meaningful distinction.

¶ 17 To be sure, the distinction between a Blue Book "customer" versus a Blue Book "user" was relevant concerning the *plaintiff's* status. We focused on *plaintiff's* decision to go beyond being merely "free listed" in the Blue Book, instead choosing to become a Blue Book "customer," where it had "purchased an advertising program for its engineering consulting services in the Blue Book from 1998 until 2007." *Id.* ¶ 10. "As a customer, plaintiff submitted its contact information, including its telephone and fax numbers, for publication in the directory *so that businesses in the industry could contact it.*" (Emphasis added.) *Id.* ¶ 10. "The advertising

program featured plaintiff's contact information so that it would stand out to *Blue Book users*." (Emphasis added.) *Id*.

¶ 18 But we never suggested, much less held, that plaintiff's consent to receive fax advertisements was limited to fellow customers—that is, to other companies that paid for a special listing in the Blue Book. The emphasized quotes in the preceding paragraph are just two examples where we made it clear that a Blue Book customer such as plaintiff was not only inviting advertisements from fellow *customers* of the Blue Book but also from other members of the commercial construction industry who *use* the Blue Book, even if they have not paid for special advertising space in the directory. We emphasized that "plaintiff supplied its fax number to the Blue Book for publication and dissemination to *companies in the industry* so that they could communicate with plaintiff via fax." (Emphasis added.) *Id*. ¶ 26. We reasoned that plaintiff was held to the general understanding of Blue Book customers that "by publishing their contact information in the Blue Book, *business in the industry* will contact them," and that, in fact, plaintiff itself "published its contact information in the Blue Book to improve its commercial contacts in the industry and so that Blue Book *users* could contact it." (Emphases added.) *Id*.

¶ 19 Nor would it make any sense to limit plaintiff's permission to receive fax advertisements to fellow customers of the Blue Book. Plaintiff has pointed to nothing in its paid listing to suggest that only fellow Blue Book *customers* were invited to utilize the listed fax number. Under the objective standard we follow (see *id*.), any reasonable tradesperson in the commercial construction industry, using the Blue Book, would believe that plaintiff was consenting to receive advertisements by facsimile.

¶ 20 It is fair to note that in a few isolated passages in *Speedway Crane*, we used the word "customer" to refer to the defendant there, rather than "user." See, *e.g.*, *id*. ¶ 31 ("Thus, plaintiff

took significantly greater steps to ensure that its contact information would be available to Blue Book customers than ordinary free-listed users."). Perhaps that owes to the fact that the defendant in that case happened to be a Blue Book customer, itself. Or perhaps it was a moment of imprecise drafting. We agree with the trial court—there can be no doubt that the overall thrust of *Speedway Crane* was to focus on the actions of the *plaintiff*, which by taking out a paid listing (making it a "customer"), affirmatively invited businesses in the industry, using the Blue Book, to send plaintiff fax advertisements.

¶ 21 So the critical point regarding the *defendant's* status in a TCPA claim is not whether the defendant is a Blue Book "customer"—a company that pays to be listed in the Blue Book—but whether the defendant is a "business[] in the industry" and a "Blue Book user[]." *Id*. ¶ 10. Though plaintiff refers to defendant as a mere member of the "general public" and a "stranger," it is undisputed that defendant was a small kitchen supply company and part of the same commercial construction industry as plaintiff. And defendant used the Blue Book to contact plaintiff. Defendant, in other words, was both a business in the industry and a Blue Book user.

¶ 22 Plaintiff cites *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 3, also involving this plaintiff, but that case has little application here. The defendant was a pizza restaurant, and it did not obtain plaintiff's fax number from the Blue Book. The Blue Book, in fact, had almost no role in the case—the pizza company had hired a company to send fax advertisements based on area and zip codes. *Id*. ¶¶ 3-4.

¶ 23 Among many arguments the defendant raised there was that the plaintiff advertised in the Blue Book and thus consented to advertisements even from companies outside the construction industry. This court rejected the notion that a placed listing in the Blue Book equated with universal consent to receive faxes from any and all businesses (*id*. ¶ 25), but that is hardly a

holding that impacts the reasoning or holding in *Speedway Crane,* much less ours here. We will not read *C&T Pizza* for the broader proposition, urged by plaintiff, that a paid listing in the Blue Book does not signify consent to receive fax advertisements from businesses in the commercial construction industry and Blue Book users. Pizza parlors, yes, but *C&T Pizza* did not remotely speak to faxes sent by companies like defendant here or the defendant in *Speedway Crane*, and we will not extend the language in that decision far beyond the scope of that case. See also *Speedway Crane*, 2015 IL App (1st) 132572, ¶ 32 (similarly distinguishing *C&T Pizza* and disagreeing that its holding could be extended more broadly to faxes sent by companies in commercial construction industry that used Blue Book).

¶ 24 By purchasing an advertising program and including its contact information in the Blue Book, an industry trade directory, plaintiff affirmatively invited and expressly consented to contact from businesses in the commercial construction industry, such as defendant's. By voluntarily providing its fax number, plaintiff consented to contact by facsimile transmissions. The fax sent by defendant was not unsolicited, and defendant did not violate the TCPA as a matter of law. The trial court properly entered summary judgment on the TCPA count in defendant's favor.

¶ 25 Plaintiff's remaining counts for conversion and consumer fraud depend on its argument that defendant's fax advertisement was not solicited. Having found against plaintiff on that point, we need not consider the additional arguments raised by plaintiff to uphold those counts. They fail for the same reason the TCPA claim fails.

¶ 26 IV. CONCLUSION

¶ 27 We affirm the decision of the circuit court of Cook County granting summary judgment in favor of defendant and dismissing the cause in its entirety.

¶ 28 Affirmed.