THE ONLY ISSUE IN A FORCIBLE ENTRY-DETAINER ACTION IS THE RIGHT TO POSSESSION

Williams v. Bayview-Realty Assocs., 420 S.W.3d 358 (Tex. App.—Houston [14th Dist.] 2014).

FACTS: Appellee, Bayview-Realty Associates ("Bayview"), initiated a forcible-detainer action against appellant, Marcus Williams ("Williams"), alleging that Williams violated a property rental agreement between the two parties and refused to vacate the premises. Bayview sought unpaid rent and a writ of possession.

The lower court rendered a final judgment in favor of Bayview in a bench trial. Williams appealed but failed to perfect the appeal, prompting Bayview to file a motion for default judgment. The county court granted Bayview's motion. Williams subsequently moved to set aside the default judgment and for a new trial. The county court denied his motions and signed an amended judgment. Williams appealed.
HOLDING: Affirmed.
REASONING: The court held that the sole issue in a forcible-detainer action under Texas law is the right to immediate and actual possession of a premise. A property owner does not need to produce proof of title, but instead needs to produce enough evidence of ownership to prove his superior right to immediate possession. Both a justice court and a county court at law have jurisdiction to hear forcible-detainer actions, but they do not have jurisdiction over title to land disputes.

MISCELLANEOUS

COMPANIES UNABLE TO REMOVE STATE-BROUGHT CONSUMER PROTECTION CASES TO FEDERAL COURT

Miss. ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014).

FACTS: Petitioner, State of Mississippi, filed a *parens patriae* suit against Respondent, AU Optronics, in state court, alleging that Optronics engaged in an illegal price-fixing scheme detrimental to numerous but unnamed state citizens. Optronics removed the case pursuant to the Class Action Fairness Act ("CAFA"), which lowers diversity jurisdiction requirements to allow removal of mass actions involving 100 or more persons.

The Court held that the CAFA requires mass action claims to be filed by 100 or more individually named plaintiffs seeking joint relief.

The district court held that the suit qualified as a mass action, but remanded it on grounds that it fell within the CAFA's "general public" exception. The Fifth Circuit reversed, concurring with the district court that the suit was a mass action, but finding the "general public" exception inapplicable. The Supreme Court granted certiorari.
HOLDING: Reversed and remanded.
REASONING: In a unanimous decision, the Court held that the CAFA's "100 or more persons" phrase, a prerequisite for removal, does not apply in cases where a state is the sole plaintiff and no individual persons are parties to the suit. While the CAFA substantially lowers barriers to filing mass actions in federal court, the Court held that the Act's plain language indicates that Congress did not intend for unnamed parties in interest to be included for numerosity purposes. Instead, the Court held that the CAFA requires mass action claims to be filed by 100 or more individually named plaintiffs seeking joint relief. Because the State of Mississippi was the sole named plaintiff in this suit, the Court remanded the case to state court.

DEFENDANT'S ATTORNEYS' FEE AWARD MUST SEGREGATE FEES

Goldman v. Olmstead, 414 S.W.3d 346 (Tex. App.—Dallas 2013).

FACTS: Appellee, Olmstead, entered into a contract to sell a home to Appellant, Goldman. After entering into the contract, Goldman gave written notice to terminate the contract.

Olmstead sued Goldman for breach of contract. In turn, Goldman sued his real estate agent and her associated broker, NRT Texas, L.L.C. (collectively "NRT"). NRT counterclaimed against Olmstead for fraud.

The court ruled in favor of Olmstead and awarded damages, costs, and attorneys' fees. The court also entered a take nothing against Goldman and awarded attorneys' fees to NRT. Goldman appealed the awards of attorneys' fees.
HOLDING: Remanded.
REASONING: On appeal, Goldman argued that NRT failed to segregate their attorneys' fees for the defense against Goldman and for the fraud counterclaim. The court held that a party seeking to recover attorneys' fees has the burden to show that the fees were reasonable and necessary and incurred on a claim that allowed recovery of such fees. Therefore, unless legal services advanced both recoverable and non-recoverable claims, the party must segregate recoverable fees and non-recoverable fees.

The court observed that NRT defended Goldman's claim and prosecuted a fraud claim against Olmstead. NRT's testifying expert on attorneys' fees did not segregate the fees between the defense of Goldman's claims and the prosecution of NRT's fraud claim. The expert also failed to testify the claims were so intertwined as to be inseparable. For this reason, the court remanded the determination of NRT's award of attorneys' fees to the lower court.

COURT FINDS TCPA CONSENT BASED ON TEN-YEAR OLD CONDUCT

Kolinek v. Walgreen Co., (N.D. Ill. 2014) (not designated for publication).

FACTS: Plaintiff Robert Kolinek ("Kolinek"), representing a putative class, sued Defendant Walgreen Co. ("Walgreens"), for violating the Telephone Consumer Protection Act of 1991 ("TCPA"). Around 2002, Kolinek provided Walgreens with his cell phone number for identification purposes. In 2012, Kolinek began receiving automated calls to refill his prescription. Kolinek claimed the calls were in violation of the TCPA because the calls were made using a prerecorded voice and without the recipient's consent.

Walgreens filed a motion to dismiss for failing to state a claim, asserting that Kolinek consented to the calls by providing his number in 2002.

HOLDING: Granted.

REASONING: The court noted that consent under the TCPA does not expire on its own; it must be revoked. The court stated that prior express consent under the TCPA was an affirmative defense on which the defendant had the burden of proof. However, the TCPA does not define prior express consent. Instead, Walgreens relied upon an interpretation of the defense by the Federal Communications Commission ("FCC").

Consent under the TCPA does not expire on its own; it must be revoked.

The court stated that the FCC's interpretation governed in this case, with the general rule stating that persons who knowingly released their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. The court granted Walgreen's motion to dismiss, concluding that Kolinek failed to state a claim because the FCC's interpretation was binding on the court, and Kolinek admitted that he knowingly gave his cell phone number to Walgreens.

DISTRICT COURT FINDS NO TCPA VIOLATION FOR TEXT SENT BY SYSTEM LACKING PRESENT DIALING CAPACITY

Gragg v. Orange Cab Co.,____ F. Supp.2d ____(W.D. Wash. 2014).

FACTS: Defendant, Orange Cab Company ("Orange Cab"), used TaxiMagic, a computer program that linked Orange Cab's dispatch terminals with drivers. TaxiMagic sent a text message to customers after dispatch, in response to a driver's acceptance of a customer's request. Plaintiff, Torrey Gragg ("Gragg"), requested a taxi but did not provide his telephone number; however, Gragg's telephone number was captured through caller identification. As a result, he received TaxiMagic's message notifying him of the driver's acceptance.

Gragg filed suit alleging the text message violated the Telephone Consumer Protection Act ("TCPA"), specifically alleging that the TaxiMagic system was an Automatic Telephone Dialing System ("ATDS"). Orange Cab moved for partial summary judgment on the TCPA ATDS claim.

HOLDING: Granted.

REASONING: The court first identified what must be shown when alleging a violation under the TCPA: 1) Defendant must have called a cellular telephone number; and 2) Defendant was using an automatic telephone dialing system; 3) without the recipient's prior express consent. In order to be an ATDS, the equipment must either have had the capacity to store or produce the telephone numbers that are called using a random or sequential number generator, or be a predictive dialer with the capacity to dial telephone numbers from a lift without human intervention.

The court determined TaxiMagic's status under the TCPA was based on the system's present, not potential, capacity to store, produce, or call randomly or sequentially generated telephone numbers. The court stated that it would not adopt the broad interpretation of the term, thereby avoiding application of the TCPA violation to virtually limitless common technological devices. The court further explained TaxiMagic was not an ATDS because it did not have the capacity to randomly or sequentially generate telephone numbers to be stored, produced, or called. The system utilized telephone numbers provided directly by customers or captured using Caller ID.

The court also found that TaxiMagic was not a predictive dialer because of the human intervention that was required to send Gragg a text message. For the text message notification to be sent to the customer, the customer must have first provided information to the dispatcher, the dispatcher must then have transmitted the information, and the driver must have accepted the information on the data terminal. The level of human agency involved was sufficient to be "human intervention."