

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	David H. Coar	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CV 340	DATE	12/17/08
CASE TITLE	e360 Insight, LLC v. Comcast Corp.		

DOCKET ENTRY TEXT

A summary of the court's review of Judge Zagel's rulings is detailed below.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

This case was transferred to this court after Judge Zagel recused himself. The plaintiff, e360 Insight, LLC, filed a motion to vacate all of Judge Zagel's rulings, which this court denied on November 19, 2008. On its own motion, this court then reviewed Judge Zagel's rulings on all non-routine matters, reserving the possibility of additional briefing or vacatur if any of Judge Zagel's rulings were close calls.

This court has reviewed (1) the dismissal of e360's complaint (R. 43); (2) the denial of the motion for reconsideration of that ruling (R. 53); and (3) the denial of the motion to dismiss Comcast's counterclaims (R. 61). The following is a summary of that review.

e360, an e-mail marketing service, initiated this lawsuit based on Comcast's refusal to deliver e360's e-mails to Comcast subscribers, despite e360's assertion that the e-mails are not spam and that the company complies with Comcast's terms of use. e360 pursued four avenues for relief: (1) a claim under Illinois law for tortious interference with prospective economic advantage; (2) a claim under the Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(5), premised on what e360 described as Comcast's "denial of service attacks" and transmission of false "bounce" information; (3) a claim that Comcast is muzzling e360 in violation of its First Amendment rights; and (4) a claim of unfair competition and business practices under Illinois law.

Judge Zagel granted Comcast's motion for judgment on the pleadings, *see* Fed. R. Civ. P. 12(c), because, under the Communications Decency Act of 1996, Comcast's good-faith efforts to filter spam protect it from civil liability. *See* 47 U.S.C. § 230(c). He noted that courts have interpreted spam to be "objectionable" material under the Act, and that if a provider subjectively, and in good faith, deems material

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to be spam, the provider may block the material without risking civil liability. Although e360 had alleged a lack of good faith based on Comcast's purportedly different treatment of other mass-marketers, Judge Zagel concluded that this allegation was not enough to raise a plausible claim for relief. In the alternative, Judge Zagel ruled that e360 had failed to state a claim under each of the laws it invoked. e360 then filed a motion for reconsideration, which was denied.

In the meantime, Comcast filed counterclaims against e360 and third-party defendants David Linhardt, Maverick Direct Marketing Solutions, Inc., Bargain Depot Enterprises, LLC, Northshore Hosting Company, LLC, Ravinia Hosting Company, LLC, Northgate Internet Services, LLC, and as many as 50 unnamed individual defendants, alleging that they were sending (or attempting to send) spam to Comcast subscribers, bombarding Comcast's servers with spam, sending false or misleading advertising, selling counterfeit goods, making fraudulent representations to Comcast, filing frivolous lawsuits, and using deception to circumvent Comcast's spam-filtration efforts. Comcast brought these counterclaims under the CAN-SPAM Act, 15 U.S.C. § 7704(a)(1)&(2), the Computer Fraud & Abuse Act, 18 U.S.C. § 1030(a)(5), and the Illinois Electronic Mail Act, 815 ILCS 511/10, along with counterclaims of trespass to chattels, unjust enrichment, and abuse of process.

e360 and the third-party defendants filed a motion to dismiss each of the counterclaims. Judge Zagel dismissed the unjust enrichment claim without prejudice, but otherwise denied the motion. He explained that Comcast had adequately alleged that each of the named defendants played a role in the spamming scheme, and that Linhardt was properly named as an individual defendant because he was alleged to have acted as the owner of a corporation and to have personally made misrepresentations and directed lawsuit abuse. Judge Zagel rejected e360's argument that Comcast's claims under the CAN-SPAM Act and the Illinois Electronic Mail Act were subject to Rule 9(b)'s pleading requirements because the claims involved misrepresentations, not fraud, and he allowed them to proceed "based on information and belief" because Comcast alleged that the third-party defendants concealed many of their tactics to avoid detection. He also explained that the CFAA claim (based on e360 sending massive volumes of e-mails to Comcast's servers), was not obviously time-barred given e360's own allegations that it had sent e-mails to Comcast subscribers within the last two years. As for the trespass to chattels claim, Judge Zagel concluded that Comcast had alleged more than nominal damage to its servers based on the bombardment of e-mails from e360. And, finally, Judge Zagel allowed the abuse-of-process claim to proceed because Comcast had alleged use of the legal system for an improper purpose and that, in at least one case, such misuse occurred after process had been served.

Having reviewed each of these rulings, the court finds no compelling reason to revisit them. *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868-69 & n.16 (1988) (concluding that fairness required revisiting debatable rulings when they were made by a judge who should have recused himself); *Russell v. Lane*, 890 F.2d 947, 949 (7th Cir. 1989) (same). None of the rulings is a close enough call to justify vacatur or additional briefing, and so they will stand.