STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

GRAPHICS HOUSE SPORTS and DISPLAY SOUTH, INC.,

Defendants-Appellees,

and

PROMOTIONS, INC.,

Defendant.

UNPUBLISHED
June 17, 2008

No. 277659
Muskegon Circuit Court
LC No. 06-044737-CK

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff, Farm Bureau Mutual Insurance Company, appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(6) in favor of defendants, Graphics House Sports Promotions, Inc., and Display South, Inc., on the ground that "another action has been initiated between the same parties involving the same claim." The order also denied Farm Bureau's motion for summary disposition. We affirm.

The underlying facts are generally not in dispute. Graphics House is a Michigan corporation whose business is the sale and placement of advertising materials that promote various sports ventures. During 2002, Graphics House acquired a CD-Rom from American Business Directory containing the names, facsimile (fax) numbers, and contact information for approximately 300,000 businesses. Graphics House provided the fax numbers of businesses to Infolink Technologies, Inc., a Canadian Company, and Vision Lab Telecommunications, Inc., a Florida Company, for the purpose of conducting separate "fax broadcast" operations from each entity promoting Graphics House's products and services to the fax recipients. Graphics House contracted with Infolink to send out broadcast faxes to recipients in several states and billed Graphics House $7,849.21 for fax transmissions ordered. The Infolink transmissions were allegedly sent at various times between June 2001 and September 2003. Graphics House entered into a similar contract dated January 6, 2003, with Vision Lab to perform a fax advertising

campaign in several states, including Louisiana. Graphics House paid $2,205.92 for fax transmissions that Vision Lab allegedly sent on behalf of Graphics House on January 7, 2003, April 26, 2003, and September 15, 2003.

The Louisiana Action

On March 12, 2003, Display South initiated a class action lawsuit against Graphics House in the Louisiana 19th District State Court. Display South's claim stemmed from its receipt of unsolicited fax advertisements from Graphics House. Display South relied on the Telephone Consumer Protection Act ("TCPA"), 47 USC § 227 *et seq.*, which prohibits the transmission of unsolicited fax transmissions.[1] Display South alleged that it received faxes sent by or on behalf of Graphics House between March 12, 1999, and March 12, 2003, during which time Farm Bureau provided insurance coverage to Graphics House for both advertising injury and property damage. Display South later amended its claim on September 23, 2003, to include Farm Bureau as a defendant under Louisiana's direct action statute, asserting that Farm Bureau had an obligation to defend Graphics House pursuant to that insurance policy.

On January 13, 2006, Farm Bureau filed a motion for summary judgment, requesting the Louisiana court to dismiss Display South's claim against Farm Bureau. Farm Bureau argued that no coverage existed under the applicable policies for the claims asserted by Display South against Graphics House. On March 21, 2006, a hearing was held on Farm Bureaus' motion for summary judgment. The Louisiana court denied the motion and set forth the basis for its denial during the hearing, essentially finding that Farm Bureau's policy includes coverage and the obligation to provide a defense to any claims asserted by Display South against Graphics House. The court signed a written judgment denying Farm Bureau's motion on June 5, 2006.[2]

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[1] Display South's complaint described the scope of the proposed class:

> ¶ 5 – The Class members are "all recipients of unsolicited telefacsimile messages and/or advertisements" sent by or on behalf of Graphics House from March 12, 1999, through March 12, 2003, as long as such recipients had no "prior contractual relationship."
>
> ¶ 6 – "Defendant transmitted or initiated the transmission of thousands" of unsolicited faxes to Louisiana.
>
> ¶ 10 – "All [Members of the Class] have received unsolicited telefacsimile messages by the defendants in the State of Louisiana."

[2] On July 5, 2006, Farm Bureau appealed the Louisiana court's denial of summary judgment by filing an Application for Supervisory Writ in the First Circuit Court of Appeals for Louisiana, which is apparently equivalent to an interlocutory appeal. Display South opposed the application, and Farm Bureau subsequently filed a Second Application for a Supervisory Writ on September 5, 2006. Farm Bureau requested the court to grant Farm Bureau's motion for summary judgment and dismiss Display South's claims against Farm Bureau because the policies do not provide coverage for the claims made by Display South against Graphics House.

In the meantime, on March 23, 2006, counsel for Display South sent to Farm Bureau's Louisiana counsel, via e-mail, facsimile, and U.S. mail, a letter identified as a "Confidential Settlement Proposal." The letter began by stating:

> In view of the trial court's ruling pursuant to which Judge Kelley found advertising injury coverage for all allegations in the Petition, including those acts which might give rise to treble damages, we want to take this opportunity to extend a settlement offer which will allow Farm Bureau and its insured to resolve all claims within policy limits.

The letter referenced transmission logs for faxes sent into Louisiana on behalf of Graphics House, including 461 fax advertisements transmitted in Louisiana on January 7, 2003, April 26, 2003, and September 15, 2003. The letter thereafter stated, "Based on these facts, and the supporting evidence, we expect that Judge Kelley will certify this case as a class action." The letter also contained a section entitled "Overview of Claim Exposure," which stated:

> Also, other evidence suggests that Graphics House transmitted hundreds of thousands of fax advertisements nationwide, in addition to those identified above. Besides McKinnon's testimony, invoices produced in the course of this litigation show that Graphics House paid for the transmission of over 200,000 fax advertisements between January 1, 2001 and December 31, 2003.

The letter contained a chart, including calculations, based on either 461 total faxes or 210,101 faxes, calculated at both regular damages and treble damages, and concluded: "Thus, Graphics House faces liability which could exceed $350 million. Its exposure in Louisiana alone exceeds $800,000." Ultimately, the letter stated in pertinent part:

> We are willing to recommend settlement of any and all claims on behalf of a Louisiana settlement class defined as all persons who were sent a fax by or on behalf of Graphics house during the requisite time period, subject to court approval, under the following terms and conditions:
>
> - A total payment of $461,000, which shall represent a payment of $1,000 to each participating class member.

The Louisiana court held a hearing on the motion for class certification on December 1, 2006. In an order signed on January 3, 2007, the Louisiana court granted Display South's motion for class certification. The Louisiana court found that "The Class, consisting of approximately 461 persons or legal entities located within the State of Louisiana, satisfies the numerosity requirement of La. C.C.P. at 591(A)(1)." The court certified a plaintiff class comprised of:

> All recipients within the State of Louisiana of unsolicited telefacsimile messages and/or advertisements which were transmitted and/or initiated by or on behalf of Graphics House Sports Promotions, Inc. d/b/a GH Imaging and CHImaging.com between the dates of March 12, 1999, and through the present, in violation of 47 USCC § 227.

The Michigan Action

On August 28, 2006, Farm Bureau filed the present complaint for declaratory judgment in Muskegon County Circuit Court against Graphics House and Display South. Farm Bureau sought a declaration as to whether its policy provided coverage for fax transmissions allegedly sent on Graphics House's behalf to (1) the Louisiana recipients identified as purported class members in the Louisiana Class Action, and (b) all other recipients located in Louisiana and/or other states. Farm Bureau requested the following relief:

> A. Declare that the Policy does not include or expressly excludes coverage and the obligation to provide a defense to any claims asserted by Graphics House for violations of the TCPA, 47 USC 227(B)(3)(A);
>
> B. Declare that the Policy does not include or expressly excludes coverage and the obligation to provide a defense to any claims asserted against Graphics House in the Louisiana Class Action.
>
> C. Grant Plaintiff such other relief as is just and equitable, including statutory costs, interest and fees.

The parties filed cross-motions for summary disposition. Defendants argued that the action should be dismissed under MCR 2.116(C)(6) because of the pending Louisiana action, while Farm Bureau maintained that there were no factual issues in dispute and that the trial court should declare whether the policy issued to Graphics House provided insurance coverage and defense for violations of the TCPA. During a motion hearing held on February 12, 2007, the trial court noted that this case involves "foreseeable litigation in other states than Louisiana." The trial court issued a written opinion and order on April 3, 2007. The trial court acknowledged that "Farm Bureau seeks a declaratory judgment that it does not have to defend or indemnify its insured, Graphics House, for current litigation in the 19th District Court for the Parish at Easton Baton Rouge, Louisiana, and feared litigation in other states." The trial court denied Farm Bureau's motion for summary disposition, but granted defendants' motion for summary disposition under MCR 2.116(C)(6) "on the strength of *Valeo [Switches & Detection Systems, Inc v EMCom*, 272 Mich App 309; 725 NW2d 364 (2006).]" The trial court furthered ordered that "The resulting dismissal will be without prejudice because of the complicated jurisdictional issues."

I

Farm Bureau argues that the trial court erred by dismissing its claim for a declaration under MCR 2.605 that its insurance policy issued to Graphics House does not provide coverage for non-Louisiana TCPA claims against Graphics House. A trial court's decision on a motion for summary disposition is reviewed de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005).

Farm Bureau's argument in this issue does not involve the 461 cases involved in the Louisiana class action suit. Rather, the argument in this case involves 201,101 "potential non-Louisiana TCPA claims that are not at issue in the Louisiana case." Although the trial court refers to these potential claims in its opinion, the court does not specifically address them in its

opinion. Rather, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(6) with regard to the 461 claims involved in the Louisiana class action suit, but apparently denied Farm Bureau's request for a declaration with regard to the 201,101 potential non-Louisiana TCPA claims "without prejudice because of the complicated jurisdictional issues."

As pertinent to this issue, Farm Bureau alleged in its complaint for declaratory relief that "Display South has threatened to expand the Louisiana class action to include recipients from other states and/or to file additional cases seeking redress pertaining to the alleged fax transmissions." Declaratory judgments are governed by MCR 2.605(A), which provides:

> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

The grant of a declaratory judgment is within the trial court's discretion and can only be granted where there is an actual controversy. MCR 2.605(A)(1); *Shavers v Attorney General,* 402 Mich 554, 588; 267 NW2d 72 (1978). Without an actual controversy, the court lacks subject-matter jurisdiction to enter a declaratory judgment. *Genesis Ctr, PLC v Comm'r of Financial & Ins Services,* 246 Mich App 531, 544; 633 NW2d 834 (2001). An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve his legal rights. *Id.* A case of actual controversy does not exist, however, where the injury sought to be prevented is merely hypothetical. *Shavers v Attorney General,* 402 Mich 554, 588, 267 N.W.2d 72 (1978).

Here, Farm Bureau sought a declaratory judgment regarding *potential* liability and a *threat* of nationwide litigation for potential non-Louisiana claims as a result of comments made by counsel for Display South, which is not its insured, in the Louisiana class action lawsuit. The claims are merely speculative and rest upon contingent future events that may not occur, *Michigan Chiropractic Council v Comm'r of the Office of Financial Ins Services,* 475 Mich 363, 371; 716 NW2d 561 (2006), and the injuries claimed by Farm Bureau are merely potential and feared. In fact, it is unknown whether any claims will ever be brought on behalf of any non-Louisiana recipients of fax transmissions sent on behalf of Graphics House. In other words, Farm Bureau asked the court to issue a declaratory judgment with regard to whether its policy provides Graphics House insurance coverage against claims that may never be brought. This is not a case where a declaratory judgment is necessary to guide Farm Bureau's future conduct in order to preserve its legal rights. *Associated Builders & Contractors v Wilbur,* 472 Mich 117; 693 NW2d 374 (2005). In a case where an actual controversy exists, the insurer is generally anxious to determine the coverage question because, if coverage does not exist, it need not defend or indemnify its insured in the underlying suit. Thus, a declaration that coverage does or does not exist is valuable to the insurer to determine the course of its actions. In the present case, however, there is no controversy between insurer and insured with regard to non-Louisiana

TCPA claims because there is no underlying suit. Once an insurer pleads and proves that an actual controversy exists between itself and its insured, the trial court possesses the power to make a declaration regarding the coverage provided by the policy. Farm Bureau failed to plead and prove that an actual controversy exists with regard to "all other recipients [not involved in the Louisiana class action suit] located in Louisiana and/or other states."

II

With regard to the Louisiana class action suit, Farm Bureau argues that the trial court erred by following *Valeo, supra*, and granting summary disposition pursuant to MCR 2.116(C)(6) in favor of defendants with regard to the claims involved in the Louisiana class action suit. Farm Bureau recognizes in its brief on appeal that "this Court is required to follow *Valeo, supra,* pursuant to MCR 7.215(J)(1)," but maintains that *Valeo* ignored "binding Supreme Court precedent which states that a court does not lose jurisdiction due to another pending case in another state or foreign jurisdiction."

In *Valeo, supra* at 319, a panel of this Court concluded that MCR 2.116(C)(6) applies equally to pending foreign jurisdiction cases as it does to pending Michigan cases. The *Valeo* panel recognized a long line of cases holding that MCR 2.116(C)(6) did not apply to cases pending outside of Michigan. After analyzing each one, the panel determined that it was not required to follow such opinions pursuant to MCR 7.215(J)(1), and held that MCR 2.116(C)(6) applies equally to pending foreign cases and pending Michigan cases alike, given the clear and unambiguous language of the court rule.

Valeo is the first opinion issued on this issue after November 1, 1990, and therefore is precedential for purposes of stare decisis. The trial court did not err by relying on *Valeo* in granting defendants' motion under MCR 2.116(C)(6) with regard to Farm Bureau's request that the trial court declare that the policy does not include or expressly excludes coverage and the obligation to provide a defense to any claims asserted against Graphics House in the Louisiana class action.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra