FILED
United States Court of Appeals
Tenth Circuit

August 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK WILSON; WILSON LAW LTD.,

Plaintiffs - Appellants,

v.

ADVISORLAW LLC; DOCHTOR DANIEL KENNEDY; STACY SANTMYER,

Defendants - Appellees.

No. 18-1441
(D.C. No. 1:17-CV-01525-MSK)
(D. Colo.)

ORDER AND JUDGMENT*

Before **LUCERO**, **MATHESON**, and **MORITZ**, Circuit Judges.

Plaintiffs Mark Wilson and Wilson Law Ltd. appeal from the district court's decision granting summary judgment in favor of defendants AdvisorLaw LLC, Dochtor Daniel Kennedy, and Stacy Santmyer on their claim for false advertising under the Lanham Act, 15 U.S.C. §§ 1051-1141n. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Wilson began working for AdvisorLaw on May 1, 2016. He formed Wilson Law in June 2016 and he and his firm then entered into a service contract with Kennedy and AdvisorLaw that same month. These Colorado attorneys and their firms worked together until Kennedy terminated the service contract in October 2016. In emails sent on November 2, 2016, Kennedy accused Wilson of using intellectual property stolen from AdvisorLaw to compete with his business. Later that same day, a "Patrick Erickson," allegedly from New York, posted a negative review of Wilson on the website ripoffreport.com (the "Review"). The Review stated:

> Mark H. Wilson sounds very trustwothy and experienced. **He lied to me with no reservations**. He made claims of his experience, affiliations, credentials, and accumen [sic] which were complete fabrications. **He conned me** into hiring his s**ham of a company** (operating out of his home in Denver, CO) to save my career.
>
> I desperately needed an experienced lawyer to navigate FINRA and the IRS issues which resulted from a recent divorce. Mark portrayed himself as an expert with vast experience. Only after paying him **upwards of $15,000** did I begin to have concern over the lack of progress. . . . After paying additional money to a professional investigator, I learned that Mark had **flat out lied to me** about all of it.
>
> When I confronted Mark, he refused to admit that he had taken advantage of me. Even when hard evidence of his lies sent by email and recorded conversations proven to be lies were provided, he told me candidly "good luck getting any money back." **He said**, "I am very good at **hiding from judgments and collections**." That may have been the ONLY true thing he said.

Aplt. App., Vol. I at 72.

Wilson discovered the Review in January 2017. He and his firm then sued the defendants, accusing Kennedy of impersonating a fictitious person and publishing a false and defamatory review of Wilson on the Ripoff Report website. The complaint

included four claims for violations of the Colorado Organized Crime Control Act, which the district court dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Those claims aren't at issue in this appeal. The four remaining claims consisted of one federal claim for false advertising under the Lanham Act and three state law claims for civil conspiracy, defamation, and deceptive trade practices under the Colorado Consumer Protection Act.

Defendants moved for summary judgment on all of the remaining claims, with the exception of the defamation claim. For that claim, defendants requested that the district court decline to exercise pendent jurisdiction. The district court granted summary judgment on the Lanham Act claim and then dismissed without prejudice all three state law claims. Plaintiffs now appeal from the district court's summary-judgment decision.[1]

We review de novo the district court's grant of summary judgment on the Lanham Act claim. *United States v. Boeing Co*., 825 F.3d 1138, 1145 (10th Cir. 2016). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id*. (quoting Fed. R. Civ. P. 56(a)).

Defendants argued to the district court that summary judgment should be granted because plaintiffs could not "demonstrate a triable issue of fact as to whether

[1] Wilson also filed a motion for sanctions, which the district court denied. He doesn't appeal from that portion of the district court's decision.

[the Review] constituted commercial advertising or promotion" within the meaning of the Lanham Act.[2] Aplt. App., Vol. I at 178. The Lanham Act doesn't define what constitutes "commercial advertising or promotion,"[3] but we have adopted the following test to make this determination. The representations must be:

> (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing customers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000) (internal quotation marks omitted).

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[2] Defendants moved for summary judgment on other grounds as well, but the district court only addressed this argument.

[3] The relevant statutory provision states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
> . . . .
> (B) in *commercial advertising or promotion*, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (emphasis added).

In their summary judgment briefing, defendants argued that plaintiffs could not meet the fourth prong of the *Proctor & Gamble* test.[4] Plaintiffs agreed with the standard for the fourth prong—that "for speech to be an advertising or promotion . . . it must be disseminated sufficiently to the relevant purchasing public to constitute advertising or promotion within that industry." Aplt. App., Vol. II at 132-33 (internal quotation marks omitted). But they argued that there were "triable issues of fact as to whether the [Review] reached a numerically-significant quantity of actual or potential customers." *Id*. at 133. In support, they pointed to statements from their expert that the Ripoff Report website receives up to 250,000 visitors a day. They asserted that due to the popularity of the Ripoff Report website, "it is likely at least tens of thousands of people saw a summary of the [Review] on or about November 2, 2016." *Id*. at 136. And they further asserted "[a]ll this evidence tends to prove the

[4] We note that the second prong of the *Proctor & Gamble* test requires that the relevant representations be made "by a defendant who is in commercial competition with plaintiff." 222 F.3d at 1273 (internal quotation marks omitted). Plaintiffs alleged in their complaint that Kennedy posted the Review and forensic evidence indicated that the Review was posted from Kennedy's home on the night in question. But defendants maintain that the Review was posted by a nonparty named Jason Bacher who was at Kennedy's home that evening. But defendants explain that this factual dispute is not relevant to the appeal because their motion for summary judgment was primarily based on plaintiffs' failure to establish that the Review constituted advertising or promotion within the meaning of the Lanham Act. Defendants therefore contend that plaintiffs can't prevail on their Lanham Act claim "regardless of who posted the Review." Aplee. Br. at 4.

[Review's] content was and will be disseminated widely to at least thousands of the parties' potential customers." *Id*.

In their reply, defendants asserted that plaintiffs failed to "demonstrate a triable issue of fact as to whether the [Review] constituted commercial advertising or promotion because *Plaintiffs have not offered competent evidence that the [Review] was disseminated sufficiently to the relevant purchasing public*." *Id*. at 203 (emphasis added). Among other things, defendants argued that even if the Review had been featured on the website's homepage the first day it was published, "it would not establish dissemination to ***relevant*** consumers" because "[g]iven Plaintiffs' niche clientele, there is no reason to believe that any potential client visited the Ripoff Report homepage on any given day." *Id*. at 205-06 (emphasis in original).

On appeal, plaintiffs assert that they proved "the fake Review was widely distributed to Ripoff Report, a popular consumer website that thousands of people use each day." Aplt. Br. at 19. They argue that because "the false information about Wilson was distributed widely, to the public at large, and to a forum and individuals in a position to influence customers[,] . . . the evidence satisfies Wilson's burden of proving the false customer review could be considered a false advertisement." *Id*. at 20.

In *Sports Unlimited, Inc. v. Lankford Enterprises*, *Inc*., 275 F.3d 996, 1004 (10th Cir. 2002), we required that the alleged false advertising be sufficiently communicated to "any prospective customers [for gymnasium floor installation services] or persons [within that industry], such as architects, who might have

influence over prospective customers." While it's undisputed that the Review was posted on the Ripoff Report website, there is simply no evidence that it was disseminated to the relevant purchasing public—prospective clients in need of the type of specialized legal services that plaintiffs provide or others in that industry who might have influence over prospective clients.[5] Plaintiffs' argument that the review was disseminated "to the public at large," Aplt. Br. at 20, doesn't demonstrate that it was disseminated to the relevant purchasing public as our precedent in *Proctor & Gamble* and *Sports Unlimited* requires.[6] *See also Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002) ("[T]he touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion' under the Lanham Act is that the contested representations are part of an organized campaign to *penetrate the relevant market*. Proof of widespread dissemination *within*

[5] Plaintiffs do not explain who the relevant purchasing public is for their services, but they state that "Wilson and his business competed against Kennedy and AdvisorLaw by providing legal services to consumers, including, but not limited to, legal services to individuals involved in FINRA (Financial Industry Regulatory Authority) arbitration proceedings." Aplt. Br. at 3.

[6] We note that the parties spend much of their briefing discussing several district court decisions. We see no reason to address those cases as it is the decisions from our court, not any district court cases, that are binding precedent for analyzing the Lanham Act claim. *See Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320, 1329 (10th Cir. 2008) ("District court decisions cannot be treated as authoritative on issues of law. The reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent." (brackets and internal quotation marks omitted)). In a similar vein, "as an appellate court applying a de novo standard of review, we are in no way bound by the district court's prior interpretation of a [statutory provision]." *United States v. McElhiney*, 369 F.3d 1168, 1171 (10th Cir. 2004).

the relevant industry is a normal concomitant of meeting this requirement." (emphasis added)); *Coastal Abstract Serv., Inc. v. First Am. Title Ins., Co*., 173 F.3d 725, 735 (9th Cir. 1999) (noting that the disputed question was whether the representation was "sufficiently disseminated to the *relevant purchasing public* to constitute . . . 'promotion' within *that industry*" (emphasis in original) (internal quotation marks omitted)).

Likewise, plaintiffs' conclusory assertion that the Review was distributed widely "to a forum and individuals in a position to influence customers," Aplt. Br. at 20, lacks sufficient supporting evidence. Other than noting Ripoff Report's general popularity and referring to general statistics about customers reading online reviews, *see id*. at 19-20, plaintiffs offer no evidence that the Review was disseminated in a manner that would reach prospective customers for their specific legal services or others within the industry that would be in a position to influence prospective customers for their specific legal services.

While we don't condone the posting of a false review on the Ripoff Report website, we agree with the Second Circuit that "[a]lthough the Lanham Act encompasses more than the traditional advertising campaign, the language of the Act cannot be stretched so broadly as to encompass all commercial speech." *Fashion Boutique*, 314 F.3d at 57. The plaintiffs may continue to pursue their state law claims for defamation, civil conspiracy and deceptive trade practices under the Consumer Protection Act as the district court dismissed those claims without prejudice. Because plaintiffs failed to show that the Review was "disseminated

sufficiently to the relevant purchasing public to constitute advertising or promotion within that industry," *Proctor & Gamble*, 222 F.3d at 1274 (internal quotation marks omitted), it was proper for the district court to grant summary judgment in favor of defendants on plaintiffs' claim for false advertising under the Lanham Act.

As remedies for defendants' alleged Lanham Act violation, plaintiffs sought money damages and injunctive relief. The district court didn't address either of these remedies in its decision after concluding that defendants were entitled to summary judgment on the Lanham Act claim. Plaintiffs argue on appeal, however, that the district court should have evaluated their claim for injunctive relief under a lower standard of proof before granting summary judgment. But in order to be entitled to injunctive relief, plaintiffs first had to show that an injunction was needed "to prevent a violation [of the Lanham Act]." 15 U.S.C. § 1116(a); *see also* Aplt. Br. at 34 ("An injunction protects both consumers and the commercial plaintiff *from continuing acts of false advertising*." (emphasis added) (internal quotation marks omitted)). Because plaintiffs failed to demonstrate that the Review constituted false advertising under the Lanham Act, they necessarily couldn't show that an injunction was needed to prevent any future or continuing violation of the Act. The district court therefore wasn't required to address plaintiffs' request for injunctive relief.

The district court's judgment is affirmed.

Entered for the Court

Nancy L. Moritz
Circuit Judge