

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

KASSIS MANAGEMENT, INC.,

Plaintiff,

INDEX NO. 104736/2008

-against-

MOTION DATE _____

VERIZON NEW YORK, INC. and VERIZON COMMUNICATIONS, INC.,

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 2 were read on this motion by defendant(s) for summary and Judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	_____
Replying Affidavits (Reply Memo) _____	_____

FILED
AUG 23 2008
NEW YORK
COUNTY CLERKS OFFICE

Cross-Motion: Yes No

Defendants moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint.

Plaintiff is a real estate management firm which performs brokerage and management services. For over 27 years, defendants provided plaintiff a particular phone service which allows the simultaneous ringing of phone lines at two different locations. In this case, the phone lines involved plaintiff's owner's home and plaintiff's office at 141 East 45th Street, New York, New York. In the beginning of 2008, plaintiff transferred to a new business location, 271 Madison Avenue, New York, New York. Plaintiff sought from defendants a service similar to that which plaintiff had at the prior location. Plaintiff claims that it was unable to receive this

service without paying an "excessive" cost.

Plaintiff is seeking damages for lost profits and injunctive relief. The complaint contains claims for breach of contract and violations of the New York General Business Law (GBL) §§ 349 and 350.

Defendants move for summary judgment on the grounds that (1) plaintiff cannot establish non-speculative proof that it has suffered damages for lost profits; (2) the controlling law on limited liability imposed by the Public Service Commission (PSC) Tariffs prohibits the imposition of liability against telecommunication providers like defendants in the absence of gross negligence and plaintiff has not shown gross negligence; (3) plaintiff's claim under the GBL cannot be substantiated; (4) plaintiff has failed to allege a specific breach of contract; and (5) plaintiff is not entitled to injunctive relief in the absence of irreparable harm.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR § 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR § 3212 [b]).

"In order to establish prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883 [2d Dept 2010]; see also *Bowery Sav. Bank v 130 East 72nd St. Realty Corp.*, 173 AD2d 364, 364 [1st Dept 1991]). The burden then shifts to the defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense.

Defendants contend that plaintiff's claims of lost profits and loss of good will cannot be shown with reasonable certainty and that plaintiff has failed to go beyond speculative claims in its pursuit of damages. According to defendants, plaintiff has provided scant evidence as to damages sustained as a result of their failure to provide it with special services. In supplemental responses, plaintiff submitted reports showing "profit and loss" for various real estate properties. However, said properties are owned by Henry Kassis (Kassis) in his individual capacity, not by plaintiff. Mr. Kassis, who is the principal owner of plaintiff, is not a party in this action. Defendants assert that any losses attributed to plaintiff is refuted by plaintiff's own 2007 tax returns, which show that in 2007, plaintiff earned \$2,629 in net income.

Defendants submit deposition testimony from Kassis. During his deposition, he testified that whatever losses occurred as a result of the absence of the special service were more likely to effect him rather than plaintiff. Defendants claim that Kassis was unable to quantify the incoming calls directed to plaintiff during non-business hours during 2007, nor was he able to identify any business opportunities that plaintiff lost due to missed phone calls. Defendants maintain that the testimony proves that Kassis is uncertain as to the degree of lost damages resulting from defendants' alleged failure to provide their special services to plaintiff.

Defendants state that their services to subscribers are provided through tariffs filed with, and approved by, the PSC. They claim that the tariffs have the force of law and are not simply contractual in nature. Defendants assert that the tariff which governs this dispute contains

express limitations of liability for service errors, omissions and disruptions. Section D.2 of section 1 of the PSC Tariff addresses potential liability to subscribers and limits the liability of telecommunication providers to acts of gross negligence or willful misconduct. Gross negligence in the context of said tariff has been defined as conduct that evinces a reckless disregard for the rights of others. See *Colnaghi, USA, Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821 [1993]. Defendants argue that their conduct, as alleged by plaintiff, does not rise to the level of gross negligence.

In the complaint, plaintiff alleges that defendants made misrepresentations which constitute deceptive acts in violation of § 349 of GBL. Defendants also allegedly engaged in false advertising in violation of § 350 of GBL, by failing to tailor solutions for small businesses such as plaintiff's. Defendants contend that plaintiff has not shown that the challenged conduct was "consumer-oriented," as required by the GBL, or that representations were made which were materially deceptive and caused direct damage to plaintiff. Defendants assert that the conduct alleged by plaintiff is related to specific circumstances, and is not related to consumers as a whole.

The complaint alleges that defendants' failure or refusal to perform the service request constitutes a breach of contract. Defendants, assuming that there was an oral agreement, at most, between the parties, argue that the agreement was too vague to ascertain material terms and is incapable of being enforced. Defendants maintain that they never specifically agreed to transfer the special service to plaintiff's new location.

The claim for injunctive relief is one compelling defendants to transfer the special service to plaintiff's new business address. Defendants seek dismissal of the claim, arguing that plaintiff cannot show that it has suffered any injury, financial or otherwise, due to its inability to have simultaneous ringing on its phone lines. Defendants also argue that the balance of equities is not in plaintiff's favor.

In opposition to this motion, plaintiff argues that the affidavits offered by defenauants should be discounted because they are by parties who are without personal knowledge of the facts and who were not involved in the matter at large. Plaintiff is referring to affidavits from defendants' customer service supervisor Lorraine Dwyer and defendants' counsel.

Plaintiff asserts that, prior to the move to the new business address, Kassis and plaintiff's former secretary were told by a Simone Crenshaw, a customer service representative of defendants, that the special service that plaintiff had experienced could be provided at the new address at no additional cost. Although efforts were made by technicians to install the service at two locations, the procedure was never completed. Plaintiff states that its former counsel spoke to a representative of defendants, who confirmed that the service could be installed. However, at a subsequent time, the former counsel was advised that the service could not be installed due to issues with the central office.

Plaintiff asserts that it has lost profits and business opportunities as a result of defendants' conduct. Plaintiff submits a copy of its 2008 tax return which indicates a loss of \$5,262. This loss is allegedly due to the failure of prospective purchasers and renters in contacting plaintiff on weeknights and weekends. In addition, plaintiff claims that, in reliance upon defendants' representation that the phone line could be transferred, it moved its office, thereby incurring additional expenses.

Plaintiff contends that defendants' repeated representations that the phone line could be installed when it subsequently could not be constitute gross negligence. Alternatively, an issue of fact allegedly exist as to whether defendants' representations constitute gross negligence.

Plaintiff argues that defendants did involve themselves in consumer oriented conduct. In making representations concerning its abilities on monthly statements which are broad enough to encompass the general market of small businesses like plaintiff, defendants are advertising to the general public. Therefore, the transaction between the parties is allegedly not

a private or unique one. According to plaintiff, the GBL is applicable to their situation.

Plaintiff also argues that there was breach of an oral agreement between representatives of plaintiff and defendants with respect to the special service being available to plaintiff. Plaintiff claims to have met its burden of establishing the existence of a contract, as well as its breach.

Plaintiff states that it is entitled to injunctive relief, claiming a likelihood of success on the merits. Plaintiff also states that it will suffer irreparable financial hardship if the injunction is not granted.

In reply, defendants defend the affidavits from Ms. Dwyer and their counsel. According to them, Ms. Dwyer has full and relevant knowledge of their phone services, how such services operate and whether the services can be offered on an equal basis. She has reported that she has reviewed plaintiff's files and records. The counsel's affidavit is allegedly accompanied by valuable and pertinent documentary evidence.

Defendants argue that plaintiff is attempting to create issues of fact that do not exist. For example, they claim that Kassis is asserting in his affidavit that the reason that plaintiff moved to its new address was in reliance on defendants' alleged representation that plaintiff would receive the same phone service that it received at the old address. Defendants cite his deposition testimony where he claims to have moved to the new address because said address was closer to his home.

Defendants contend that plaintiff is creating such issues because it cannot demonstrate actual loss of profits in any concrete manner. They cite the deposition testimony as showing a lack of clarity or certainty as to loss of profits and no proof of any connection between the loss of profits and the lack of proper phone service. Defendants state that plaintiff has failed to show that their conduct or statements have reached the necessary level of gross negligence as required by the PSC.

Moreover, defendants state that the alleged GBL violations are based on a private transaction that has no effect on consumers at large. They contend that the breach of contract is too vague to be substantiated. They reject plaintiff's need for injunctive relief.

Defendants' primary argument is that there is no dispute that plaintiff cannot provide proof of damages due to their alleged conduct. Since plaintiff has stated that it has suffered lost profits, lost business opportunities and lost goodwill, it is important to make a determination as to the extent of its damages. In order to recover lost profits, plaintiff must prove that such damages were in the contemplation of the parties when the contract was made; that lost profits were caused by the breach; and that the existence and amount of such damages can be established with reasonable certainty. See *Ashland Management, Inc. v Janien*, 82 NY2d 395, 403 [1993].

In this case, plaintiff alleges an oral contract between the parties. It is not clear whether the parties had contemplated damages at the time of the contract. See *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325 [1st Dept 1997]. Moreover, it is not clear that plaintiff can demonstrate an actual injury or relate the injury to the failure of acquiring the desired phone service. In his deposition testimony, Kassis expressed an inability to rent one of his apartments in one of the buildings he owns during 2008. Since plaintiff is the manager of the buildings owned by Kassis, plaintiff would have profited from the use of the apartment. However, when asked if the failure to rent was due to the lack of phone service, Kassis stated that he had no idea.

His doubts about the linkage between the loss of profits and the lack of phone service appears throughout the testimony. The documentary testimony provided by him shows the alleged value of those properties owned by Kassis, but do not show a foundation from which plaintiff can establish a loss of profits.

With respect to the GBL statutes involving deceptive practices and false advertising,

plaintiff must prove that the challenged act or practice was consumer-oriented; that it was misleading in a material way; and that plaintiff suffered injury as a result of the act or practice. See *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]. Here again, plaintiff must prove that it suffered an injury and that the injury is related to the deceptive conduct of defendants.

Lost profits must be measured by reliable factors which go beyond mere speculation. While such profits need not be proven with mathematical precision, there needs to be more proof than what has been offered by plaintiff. See *Locke v Aston*, 1AD3d 160, 161-2 [1st Dept 2003]. Much of the documentary evidence is not actually verifiable. Therefore, the court must dismiss this action based on the lack of reasonable certainty in calculating the injury to plaintiff.

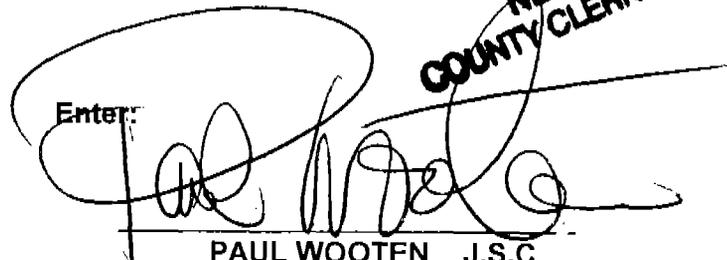
Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 8-16-10

Enter: 
PAUL WOOTEN J.S.C.
Paul Wooten
J.S.C.

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE