

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY  
Justice

IAS PART 16

RACHEL VITIELLO, on behalf of herself  
and all others similarly situated,

INDEX NO. 31494/2007

Plaintiff,

MOTION  
DATE March 18, 2008

- against -

MOTION  
CAL. NO. 23

MICRO CENTER C CORPORATION,

MOT. SEQ.  
NUMBER 1

Defendant.

The following papers numbered 1 to 4 read on this motion by the defendant to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR §3211[a][7].

PAPERS  
NUMBERED

Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 7
Affid(s) in Opp.-Exhibits-Memo of Law.....	8 - 10
Replying Affid(s)-Exhibits-Memo of Law.....	11 - 13

Upon the foregoing papers the motion is determined as follows:

In this putative class action, the plaintiff claims that on December 14, 2007 she purchased, for cash, a laptop computer from the defendant, Micro Center C Corporation ("Micro Center"), an operator of a chain of retail electronics stores. Later the same day, the plaintiff returned the computer for a cash refund, and she was charged an "open box fee" by the defendant amounting to 15% of the cost of the computer.

The plaintiff does not dispute that the box containing the computer was opened, but claims in her unverified complaint that the "open box fee" charged by Micro Center is an "unreasonable and deceptive" trade practice that violates section 349 of the General Business Law and that the defendant's failure to adequately disclose that it charged an "open box fee" also constituted a violation of General Business Law §349.

The defendant now moves, pursuant to CPLR §3211[a][7], to dismiss the plaintiff's complaint. In support of its motion defendant has submitted an affidavit from Thomas Eckert ("Eckert"), the general manager of the Micro Center store where the plaintiff purchased and returned her laptop on the date of the sale in question. Eckert avers that on the day of the sale, Micro Center's return policy, including the "open box fee" charged on the return of non-defective laptop computers, was conspicuously posted near the entrance, the customer service desk,

at each check out aisle, and on the only customer exit door. Photographs of the return policy and its locations in the store were annexed to the moving papers.

In opposition to the motion, the plaintiff submitted an affidavit from David Grodzian ("Grodzian"), a private investigator, who claims that he took photographs at the subject Micro Center on February 12, 2008 and averred, in pertinent part, that the "photographs show no notices of any kind regarding an 'Open Box Fee' at the cash registers and checkout counters wherein [sic] customers pay for merchandise". Grodzian also said that "[a]s stated by Plaintiff in her Complaint, the photographs also do not show any notices regarding an 'Open Box Fee' prominently displayed, or any notices of any kind at any of the checkout counters, cash registers or merchandise aisles".

The plaintiff's initial claim, that the 15% "open box fee" charged by Micro Center is, in and of itself, an unreasonable penalty that violates General Business Law §349, is without merit. Generally, "[u]nder General Business Law §349(h) '[a] prima facie case requires . . . a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof'" (Goshen v Mut. Life Ins. Co., 98 NY2d 314, 324, citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20, 25). A deceptive act or practice is defined by the Court of Appeals as one "likely to mislead a reasonable consumer acting reasonably under the circumstances" (Oswego, supra at 26).

While the court could not find a reported case explicitly addressing whether an "open box fee" is per se unreasonable, there are numerous cases supporting the proposition that, in a consumer transaction absent coercion, as long as a fee is adequately disclosed "the question of whether the amount charged is unreasonable or excessive is not an issue for the courts to address" (Zuckerman v BMG Direct Marketing, Inc., 290 AD2d 330, 331; see also, Sands v Ticketmaster-New York, 207 AD2d 687; Lewis v Hertz Corp., 181 AD2d 493; Super Glue Corp. v Avis Rent A Car System, Inc., 159 AD2d 68). Since defendant was free to interpose an "open box fee" and the amount of same is not a matter for the court to rule upon, plaintiff's claim in this respect must be dismissed.

The plaintiff's cause of action alleging that the defendant Micro Center violated GBL §349 by not fully disclosing its "open box fee" to its customers also fails. On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174). However, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (See e.g., Kantrowitz & Goldhamer, P.C., 265 AD2d 529; Meyer v Guinta, 262 AD2d 463). When the defendant offers such evidence, the court "must determine whether the proponent of the pleading has a cause of action,

not whether she has stated one" (Kantrowitz & Goldhamer, P.C., supra).

In this case, the defendant completely controverted the plaintiff's factual claim that Micro Center did not adequately disclose its return policy concerning laptop computers. Eckert's affidavit and the photographs incorporated by reference thereto demonstrated that the disputed "open box fee" was displayed near the entrance, at the customer service desk, at the entrance to each check out aisle and on the only customer exit door. This evidence was sufficient to strip the presumption of truthfulness from the allegations in the plaintiff's complaint.

In opposition, the plaintiff failed to establish that she had a cause of action under GBL §349. First of all, the plaintiff did not submit an affidavit in opposition and the complaint is unverified. The only affidavit submitted on plaintiff's behalf was from an investigator, David Grodzian, who was not present on the date the purchase was made. As a result, there is no proof in plaintiff's motion papers to support a claim that the defendant's "open box policy" was not prominently displayed when the plaintiff made her purchase. Additionally the evidence submitted by Grodzian's affidavit is suspiciously tailored solely to state that the photographs he took do not show any "notices" in the areas shown. Such an argument is not only illogical but borders on outright deception. Nowhere in his affidavit does Grodzian actually state that an "open box policy" is not displayed elsewhere or anywhere at Micro Center. Obviously, depending on what or where Grodzian chose to focus his camera, the photographs can depict or not depict anything. Curiously, his photographs are not of the areas defendant has asserted and submitted proof in its motion of where its notices were posted.

Accordingly, the plaintiff's cause of action pursuant to GBL §349 is dismissed.

The plaintiff's cause of action for unjust enrichment is also defective as a matter of law. Unjust enrichment "is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another" (Miller v Schloss, 218 NY 400, 406-407). "The remedy is available 'if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass'" (Parsa v State of New York, 64 NY2d 143, 148, citing Miller v Schloss, supra at 408). In this case, since the court has determined that the imposition of an "open box fee" is not an unreasonable penalty as asserted by the plaintiff, a claim that equity and good conscience would not permit the retention of this fee fails. Moreover, the existence of an express contract here precludes resort to unjust enrichment (See e.g., Morales v Grand Cru Assocs., 305 AD2d 647).

The cause of action for injunctive relief is dismissed as, in light of the foregoing rulings, there is no likelihood that the plaintiff will succeed on the merits of her claims (See generally, CPLR §6301; Ying Fung Moy v Hohi Umeki, 10 AD3d 604).

Dated: April 24, 2008

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Peter J. Kelly, J.S.C.