

**Vertical Ventures Invs., LLC v Smartserv
Online Inc.**

2007 NY Slip Op 30298(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0602669

Judge: Herman Cahn

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

PRESENT: Herman Cohn
0602669/2004

PART 49

VERTICAL VENTURES INVESTMENTS
VS
SMARTSERV ONLINE INC
SEQ 1
DISMISS ACTION

C

INDEX NO. 602669/04
MOTION DATE 3/21/05
MOTION SEQ. NO. 001
MOTION CAL. NO. 20

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE COURT'S ORDER AND
DECISION IN THE FOLLOWING SEQUENCE**

FILED
MAR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/13/07 Herman Cohn
J.S.C.

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

[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
VERTICAL VENTURES INVESTMENTS, LLC,

Plaintiff,

Index No. 602669/04

- against -

SMARTSERV ONLINE, INC.,

Defendant.

-----X

HERMAN CAHN, J.

Defendant moves to dismiss the complaint, CPLR 3211, on the grounds that plaintiff has no standing to bring this breach of contract action.

Pursuant to a stock purchase agreement, defendant sold plaintiff shares of common stock and stock warrants in defendant corporation. The warrant agreement indicates that plaintiff may exercise the warrants to purchase the underlying shares through June 5, 2007 (Warrant Agreement at 1).

In addition to the Stock Purchase and Warrant Agreements, the parties entered into a Registration Rights Agreement (“RRA”). Pursuant to the RRA, defendant must have declared effective under the Federal Securities Act, a registration statement covering the Registrable Securities (RRA ¶ 2 [a]). If the registration statement ceases to remain continuously effective as to all Registrable Securities for a specified number of days, for any reason, defendant will pay liquidated damages to “the Holder” of registrable securities (RRA ¶ 2 [b] [e]).

Plaintiff alleges that defendant failed to keep the registration statement effective for the required number of days, and now seeks \$250,000 in liquidated damages, as well as attorneys’

fees.

Defendant argues that the complaint should be dismissed because plaintiff is not a “Holder,” as defined by the RRA, and that only a Holder may invoke the provisions of that agreement. A careful reading of the RRA shows that the rights it grants are generally granted to the “Holder.” A “Holder” is defined in the RRA as “the holder . . . from time to time of Registrable Securities.” “Registrable Securities” are defined to mean Shares and Warrant Shares. “Shares” are defined as “shares of common stock issued or issuable” pursuant to the Purchase Agreement, while “Warrant Shares” are defined as the warrants “issued or issuable” under the Purchase Agreement.

Defendant asserts that plaintiff is not a Holder of Registrable Securities, and therefore has no rights under the RRA. It has submitted a statement from its Stock Transfer Company, indicating that plaintiff owned no shares of stock after January 8, 2003. Interestingly enough, the complaint contains no allegation that plaintiff is a Holder of registrable securities.

Plaintiff alleges that it is the Holder of warrants under the RRA. In opposition to the motion, plaintiff asserts that it exercised some of its warrants, and is therefore the Holder of Warrant Shares.

A reading of the RRA shows that the rights conferred by its Section 2[b] (pursuant to which this action is brought), are conferred on a “Holder” as defined therein, and as discussed above. If plaintiff was a “Holder” of shares or warrant shares when the action was commenced, it has standing to bring the action; if not, it has no standing and the action must be dismissed.

In view of the fact that plaintiff has not even claimed to be a Holder of such shares in the complaint, the motion is granted and the complaint is dismissed. Leave is granted for plaintiff to

serve an amended verified complaint, CPLR 3020 (2)(3), within ten days of service of a copy of this decision and order on its attorney, if it be so advised.

It is therefore

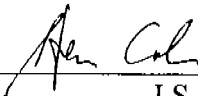
ORDERED that the motion to dismiss is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff may serve a verified amended complaint within ten days after service of a copy of this order with notice of entry on its attorney, if it be so advised; and it is further

ORDERED that if no verified amended complaint is timely served, the clerk shall enter judgment in favor of defendant against plaintiff, dismissing the action, together with costs and disbursements.

Dated: March 13, 2007

ENTER:



J.S.C.