

J Squared Software, LLC v Bernette Knitware Corp.
2007 NY Slip Op 31662(U)
June 12, 2007
Supreme Court, New York County
Docket Number: 0112375/2006
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 112375/2006
J SQUARED SOFTWARE, LLC
vs
BERNETTE KNITWARE CORP.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/5/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
<u>1-4</u>
<u>5-11</u>
<u>12-18</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **is decided in accordance with the annexed memorandum decision and order.**

JUN 18 2007
COUNTY CLERK
NEW YORK

Dated: 6-12-07

JANE S. SOLOMON



JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
J SQUARED SOFTWARE LLC,

Plaintiff,

-against-

INDEX NO. 112375/06

DECISION and ORDER

BERNETTE KNITWARE CORP., a/k/a
BERNETTE TEXTILE CORP., DANIEL B.
FRASIER and S4 SOLUTIONS, INC.

Defendants.

-----X
JANE S. SOLOMON, J.

In this lawsuit by a software company against a customer, plaintiff J Squared Software LLC moves for partial summary judgment on liability and defendants Bernette Knitware Corp., a/k/a Bernette Textile Corp. ("Bernette"), Daniel B. Frasier ("Frasier") and S4 Solutions, Inc. ("S4 Solutions") (collectively, "Defendants") cross-move to dismiss. For the reasons below, plaintiff's motion is denied and the cross-motion is granted.

The complaint contains no specified causes of action, but it states that plaintiff seeks an injunction, a temporary restraining order, an accounting to determine what profits defendants have made by using plaintiff's software, and to recover the expenses and attorneys' fees of this litigation.

Plaintiff sells and services software for the wholesale clothing trade. Plaintiff entered into a contract with

Bernette, dated January 8, 1997 (the "Contract"), under which plaintiff granted Bernette a license to use a computer program designed by plaintiff called the A/Line Design 21 Software (the "A/Line Software"). The contract provided that plaintiff retained title to the program, but that the license would remain in force until terminated.

Under the Contract, plaintiff transferred to Bernette a license to use the A/Line Software for \$11,000, plus, for an additional \$2,400, eighteen months of telephone support and ten days of on-site training. The A/Line Software was designed for use by distributors in the apparel trade. It includes software for tracking inventory, accounts receivable, accounts payable, a general ledger, and, among other things, provided for electronic data entry by five trading partners.

The Contract permits Bernette to copy, modify and combine the A/Line Software with another program, provided that Bernette complies with the terms of the license. The contract states that the license remains in effect until terminated by Bernette, or if Bernette fails to comply with the terms of the Contract. Upon termination, Bernette must return all copies of the program and certify that it has returned or destroyed all copies, including modifications or combined portions of the program.

Bernette hired S4 Solutions in February 2005 to provide support for the A/Line Software, and to write new and upgraded programs to interface with it. Fraser is an independent programmer who worked for S4 Solutions. Bernette then notified plaintiff that it would no longer purchase technical support services from it. After plaintiff stopped providing technical support in or about February 2005, it did not demand that Bernette return the A/Line Software, and did not demand further payments to extend the license.

Plaintiff filed this lawsuit and sought a preliminary injunction in September 2006 to prevent defendants from using the software. Defendants objected to the motion, alleging that they were permitted to continue to use the software because the license was still in effect, but they consented to an injunction preventing them from transferring the A/Line Software to any third party. They contend that although they combined the A/Line Software with other programs, it remained always with Bernette, and that the license agreement was not violated. The court issued an injunction on September 18, 2006, prohibiting the transfer of plaintiff's software or the S4 modifications to others pending further court order.

On this motion, plaintiff alleges that it is entitled to summary judgment as to liability. It argues that Bernette

admitted liability when, in opposing the prior motion for a preliminary injunction, it stated that it continued to use the A/Line Software after it stopped making payments for technical support, and that it permitted S4 and Fraser to modify the program. The motion is denied because, under the terms of the Contract, Bernette did not terminate the license by failing to purchase technical support, and because the Contract specifically contemplates modification and combination of the software by the customer.

Defendants cross-move for summary judgment dismissing the complaint. They contend that the only articulated cause of action in the complaint seeking damages is for conversion, and that the complaint fails to state a cause of action for that claim.

Conversion is the unauthorized exercise of dominion over goods belonging to another to the exclusion of the owner's rights. Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 44 (1995). The complaint does not allege facts constituting conversion. On its face, the Contract provides that the license remains in effect until terminated, either by Bernette unilaterally or as a result of a breach of the Contract. The complaint alleges that Bernette stopped making technical support payments and permitted defendants S4 and

Erasier to modify or combine the A/Line Software. Bernette correctly argues that no breach of the Contract or termination of the license is alleged under those facts, as the Contract clearly permits modification and combination with other programs, and it does not require that Bernette continue to make payments to retain its license beyond the \$11,000 paid in 1997.

Since the complaint does not allege facts showing that the license terminated, Bernette's retention of the A/Line Software does not constitute an unauthorized exercise of dominion of plaintiff's goods. Indeed, the license specifically authorizes Bernette to retain the software until the license is terminated. There is no allegation to support a claim that Bernette was obligated to return the A/Line Software and failed to do so.

In reply, plaintiff's principal, Judd Love, raises new facts that were not set forth in the complaint. Among other things, he alleges that Bernette has more users than permitted under the license; that it has suppressed the copyright notice in the A/Line Software; that Bernette converted data files to a new format in violation of the license; and that the continued payments were for technical support that should have been continued (this last allegation is of no consequence for the reasons discussed above). Although the new allegations could

support a claim for breach of contract, the complaint does not allege breach of contract, and plaintiff does not seek leave to amend its pleading.

With respect to the balance of the complaint, defendants move to dismiss it in its entirety but do not specifically address plaintiff's demand for a permanent injunction, the demand for an accounting and damages arising by reason of it, or the demand for attorneys's fees and costs of litigation. Plaintiff likewise does not address these other claims.

On its face, the complaint fails to state a claim for an accounting. An accounting is an equitable remedy ". . . premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking an accounting has an interest." 2A NY Jur2d, Agency § 241 (West 1998 & Supp. 2006); and see Elghanian v Elghanian, 277 AD2d 162 (1st Dept 2000) (no cause of action where defendant had no "special relationship" to plaintiff). Bernette did not have a confidential or fiduciary relationship with plaintiff, and consequently there is no basis for the accounting claim. The claim for attorneys's fees and costs of litigation also is dismissed because no such claim exists under the American Rule

absent a contractual or statutory cost-shifting provision not present here. Finally, since the complaint does not allege a basis for imposing the equitable remedy of an injunction (that is to say, the facts as alleged in the complaint read with the terms of the Contract show that the license did not terminate), the demand for an injunction also is dismissed.

Accordingly, it hereby is

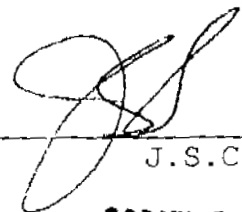
ORDERED that Plaintiff's motion for summary judgment is denied; and it further is

ORDERED that the preliminary injunction issued September 18, 2006 is vacated; and it further is

ORDERED that Defendants' cross-motion to dismiss and for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed, and the Clerk is directed to enter judgment accordingly.

Dated: June 12, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
JUN 18 2007

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JANET M. ...

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