SHORT FORM ORDER

INDEX NO. 15251/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

A-1 SEWER AND DRAIN SERVICES, INC.

Plaintiff,

-against-

VERIZON COMMUNICATIONS, A-1 SEWER AND DRAIN, and DAVID WARREN,

Defendants.

ORIG. RETURN DATE: DECEMBER 21, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: DECEMBER 21, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 002
CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:
BARRY V. PITTMAN, ESQ.
26 SAXON AVENUE - POB 5647
BAY SHORE, NEW YORK 11706
631-665-4477

DEFT'S/RESP ATTORNEY:
CONWAY, FARRELL, CURTIN & KELLY, P.C.
48 WALL STREET - 20TH FLOOR
NEW YORK, NEW YORK 10005
212-785-2929

Upon the following papers numbered 1 to 8 read on this motion and cross-motion TO DISMISS AND TO AMEND COMPLAINT. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Replying Affidavits and supporting papers 7, 8; it is,

ORDERED that this motion by defendant VERIZON COMMUNICATIONS ("VERIZON") for an Order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint for failure to state a cause of action sounding in gross negligence or for failure to prove damages beyond speculation, or pursuant to CPLR 3212, granting VERIZON summary judgment dismissing plaintiff's complaint and all cross-claims as VERIZON is a holding company that does not solicit or publish telephone directories, is hereby **GRANTED** as provided hereinafter; and it is further

ORDERED that this cross-motion by plaintiff for an Order granting plaintiff leave to amend its complaint is hereby **DENIED**.

The gravamen of plaintiff's claim in this action against defendant VERIZON is that VERIZON accepts advertisements for placement in its white pages telephone directory from a company or companies using the name A-1 SEWER AND DRAIN, knowing that these companies are different from plaintiff. Plaintiff's first cause of action relates to VERIZON's alleged negligence, and demands judgment from all three defendants in the amount of one million ($1,000,000.00) dollars.

VERIZON now moves to dismiss the complaint as asserted against it, arguing that the allegations in the first cause of action, even if true, do not amount to a cause of action sounding in "gross negligence" or "willful misconduct." VERIZON argues that pursuant to the governing Public Service Commission tariffs, no liability for damages arising from errors or mistakes in or omissions of directory listings shall attach in the absence of gross negligence or willful misconduct (PSC NY No. 1–Communications, General Rules and Regulations, Section [D][2][j]). As such, VERIZON alleges that plaintiff's complaint should be dismissed as the only cause of action against it sounds in ordinary negligence. In support of the motion, defendant submitted, among other things, the affidavit of JANE A. SCHAPKER, an assistant corporate secretary of VERIZON, who states that VERIZON COMMUNICATIONS, INC. is a holding company which offers no goods or services to the public, and has never owned, operated, or maintained any type of facilities that publishes telephone directories in the State of New York. VERIZON seeks dismissal based upon the foregoing allegations of Ms. Schapker as well.

The New York Public Service Commission has primary administrative jurisdiction over a telephone company's service and the utility's liability to its customers arises only from gross negligence or willful misconduct (*Hamilton Employment Service, Inc. v New York Tel. Co.*, 253 NY 468 [1930]; *Long Island Cent. Station, Inc. v New York Tel. Co.*, 54 AD2d 893 [1976]). Gross negligence is defined as "a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others" (PJI 2:10A; *Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *Seagroatt Floral Co. v New York Tel. Co.*, 76 AD2d 1038 [1980]). Gross negligence implies wanton and reckless conduct, the lack of even scant care, or an intentional failure to perform a duty (*Long Island Cent. Station, Inc. v New York Tel. Co.*, 54 AD2d 893, *supra*). "Wilful misconduct occurs when a person intentionally acts or fails to

act knowing that his or her conduct will probably result in injury or damage" (PJI 2:10A; *Hummel v Vicaretti*, 152 AD2d 779 [1989]).

"In the absence of an allegation of gross negligence or willful misconduct, nothing worse will be inferred than ordinary negligence such as some unaccountable mistake by an employee who could not be entirely controlled by any regulation however stringent" (*Hamilton Employment Service, Inc. v New York Tel. Co.*, 253 NY 468, *supra*). On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). In the case at bar, plaintiff has failed to allege gross negligence or wilful misconduct, and the allegations in the complaint, read in a light most favorable to plaintiff, do not amount to claims for gross negligence or wilful misconduct. Plaintiff has conceded this point, as it seeks, by way of cross-motion, to amend the complaint to add a cause of action sounding in gross negligence. In view of the foregoing, the Court finds that defendant's application to dismiss must be granted pursuant to CPLR 3211(a)(7).

With respect to plaintiff's cross-motion to amend the complaint to add a cause of action alleging gross negligence, "a mistake or a series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence" (*AT&T v City of New York*, 83 F3d 549 [2d Cir 1996]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, *supra*). A review of plaintiff's proposed amended complaint reveals that the following conduct of VERIZON is alleged in support of plaintiff's claim sounding in gross negligence: VERIZON failed to verify the true identity of the company from which it accepted listings despite knowing the company had different addresses; VERIZON failed to properly proofread or otherwise review material to be published in its white pages; VERIZON failed to refuse such advertising despite knowing other companies had improperly used plaintiff's name in the past; and VERIZON "wilfully and recklessly" failed to correct an improper listing practice known to it from prior litigation. Although there can be no question that these additional allegations establish a *prima facie* claim for ordinary common-law negligence, the Court finds that the allegations do not establish conduct that is wanton and reckless or that is so careless as to show complete disregard for the rights and safety of others.

Accordingly, plaintiff's cross-motion for leave to serve an amended complaint to assert a cause of action sounding in gross negligence is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: June 25, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court