

Jesmer v Retail Magic Inc.

2007 NY Slip Op 34375(U)

March 15, 2007

Supreme Court, Nassau County

Docket Number: 2166-06/

Judge: Stephen A. Bucaria

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SUSAN JESMER dba FIRST AMERICANS
FOOD,

Plaintiff,

-against-

RETAIL MAGIC INC. and AUTO-STAR
COMPUSYSTEMS INC.,

Defendants.

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 002166/06

MOTION DATE: Jan. 30, 2007
Motion Sequence # 001, 002

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition & Further Support..... X
- Reply Affirmation X
- Memorandum of Law..... X

This motion, by defendant Auto-Star Compusystems Inc. (hereinafter "ASC"), for an order pursuant to CPLR §3211(a)(1) and/or (7), dismissing the Complaint against Auto-Star Compusystems, Inc., with prejudice, and for such other and further relief as this Court may deem just and proper; and a cross-motion, by plaintiff, for an order denying the defendant Autostar's motion to dismiss and granting plaintiff's cross-motion for leave to file and serve the Supplemental Summons and Amended Complaint in form as annexed hereto adding Jessie Lamba and Bozzuto's Inc. as additional defendants, together with such other and further relief as to this Court may seem just, proper and equitable, are **both** determined as hereinafter set forth.

The plaintiff owns a Food Store located in Hogansburg, New York who contracted with a consultant, Bozzuto's, Inc., located in Connecticut, to upgrade its cash registers, accounting system, computers and hardware. As a result of Bozzuto's efforts, the plaintiff contracted with the defendant Retail Magic to purchase and install a "state of the art" point of sale ("POS") system made by ASC, located in Canada. The complaint alleges that the system never functioned as intended.

The defendant ASC, by its President, asserts that it sold its system to co-defendant Retail Magic, and that Retail Magic sold and installed the software to the plaintiff. It also asserts that it did not install the software; that in September 2003, it entered into a Software Distribution Agreement with Retail Magic; and that the plaintiff purchased all the hardware and software directly from Retail Magic, and issued no invoice nor received any payment from the plaintiff. It contends that there is no contract between ASC and the plaintiff; and that it expressly disclaimed all warranties in its Digital License Agreement (hereinafter "DLA"), which was accepted by either the plaintiff or Retail Magic during the setup and installation process. Such DLA appears on the install shield wizard which presents the user or installer two options — acceptance or non-acceptance. It asserts that acceptance is the equivalent of agreement to the terms, and non-acceptance leads to three options: click on the button that states: "I accept the terms of the license agreement", the button that says "Back" or the Cancel button. If the user or installer clicks on the "accept" button, the "Next" button is enabled and full responsibility is accepted and the installation is permitted to proceed. When the "accept" button is clicked on, the warranty disclaimer is accepted by the user or installer, and the defendant ASC contends that such action triggers the disclaimer, warranting dismissal of the claim against it. ASC argues that the acceptance of the DLA also includes the disclaimer of the following warranties: quality, performance, title, merchantability, merchantable quality, fitness for a particular purpose, durability, infringement and those arising by statute or from the course of dealing or trade. Additionally, a similar warranty disclaimer exists between the co-defendants.

The plaintiff avers that it hired a consultant named Bozzutos' Inc. (hereinafter "BI") to upgrade its cash registers, accounting system and computers in its stores in Hogansburg, New York, and that BI is a product vendor for grocery stores and is located in Cheshire, Connecticut. The plaintiff relates that, in turn, BI introduced her to the principal of co-defendant Retail Magic (hereinafter "RM"), as a ". . . representative of Auto-Star". The plaintiff asserts that none of the principals or representatives of RM and ASC, ever told her or any of the plaintiff's representatives that ASC had no intent of being contractually responsible for the point of sale system; and none of the printed materials provided by ASC ever stated that ASC would not be directly responsible for the system. The plaintiff further

avers that the system was never completely installed and was never fully operational. The plaintiff further asserts that she has no knowledge of any license that ASC refers to, as the software was already loaded on the computer hardware when it was delivered. The plaintiff identifies RM as ASC's agent, and contends that the license, that ASC refers to, was only viewed by RM, and RM is nothing more than a shell for one Jessie Lambda, and BI was also responsible for providing the plaintiff with an unqualified vendor.

In reply, ASC avers, through its attorney, that the plaintiff has not rebutted or addressed any of the case law cited by ASC in its moving papers. ASC argues that the plaintiff's assertion that she never saw the license which contained the software disclaimers is irrelevant, because the end user is, nevertheless, bound by the agreement where the terms are displayed on the computer screen prior to software installation. ASC avers that it was not involved in the installation of the system; it only supplied the software to master distributor Blue Star and provided RM, as an authorized distributor/reseller, with "second-line" support. Counsel argues that there is no evidence that RM was acting as ASC's agent when RM installed the system, only conclusory statements made by the plaintiff's attorney; and that the Software Distribution Agreement between ASC and RM conclusively shows that ASC was not involved with installation and that both RM and ASC are independent contractors with respect to each other and cannot bind each other. Counsel cites case law holding that without any evidence that a manufacturer exerted control over a distributor, a distributor can only be an independent contractor, for whose acts the manufacturer cannot be held liable. Counsel points out that the invoices between ASC and RM show no charge for installation by ASC, and it was a direct sales quote by RM to the plaintiff, evidence that plaintiff hired and paid RM to install the equipment and software, and as such, RM was the plaintiff's agent and installed the software on behalf of and for the benefit of the plaintiff. Counsel further argues that RM's actions on behalf of the plaintiff bound the plaintiff to the terms of the Agreement. Counsel contends that plaintiff's proof does not show any contracts, agreements, quotes, correspondence, purchase orders or invoices between the plaintiff and ASC, and such lack of supporting documentation conclusively shows a lack of privity between the plaintiff and ASC. Counsel contends that any proposed amendment to the complaint as to ASC must be denied as there is no merit to any cause of action against ASC.

DECISION

It is a well-settled principle of law in this State that this Court must, in a motion to dismiss pursuant to CPLR 3211, accept as true the allegations of the complaint (**Hayes v Wilson**, 25 AD3d 586, 807 NYS2d 567, 2nd Dept., 2006).

Within that broad concept of law, the court must also consider the documentary evidence when the motion to dismiss is based upon documentary evidence, and the criterion is not whether the plaintiff has stated a cause of action, but whether a cause of action exists based on the evidentiary material (see, Guggenheimer v Ginzburg, 43 NY2d 268).

The basis of the plaintiff's claims against ASC is that RM was ASC's agent by virtue of RM being an authorized re-seller of ASC's software. While RM may have been, and may still be, an authorized re-seller of ASC's software, and that has a certain commercial meaning, a principal-agent relationship has a specific legal meaning which does not include or parallel that of a developer—"authorized distributor or re-seller".

“A principal-agent relationship may be established by evidence of the “consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. . . The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority” (Maurillo v Park Slope U-Haul, 194 AD2d 142, 146, 606 NYS2d 243; see Dynas v Nagowski, 307 AD2d 144, 147-148, 762 NYS2d 745)”.

(Time Warner City Cable v Adelphi University, 27 AD3d 551, 813 NYS2d 114, 2nd Dept., 2006).

In the case at bar, the documentary evidence demonstrating a direct nexus between the plaintiff and ASC is non-existent. The contractual relationship in the case at bar, if any, is between the plaintiff, RM, and perhaps Lamba and Bozzuto's (the latter dependent upon the development or existence of any documentation). There is an extant agreement between RM and ASC, and the plaintiff is not a signatory to that “Software Distribution Agreement”; nor does that agreement create any third party beneficiary relationship between the plaintiff and ASC. The contractual relationship is established between RM/Lamba and the plaintiff, and the installation of the software on the plaintiff's computer system, sold to her by the

JESMER v RETAIL MAGIC INC., et al

Index no. 002166/06

defendant RM, was by the acceptance of the terms of the license that appeared on the screen upon the installation by the distributor, RM pursuant to the contract between RM and the plaintiff. No warranty was made and passed to the plaintiff by ASC, nor are they created or imposed by law under these circumstances parallel to those described in Moore v Microsoft Corporation, (293 AD2d 587, 741 NYS2d 91, 2nd Dept., 2002) wherein that defendant offered a contract accepted by the end-user (the plaintiff), effectively barring any warranty by a clear disclaimer and waiver of liability, and they were accepted by clicking on the "I agree" button on the plaintiff's computer screen. The warranties created by law and for breach of warranty of fitness for a particular purpose were specifically excluded by the DLA that alerted the plaintiff through her agent, RM, that the plaintiff contracted with to install the hardware and software.

With respect to the plaintiff's cross-motion to supplement the summons and amend the complaint to add Jessie Lamba and Bozzuto's Inc. as additional defendants is **granted only** to that extent. Any part of the amendment which alleges a cause of action against ASC is **denied** as it is patently devoid of merit (see, Surgical Design Corp. v Correa, 31 AD3d 744, 819 NYS2d 542, 2nd Dept., 2006).

Accordingly, the ASC motion to dismiss the complaint against it is **granted**. The action against the remaining defendants is **severed** and **continued**.

The summons and amended complaint shall be served against those proposed additional defendants within 20 days after service of a copy of this order upon the plaintiff's attorney.

Dated MAR 15 2007


J.S.C.

ENTERED

MAR 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE