SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

ROSICKI, ROSICKI & ASSOCIATES, P.C., ENTERPRISE PROCESS SERVICE, INC., THRESHOLD LAND, INC. and WHITTIKER LEGAL PUBLISHING CORP.,

Plaintiffs,

INDEX NO.: 012018/2006
MOTION DATE: 03/11/2008
MOTION SEQUENCE: 003 and 004

-against-

JOAN COCHEMS as the Executrix of the Estate of Philip Cochems, individually and d/b/a FILMOR INDUSTRIES, FILMOR INDUSTRIES, INC., COMPUTER HELP CENTER, INC., JOHN BUDRIS, JOAN COCHEMS, CRAIG JENNINGS, POWHATTAN CONSULTING CORP., FRANK BASANTA, KEVLAR SOLUTIONS, INC. d/b/a SYSTEMS SOLUTIONS, ULTRATEK PC INT'L INC., ARKADI ROSENSON a/k/a ARRO ROSENSON and JOHN COCHEMS,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Notice of Cross-Motion, Affirmation & Exhibit Annexed	2
Memorandum of Law in Opposition to Plaintiffs' Motion to Amend the Complaint and in Support of Defendants Kevlar Solutions, Inc. and Frank Basanta's Cross-Motion for Sanctions	3
Affirmation in Opposition to Plaintiffs' Motion for Leave to Amend Complaint of Steven R. Newmark & Exhibit Annexed	4
Craig Jennings and Powhattan Consulting Corp.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Amend Their Complaint	5

Defendants' Affirmation in Opposition to Motion to Amend of Marc A. Wasserman 6
Reply Affirmation of Andrew Morganstern, Reply Affidavit of Thomas Rosicki & Exhibits Annexed..... 7
Letter of Andrew Morganstern dated 3/13/2008 8

This motion by plaintiffs for an order pursuant to CPLR § 3025(b) granting leave to serve a second amended complaint is denied, and the cross-motion by defendants Kevlar Solutions, Inc., d/b/a Systems Solutions and Frank Basanta for sanctions is denied.

Plaintiffs seek leave to assert an eleventh cause of action against Kevlar Solutions, Inc. and Frank Basanta insofar as they represented in a writing dated November 8, 2005, that all software installed on plaintiffs' computers was in compliance with Microsoft license schema. Plaintiffs allege that since movants knew the purpose of the representation was to absolve plaintiff of any misconduct before SILA, they, therefore, should have investigated into whether plaintiff had valid OEM licenses before making the aforesaid affirmative statement. They were allegedly negligent in their duty to inquire thoroughly and represent truthfully with the result that plaintiffs have suffered damages. It appears that a cause of action for negligence and negligent representation is plead.

Under 3025(b) of the New York Civil Practice Law and Rules ("CPLR"), a party may amend a pleading at any time by leave of court. Leave to amend pleadings shall be freely given upon just terms. McCaskey, Davies and Assoc., Inc. v. N.Y. City Health and Hospitals Corp., 59 N.Y.2d 755, 757 (1983). The statutory provision should be liberally construed to permit pleadings to be amended so as to ensure full litigation of a controversy. Rife v. Union College, 30 A.D.2d 504, 505 (3d Dept. 1968).

However, the decision to grant or deny the motion rests in the sound discretion of the court. Cippitelli Bros. Towing and Collision, Inc. v. Rosenfeld, 171 A.D.2d 637, 639 (2d Dept. 1991). The court has no obligation to permit an amendment either where it lacks merit or where a substantial question exists as to its sufficiency. Berardino v Ochlan, _ A.D..2d _ , WL 22962978 (2d Dept 2003); Hauptman v. N.Y. City Health and Hospital Corp., 162 A.D.2d 2d 588, 589 (2d Dept. 1990).

In support of its cross-motion for sanctions and in opposition to the motion, defendants Kevlar Solutions, Inc. and Basanta submit written evidence in admissable form to show that they were hired to install two new upgrades to the software installed on plaintiffs' computer and that its representation was strictly limited to a statement that the new software Kevlar and Basanta had installed was compliant with Microsoft license schema.

Insofar as the sufficiency or lack of merit of a proposed pleading is open to inquiry when reviewing a motion to amend, Tsachalis v. City of Mount Vernon, 293 A.D.2d 525, 526 (2d Dept. 2002), the elements of negligent misrepresentation should be examined.

A cause of action based on negligent misrepresentation "requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information." Fresh Direct LLC v. Blue Martini Software, Inc., 7 A.D.3d 487, 489 (2d Dept. 2004). Plaintiff offers as a general proposition that a layman, such as plaintiff, is entitled to rely upon the specialized expertise of an IT expert in circumstances such as are present in this action. It is not an incorrect statement provided the common law elements stated above are also present. This includes one of the essential elements at the heart of negligent misrepresentation which is detrimental reliance. Meyercord v. Curry, 38 A.D.3d 315 (1st Dept. 2007).

Plaintiffs are careful not to disclose at what point their OEM licensing became a foremost issue with SILA. Plaintiffs never affirmatively state that Basanta was told by them to check for OEM licensing. And it cannot even be inferred from the record compiled heretofore that Basanta should have known that SILA was investigating OEM software, nor even that plaintiffs were aware of that circumstance. See ¶¶ 3 - 7 of Affirmation in support of motion. The conclusion is quickly apparent that there was no detrimental reliance if plaintiffs themselves did not know what Basanta and his company were to look for. Finally, there was arguably a special relationship between Cochems and plaintiffs, but nothing other than a contractual relationship is apparent between plaintiffs and Basanta.

Similarly, plaintiffs seeks leave to assert a tenth cause of action against defendants Craig Jennings and Powhattan Consulting Services for negligently performing a review of the propriety of the licensing of the software installed on the computer system of plaintiff. Plaintiffs

allege that Jennings and Powhattan knew the result of their review would be offered in defense of SILA's investigation as to whether plaintiffs OEM software and other software installed on plaintiffs' computer systems was properly licensed.

The allegation against Jennings and Powhattan is that they did not investigate the integrity of the licensing for plaintiffs' OEM software, and carelessly relied upon representations of Cochems and Budris, with the result that although they reported that plaintiff had proper licensing they in fact did not, if one considered the OEM software - which seemingly was SILA's concern.

In opposition to the motion defendants Powhattan and Jennings state quite definitely that they were not engaged to review the OEM software. Their contract was to "verify an audit done using GASP 7 software to determine that there was an adequate number of licenses for the computers in use by plaintiffs. Gasp 7 Software does not determine whether the underlying software was OEM. Powhattan and Jennings Memo of Law, page 8.

While plaintiffs now question why it would have paid Powhattan to simply count their software, their buyer's remorse, if you will, does not serve to impose upon Powhattan the performance of a duty for which it did not contract. In fact, the proposed pleadings place plaintiffs in the awkward procedural position of having contracted with the two proposed defendants to provide services for which the penalty for negligent performance is breach of contract. On the other hand, if the breach is of a duty to truthfully represent their findings on the basis of a superior position of knowledge, and a special relationship, the elements have not even been plead. Just as is the case with Basanta, there is no claim of reasonable reliance or change of position based upon the reports plaintiffs received. By that time Rosicki, Rosicki & Associates' licensing situation, with which SILA was concerned had been in existence for a long time. Plaintiffs' lately heard protestations that had they known the true state of affairs they would have cooperated with SILA is too slender a reed upon which to hang blame on Jennings or Basanta.

Since the tenth cause of action sounding in negligence against Powhattan and Jennings is concerned with plaintiffs' OEM software, a cause of action is not stated as the aforesaid defendants never had anything to do with the OEM software.

Accordingly, the amended complaint in the form annexed to the moving papers can

sustain neither a cause of action for negligence, nor negligent misrepresentation, against the two entities engaged to investigate, as it is based on faulty principles of law, conclusory allegations, and contradicted factual statements. The motion is denied.

Dated: April 24, 2008

J.S.C.