

**Atrex Sec. Sys., Inc. v Windemere Home
Owners Assn., Inc.**

2008 NY Slip Op 31664(U)

June 10, 2008

Supreme Court, Nassau County

Docket Number: 2093-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ATREX SECURITY SYSTEMS, INC.,

INDEX No. 022093/07

Plaintiff,

MOTION DATE: April 17, 2008
Motion Sequence # 001, 002

-against-

WINDEMERE HOME OWNERS
ASSOCIATION, INC.,

Defendant.

The following papers read on this motion:

Notice of Motion.....	XX
Affidavit in Reply.....	X
Memorandum of Law.....	X

This motion, by plaintiff, for an order pursuant to CPLR 3211 (a) (7) striking the defendant's first affirmative defense in the defendant's answer on the grounds that the defense is improper as a matter of law, dismissing the defendant's counterclaims on the grounds that no causes of action are stated, and for such other and further relief as the Court deems necessary and proper; and a motion, by defendant, for an order granting summary judgment in favor of Windemere Home Owners Asso. Inc. dismissing the complaint against it, are **both** determined as hereinafter set forth.

ATREX SECURITY SYSTEMS, INC.

Index no. 022093/07

Plaintiff, Atrex Security Systems, Inc., supplied central station monitoring for Defendant, Windemere Home Owners Association, Inc., under two successive 5-year contracts beginning in February, 1995, and ending in October, 2005. Thereafter, the contract automatically renewed for a 1 year term, unless terminated as specified in paragraph 3 of the Contract . That paragraph provides:

Terms of Agreement Renewal

The term of this agreement to provide monitoring and service of the transmitter shall be for a period of five (5) years and shall self-renew for successive periods of one year thereafter under the same terms and conditions, unless either party gives written notice to the other by certified mail, return receipt requested, of the intention not to renew the contract at least 30 days prior to the expiration of any term. Company shall be permitted to increase the yearly payments provided for herein at any time after the expiration of one year from the date hereof, upon giving notice to Subscriber, and if Subscriber is unwilling to pay such increased charge Company shall be permitted, as its option , on written notice to the subscriber, to terminate this agreement as if the full term had expired in which event Subscriber shall pay the yearly charge pro rata, only until equipment is removed. (emphasis supplied)

The plaintiff seeks dismissal of an affirmative defense and counterclaims.

Defendant seeks summary judgment. At issue is the precise termination date of the contract and the respective responsibilities attendant with that termination.

The defendant asserts that the contract was terminated in person on July, 2006, and affirmed by mail in letters dated October 16 and 18, 2006. On termination, Defendant

asserts that plaintiff has an obligation to discontinue performance, i.e., the monitoring service, which, the defendant argues, the plaintiff did not do. Further, defendant claims that it never refused plaintiff the right to take back the monitors and materials related to the installation.

Plaintiff argues that defendant did indeed terminate its fire alarm monitoring contract, but it did not stop using the fire alarms. Specifically, plaintiff contends, the fire alarms were never disconnected by Windemere, and the alarms continued to transmit signals to plaintiff's central station monitoring company. Altrex argues that it be compensated so long as a signal is transmitted between defendant and plaintiff. Regarding the monitoring equipment installed by plaintiff at Windemere, plaintiff asserts conversion, arguing that the defendant has not returned the equipment or allowed access to it by the plaintiff.

DECISION

With respect to the plaintiff's motion to dismiss the defendant's first affirmative defense, and the defendant's counterclaims, the defendant does not directly respond. Instead, the defendant has moved for summary judgment.

The law is well-settled in the Second Department that an affirmative defense for failure to state a cause of action cannot be raised in an answer (Guglielmo v Roosevelt Hospital Staff Housing Co., Inc., 222 AD2d 403, 635 NYS2d 42, 2nd Dept., 1995), and such cause of action is, in fact, dismissed. The first counterclaim does not state any facts upon which the defendant can base a cause of action and it is dismissed. The second counterclaim is for attorneys fees, which are not recoverable in this state absent statutory authorization. (see, Alyeska Pipeline Co. v Wilderness Society, 421 US 240). Therefore, that counterclaim is dismissed.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be

granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this court. Material issues of fact abound in the instant case, i.e., when termination actually occurred; and whether a cause of action for conversion is justified by the facts. Essentially, the question of fact is posed: when is termination not a termination? Additionally, the contract is silent as to the notice and obligations of the parties for removal and/or permission to remove the 130 units, valued by the plaintiff at \$900 each. Further, there is a dispute and the record is silent as to permission for removal. For these reasons, summary judgment is **denied**, and the plaintiff's motion to dismiss is **granted**.

Please be advised that a Preliminary Conference has been scheduled for June 23, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUN 10 2008

Stephen A. Scarami

ENTERED

JUN 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE