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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 36

Justice

Index Number : 602425/2005

SAVASTA AND COMPANY

VS.

INTERACTIVE PLANET SOFTWARE

SEQUENCE NUMBER : 004

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 01/11/08

MOTION SEQ. NO. 004

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED JUN 13 2008 COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 004 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants' motion is granted only to the extent of dismissing plaintiff's sixth and seventh causes of action, and is otherwise denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff; and it is further

ORDERED that all other causes of action are severed and continued.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/12/08

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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SAVASTA AND COMPANY, INC.,

Plaintiff,

-against-

INTERACTIVE PLANET SOFTWARE, INC., JOHN ZANOTTI, LIRON ZUR, and TOMER VARDI,

Defendants.

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Index No.
602425/05

Motion Sequence No.
004

CAROL R. EDMEAD, J.:

In this motion for partial summary judgment, defendants seek to dismiss plaintiff's entire complaint as to defendants John Zanotti (Zanotti), Liron Zur (Zur), and Tomer Vardi (Vardi), as well as to dismiss plaintiff's fifth, sixth and seventh causes of action as to Interactive Planet Software, Inc. (Interactive). Additionally, defendants seek to limit any damages that may be awarded in this action to those contained within the contractual agreement between the parties.

For the reasons stated below, that portion of defendants' motion that seeks dismissal of the sixth and seventh causes of action is granted, and the motion is otherwise denied.

Background

Plaintiff is a third-party administrator (TPA) for multi-employer pension and welfare funds,[1] which utilizes computer software to maintain databases of the funds' participants, as well as to process its transactions.

Some time in 2003, plaintiff decided to change the software in use for these purposes and sought a replacement program to fulfill its needs. According to plaintiff, in that same year, plaintiff's president met defendant Zanotti at a conference, during which Zanotti demonstrated Interactive's "Union Manager" software program (the program) and made certain statements regarding the program's TPA capabilities.

Plaintiff asserts that, based upon its viewing of the program at the conference, as well as several other demonstrations and assurances by Interactive regarding the program's appropriateness for plaintiff's use, on August 19, 2003, plaintiff and Interactive signed an "Agreement for Software Development" (the Agreement), wherein Interactive agreed to install the program on plaintiff's computer systems and provide "20 hours of software development customization in addition to the provided software." See Affidavit of Zur, exh. H at ¶ 1. Additionally, the Agreement provided that Interactive would

[1] Plaintiff computes and facilitates the proper distribution of payments to either pension and welfare fund participants or to treating healthcare providers.

migrate plaintiff's available data to the program and "do everything in its power to ensure that the data is functional within the new software." See Affidavit of Zur, exh. H at ¶ 7.3.

According to plaintiff, immediately upon installation in January 2004, it notified Interactive that the program failed to conform to that which was promised in the Agreement.[2] According to plaintiff, over the next 18 months, there were repeated problems with the program that required error checking and debugging sessions. Additionally, plaintiff maintains that the help menus in the program did not work, and there was no user manual provided to enable plaintiff to use the system without help from Interactive.

It is uncontested that plaintiff did pay to Interactive the entire $120,000 required under the Agreement, as well as the $750/month fee for software support, and that, even though the plaintiff contends that the program was not in acceptable working order, it continued to use the program as Interactive attempted to rectify problems.

Plaintiff contends that during the time that Interactive was attempting to correct what should have been properly programmed into the original software, Interactive was billing plaintiff at

[2] Problems with the program included, but were not limited to, improper amounts being sent to fund members as reimbursements, as well as the failure to generate proper Explanations of Benefits to be sent out with any reimbursement checks.

a rate of $125/hour to try to correct errors in the program. According to plaintiff, it was forced to engage legal counsel to try and resolve these billing and programming issues. However, upon learning of an attorney's involvement, Interactive and its principals refused to authorize any further work to correct errors in the program. Plaintiff avers that, it was only in desperation to get the program running properly that plaintiff directed its attorneys to offer an agreement (the Second Agreement), under which Interactive would repair the software and deliver manuals in return for a fee, without prejudice to plaintiff's legal rights. Although Interactive never signed the Second Agreement, defendants did resume work on the program.

Plaintiff contends that on the morning of June 30, 2005, a "virus" in Interactive's program caused plaintiff's complete computer system to crash. This crash resulted in plaintiffs being unable to process any claims for more than 24 hours. According to plaintiff, after Interactive was notified of the crash, it responded by attempting to force plaintiff to pay 60% of previously billed contested additional fees. Plaintiff avers that, given the circumstances, it had no choice but to accede to Interactive's demands; however, it was only after paying the demanded amount and the system crash was resolved, that plaintiff was told that defendants had embedded a "security script" in the program.

Although defendants assert that there are "security scripts" embedded in all their programs and this one was set to trigger when unauthorized modifications and additions were being made to the program, plaintiff maintains that no unauthorized modifications were being made to the program, and contends that this "virus" was embedded into the software some time after installation specifically to force plaintiff to pay the additional fees defendants sought to collect.

Plaintiff seeks damages for breach of contract, fraud, *prima facie* tort, and tortious interference with contract. Additionally, plaintiff seeks specific performance of the Agreement, as well as turnover and replevin of the program's documentation.

Defendants allege that Interactive has fulfilled its obligations under the Agreement, and that, under the Agreement, plaintiff's time to seek legal redress expired prior to the commencement of the instant action. Further, defendants seek monetary damages under their counterclaims for breach of contract, unjust enrichment, *quantum meruit*, *prima facie* tort, defamation, tortious interference with contract, and tortious interference with prospective economic advantage.

Discussion

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Fifth, Sixth, and Seventh Causes of Action

Defendants first seek summary judgment dismissing plaintiff's fifth, sixth, and seventh causes of action. Those causes of action (i.e., for fraud, *prima facie* tort, and tortious interference with contract) sound in tort, which defendants contend are duplicative of the breach of contract cause of action.

Fraud

Plaintiff's fifth cause of action seeks to recover for fraud based upon defendants' insertion of an executable program embedded into the software that defendants installed onto plaintiff's computer system, such that, if there were data alterations in plaintiff's computer system, all of its software

would crash.

"A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relies on to its injury." Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 122 (1995). Where a contract exists between the parties to an action, a defendant "may be liable in tort when it has breached a duty of reasonable care distinct from [any] contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations." New York University v Continental Ins. Co., 87 NY2d 308, 316 (1995). However, such alleged behavior must be collateral to or extraneous from the agreement itself (see GH Liquidating Trust v Deloitte & Touche LLP, 47 AD3d 516 [1st Dept 2008]), and be specifically pled (see CPLR 3016 [b]; see also Tomkins PLC v Bangor Punta Consol. Corp., 194 AD2d 493 [1st Dept 1993]; Board of Managers of 411 East 53rd Street Condominium v Dylan Carpet, Inc., 182 AD2d 551 [1st Dept 1992]), because "where a party is merely seeking to enforce its bargain, a tort claim will not lie." New York University v Continental Ins. Co., 87 NY2d at 316.

In the instant action, plaintiff attempts to rely upon the First Department's ruling in First Bank of Americas v Motor Car

Funding, Inc.,[3] in contending that defendants' August 19, 2003 statements regarding the program's ability to handle plaintiff's needs were misrepresentations of both present fact and warranties and are thus actionable in fraud. However, the factual circumstances in the two actions are different, in that each of the alleged misrepresentations here differ from those at issue in First Bank of Americas v Motor Car Funding, Inc.

In that action, the allegedly fraudulent statements were extraneous to the warranties that were included in the contract therein. Here, section 4 of the Agreement (entitled "Standard of Care") makes "no guarantee as to the efficacy or value of any of the services performed or software developed, except to the extent that [Interactive] warrants that the software will be fit for its intended purposes and uses."

Plaintiff's allegations of misrepresentation fall exactly within the warranties contained within this paragraph and are not extraneous to the Agreement. Therefore, plaintiff cannot predicate its fraud claim on either defendants' alleged misrepresentations of present fact or alleged misrepresentations of warranty.

Plaintiff further asserts that it was fraudulently induced into signing the Agreement, in that defendants knew that the

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[3] 257 AD2d 287 (1st Dept 1999).

program was not designed to fit plaintiff's needs. However, plaintiff's claim that Interactive's program did not fit its needs is also a duplication of the breach of contract claim. With this claim, plaintiff is alleging that defendants breached the "Standard of Care" paragraph cited above, in that the paragraph warrants that the "software will be fit for its intended purposes and uses."

Finally, plaintiff alleges fraud based upon defendants' concealment of the "security script" in the program. A claim for fraudulent concealment does not lie except where there is a fiduciary relationship between the parties (Robinson v Crawford, 46 AD3d 252 [1st Dept 2007]; see also SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352 [1st Dept 2004]) or where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." Swersky v Dreyer and Traub, 219 AD2d 321, 327 (1st Dept 1996) (quoting Chiarella v United States, 445 US 222, 248 [1980]). Plaintiff alleges that defendants had superior knowledge of the "security script," knowledge of which plaintiff contends would have affected its decision to enter into the Agreement. Additionally, plaintiff asserts that had it had knowledge of the "security script," it would have acted differently, both before and after the June 30, 2005 system crash.

This court holds that plaintiff has made a colorable claim

regarding defendants' fraudulent concealment of the "security script" within the program, and that there are material questions to be determined by the trier of fact as to whether defendants caused such embedding and, if so, whether there is liability for doing so.

Because plaintiff's fraudulent concealment claim presents material questions of fact, that portion of defendants' motion that seeks dismissal of plaintiff's fifth cause of action is denied.

Prima Facie Tort

New York courts have long held that "harm intentionally inflicted is prima facie actionable unless justified[, which] has developed into the specific cause of action of prima facie tort consisting of ... (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful." Curiano v Suozzi, 63 NY2d 113, 117 (1984).

Such a claim requires that a defendant's action must be without excuse or justification (see Havana Central NY2 LLC v Lunney's Pub, Inc., 49 AD3d 70 [1st Dept 2007]), because "[t]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314 (1983); see also Maruki, Inc. v Lefrak Fifth Ave. Corp., 161 AD2d 264 (1st Dept

1990).

In its sixth cause of action, plaintiff alleges that defendants intentionally inflicted harm upon plaintiff by embedding the "security script" into the program. Additionally, plaintiff alleges that defendants violated Penal Law § 156.26. Plaintiff has not, however, alleged or proffered any evidence that defendants were motivated *solely* by the intent to harm plaintiff, which is required to recover under this cause of action. Therefore, plaintiff's sixth cause of action is dismissed.

Tortious Interference With Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 (1996). Although it is clear from the evidence that defendants were aware that plaintiff had at least one contract with a third-party, plaintiff has not proffered any evidence that either (1) a third-party breached at least one of those contracts, or (2) that plaintiff suffered damages from any tortious interference of the breach of that contract by a third-party. Therefore, the seventh cause of action is dismissed.

Dismissal of Claims Against Zanotti, Zur, and Vardi

Defendants additionally seek dismissal of all claims against Zanotti, Zur, and Vardi individually, because this action sounds entirely in contract and is strictly based upon one or more alleged breaches of the Agreement, to which Zanotti, Zur, and Vardi were not parties.

However, this court has already held that there are material questions of fact as to whether or not defendants' actions in the embedding the "security script" in the program and failing to inform plaintiff of the executable program on their system constituted fraudulent concealment, which is a tort claim.

As respects plaintiff's contract claim, although plaintiff seeks to hold Zanotti, Zur, and Vardi accountable individually, which requires this court to pierce the corporate veil and hold them individually liable for their allegedly fraudulent actions, "[t]hose seeking to pierce a corporate veil ... bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 339 (1998); see also Joseph Kali Corp. v A. Goldner, Inc., 49 AD3d 397 (1st Dept 2008).

A decision whether or not to pierce the corporate veil is fact-specific (see Morris v New York State Dept. of Taxation and

Finance, 82 NY2d 135 [1993]), and requires a trier of fact to find that the principals of the corporation "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." Morris v New York State Dept. of Taxation and Finance, 82 NY2d at 142.

Plaintiffs have not proffered any evidence to show that any of Zanotti, Zur, and Vardi used Interactive as "a mere device to further their personal rather than the corporate business." Morris v New York State Dept. of Taxation and Finance, 82 NY2d at 141; see also Heim v Tri-Lakes Ford Mercury, Inc., 25 AD3d 901 (3d Dept), lv denied 6 NY3d 886 (2006); Seuter v Lieberman, 229 AD2d 386 (2d Dept 1996). Nor has plaintiff shown that any of Zanotti, Zur, or Vardi acted outside his duties as an employee or principal of Interactive.

Finally, although, according to plaintiff, Interactive is no longer an active company and monetary recovery may not be available except from the individual defendants, this fact alone does not warrant the court's contriving to pierce the corporate veil to achieve a monetary recovery for plaintiff.

As respects plaintiff's tort claim, although generally, officers and employees of a corporation are not individually liable for fraud unless they personally participate in it or have knowledge of it (see Marine Midland Bank v John E. Russo Produce

Co., Inc., 50 NY2d 31 [1980]), if those principals and/or employees knowingly commit a fraudulent act in the performance of their corporate duties, whether or not the corporate veil is pierced, individual liability may be assigned. See American Exp. Travel Related Services Co., Inc. v North Atlantic Resources, Inc., 261 AD2d 310 (1st Dept 1999); see also Espinosa v Rand, 24 AD3d 102 (1st Dept 2005); Ideal Steel Supply Corp. v Fang, 1 AD3d 562 (2d Dept 2003).

Zanotti, Zur, and Vardi were the principals and employees of Interactive at the time that the alleged fraudulent concealment occurred, and if any such concealment is found by the trier of fact, it is certainly possible that one of Zanotti, Zur, and Vardi were the actors.

Therefore, plaintiff's fifth cause of action as against Zanotti, Zur, and Vardi remains, and that portion of defendants' motion that seeks dismissal of all causes of action against Zanotti, Zur, and Vardi is denied.

Limitation of Damages

Defendants seek to limit the amount of damages that can be recovered to that which is enumerated in the Agreement. However, this court has determined above that plaintiff's fifth cause of action for fraudulent concealment remains in this action. Therefore, that portion of defendants' motion that seeks to limit the monetary damages in this action is denied.

Order

Accordingly, it is hereby

ORDERED that defendants' motion is granted only to the extent of dismissing plaintiff's sixth and seventh causes of action, and is otherwise denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff; and it is further

ORDERED that all other causes of action are severed and continued.

Dated: June 12, 2008

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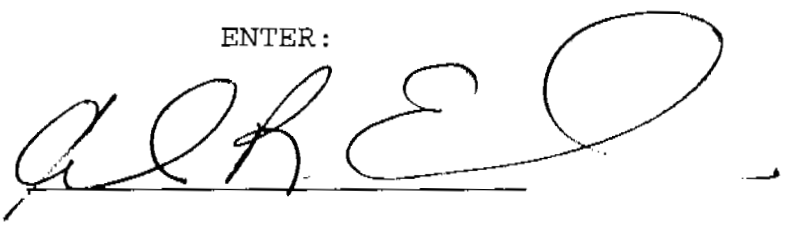

C. Robinson Edmead, J.S.C.