

Person v Hewlett-Packard Co.

2009 NY Slip Op 30012(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 601614/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC

PART 8

Justice

Index Number : 601614/2008
PERSON, CARL E.
VS.
HEWLETT-PACKARD COMPANY
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 601614-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

are read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided*
pursuant to attached Rem

FILED

JAN 07 2009

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER

J.S.C.

Dated: 1/6/09

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----x

CARL E. PERSON,
Plaintiff,

Index No.: 601614/08

-against-

DECISION AND ORDER

HEWLETT-PACKARD COMPANY and
HEWLETT-PACKARD DEVELOPMENT
COMPANY, L.P.,

Defendants.

-----x

SHAFER, J.

FILED
JAN 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Defendants move to dismiss the complaint for failing to state a cause of action, pursuant to CPLR 3212 (a) (7).

Plaintiff, an attorney acting pro se, purchased a printer manufactured by defendants in December, 2007, from a computer retailer for approximately \$100. The printer contains a popup help tool, known as the HP Product Assistant, which is designed to detect problems that occur with defendants' products, and can offer solutions to resolve such problems.

Prior to the installation of any software from the disk included with the printer, the user is given the option of reviewing the Software End User License Agreement (EULA), which governs the use of the defendants' software products, including the HP Product Assistant. The EULA provides that "by installing,

downloading, or otherwise using the software, you agree to be bound by this EULA."

The user can choose either to install the program with all of its pre-set default settings, or can review each of the default settings to determine which, if any, the user would like to keep.

Plaintiff alleges that the HP Product Assistant interfered with the use of his computer because it caused a popup to appear on his computer screen. According to the limited warranty that came with the printer, the user is afforded several options for technical support. Additionally, defendants' website provides information on how to resolve various issues, including how to stop the HP Product Assistant from being displayed on the computer screen.

Plaintiff does not allege that he tried to use any of defendants' technical support systems. Rather, plaintiff, who describes himself as not having high-level computer skills, decided to delete, by himself, various system services found in the Windows Task Manager on his computer in an attempt to uninstall the HP Product Assistant.

As a result of plaintiff's attempts to uninstall the HP Product Assistant, his computer malfunctioned. Plaintiff does not allege that he attempted to contact any of defendants' technical support services. Plaintiff re-installed the Windows

operating system on his computer himself, and, consequently, had to re-install all of his software programs, which he maintains took him 24 hours to complete.

Plaintiff has asserted six causes of action: (1), breach of contract; (2), breach of express and implied warranties; (3) unjust enrichment; (4), fraud and misrepresentation; (5) violation of § 349 of the New York General Business Law (GBL); and (6), violation of GBL § 350. Plaintiff seeks actual and consequential damages in the amount of \$10,000, and punitive damages in the amount of \$100,000.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

First Cause of Action: Breach of Contract

Plaintiff fails to allege any provisions of the presumed contract between himself and defendants. In his opposition,

plaintiff asserts that his purchase of defendants' product alone creates a non-written sales contract. Plaintiff maintains that he was unaware of the built-in pop-ups when he purchased the printer, and therefore defendants have breached the contract. Plaintiff has provided no legal support for this argument.

In order to defeat a motion to dismiss a breach of contract claim, the complaint must allege, in non-conclusory language, the essential terms of the contract and which provision was breached. See *Sheridan v Trs. of Columbia University*, 296 AD2d 314 (1st Dept 2002). The only allegation appearing in the complaint is that defendants created the popup that interferes with plaintiff's computer use, but the complaint fails to specify any agreement between the parties that would preclude such a device.

The only contract, aside from the sale of the product, that exists between the parties is the EULA, which limits defendants' liability to the greater of \$5 or the actual amount the user paid for defendants' product. Under New York law, "contractual exculpatory and limitation of liability clauses are enforceable." *David Gutter Furs v Jewelers Prot. Servs. Ltd.*, 79 NY2d 1027, 1029 (1992); *Noble Thread Corp. v Vormittag Assocs.*, 305 AD2d 386 (2d Dept 2003). Therefore, even if any contractual breach was sufficiently pled, plaintiff's recovery would be limited to his purchase price.

In his opposition, plaintiff cites to § 2-719 of the Uniform

Commercial Code (UCC), which provides for consequential damages unless the limitation of liability clause is unconscionable, which is not alleged in the complaint. Therefore, this cause of action is dismissed

Second Cause of Action: Breach of Express and Implied Warranties

Plaintiff fails to identify any express warranty, and so this cause of action for breach of an express warranty is dismissed.

Plaintiff also argues that defendants have breached an implied warranty for fitness for a particular purpose and an implied warranty of merchantability.

In order to maintain a cause of action for an implied warranty of fitness for a particular purpose, plaintiff must allege that, at the time of the sale, the seller had reason to know of a particular use for which the buyer was planning to use the product, and the buyer relied on the seller's skill or judgment to select a suitable product. UCC § 2-315. Plaintiff does not allege that he relied on defendants' skill or judgment, and the seller was not defendants, but the retailer from whom the printer was purchased. Consequently, this cause of action cannot be maintained.

A cause of action based on an implied warranty of merchantability cannot be sustained where the plaintiff purchased

the product from a retailer, not the defendant manufacturer, the product in question is fit for ordinary purposes, and the alleged damages were to property, not the person. *Pronti v DML of Elmira, Inc.*, 103 AD2d 916 (3d Dept 1984).

Third Cause of Action: Unjust Enrichment

The existence of a valid contract, the EULA, bars a cause of action in quantum meruit. *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (2004); see also *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1st Dept 2002). Therefore, this cause of action is dismissed.

Fourth Cause of Action: Fraud and Misrepresentation

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1994]) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant matter, plaintiffs' allegations of fraud are

conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b).

"[T]he mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud (internal quotation marks and citations omitted)." *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248, 249 (1st Dept 1997). Accordingly, the fraud cause of action is dismissed.

Fifth Cause of Action: Violation of GBL § 349

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." Plaintiff does not identify anything in the EULA that is false, deceptive or misleading. Furthermore, the disclaimers and waivers of liability appearing in the EULA bar any such remedy. *Moore v Microsoft Corp.*, 293 AD2d 587 (2d Dept 2002). Consequently, this cause of action is dismissed.

Sixth Cause of Action: Violation of GBL § 350

GBL § 350 prohibits false advertising. The complaint fails to specify any advertising claims made by defendants that were false or misleading, or that he relied upon any such claims in making his purchase. See *McGill v General Motors Corp.*, 231 AD2d 449 (1st Dept 1996). Therefore, this cause of action is also dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/6/09

ENTER: **MARILYN SHAFER**

Marilyn Shafer, J.S.C.

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