

Mehmet v Add2Net, Inc.
2009 NY Slip Op 30521(U)
March 5, 2009
Supreme Court, New York County
Docket Number: 603859/07
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 603859/2007

MEHMET, B. DAVID

vs.

ADD2NET

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. _____

MOTION DATE 12/4/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPER# NUMBERED	
1-2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

MAR 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/5/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
B. DAVID MEHMET,

Plaintiff,

-against-

ADD2NET, INC. d/b/a LUNARPAGES.COM,

Defendant.
-----X

SHIRLEY WERNER KORNREICH, J.

**DECISION
& ORDER**

Index No.: 603859/07

FILED

MAR 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

In this action arising out of defendant's termination of webhosting services purchased by plaintiff, defendant moves to dismiss the amended complaint. The amended complaint contains the following causes of action: breach of contract (1st); gross negligence (2nd); negligent misrepresentation (3rd); unfair, deceptive and unlawful business practices (4th); intentional infliction of emotional distress (5th); and a declaration that defendant violated General Business Law §349.

Background

The following facts are undisputed. On or about August 14, 2005, plaintiff and defendant entered into a contract. The parties agree that the contractual relationship was embodied in a document entitled "Terms of Service" (Contract). Defendant's Motion, Exh. H. In the Contract, defendant agreed to provide webhosting services on Lunarpages.com for plaintiff's site, stocroom.com, in return for a monthly fee, renewable each month by payment in advance. Defendant advised plaintiff, on November 9, 2007, that his account would be charged on November 11, 2007, but on that date the charge was declined. Defendant's Motion, Exh. I. On November 16, 2007, defendant left a message on plaintiff's answering machine stating that plaintiff should call to avoid

interruption of his service. On November 19, 2007, plaintiff had not paid the bill and defendant suspended plaintiff's service. Plaintiff lost all the data relating to stocroom.com, which he had stored on defendant's server. As of November 30, 2008, plaintiff still had not paid the bill. Defendant terminated his account on December 5, 2008.

The terms of the Contract provided that the service would be initiated when plaintiff's check for the first month's service cleared and the funds were received by defendant. Subsequent fees were "due and payable immediately upon invoice and in no instance later than the expiration of the last day of the previous period without regard to any invoice." Section 8.1 stated that in the event that fees were not paid, the account could be suspended by deactivating access by plaintiff and web users to any information contained on the server, including "disabling your hosted domain and/or any access to information or data related to your account." The Contract gave defendant the "option" to give plaintiff an opportunity to correct a breach. However, if the breach continued after plaintiff was notified of the opportunity to correct it, defendant had the right to terminate the account. In the section regarding termination, the Contract provided that it would "include the removal of any and all of your information from the Lunarpages servers. Such information or data may or may not be made available to you by Lunarpages after any such termination." Section 12.5 of the Contract limited the remedies to which plaintiff was entitled for negligence or intentional conduct to three months' of the service fee and prohibited plaintiff from recovering indirect, special, exemplary, punitive, incidental or consequential damages, loss of profits or loss of business.

* 4]

Plaintiff alleges that on November 16, 2007, he returned the call from defendant's employee and left a message stating that he would be mailing the payment due and that it would be received by November 20, 2007. He claims that he was entitled to a reasonable time to pay after defendant left the message on the November 16, and that it was a violation of the covenant of good faith and fair dealing, implied in every contract, for defendant to suspend the service on November 19. His position is that defendant breached the Contract, and committed various torts and unfair practices by terminating on November 19 and blocking access to his server data.

There are conflicting facts alleged concerning whether defendant was justified in terminating the Contract for plaintiff's alleged use of foul language and threats when speaking to defendant's employees after the account was suspended. The parties also differ as to whether defendant provided usable links for plaintiff to recover his data. However, as noted below, it is not necessary for the court to reach these issues.

Discussion

A. Breach of Contract

A contract that is unambiguous will be construed by a court from its four corners without resort to extrinsic evidence. *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969). A court should not make a poor bargain good by construction where the language is unambiguous. *185 Lexington Holding Corp. v. Holman*, 19 Misc.2d 521 (Sup. Ct. N.Y. Co. 1959), *aff'd*, 10 A.D.2d 569 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 965 (1960).

The first cause of action for breach of contract is dismissed because there is no dispute that plaintiff breached the Contract by failing to pay his account on November 11, 2007, prior to any alleged breach by defendant. Pursuant to the unambiguous terms of the Contract defendant was entitled to suspend the account for nonpayment on November 19, 2007 and to terminate the account thereafter. Further, the Contract expressly provided that, upon suspension, defendant could disable plaintiff's access to his data and that, upon termination, plaintiff had no right of access to his data. The fact that defendant exercised its option to call plaintiff and request payment to avoid service interruption, or that plaintiff responded that he would pay by November 20, did not negate plaintiff's earlier breach or extend his time to pay under the Contract.

The court rejects plaintiff's claim that the implied covenant of good faith and fair dealing implied in every contract, was violated by defendant. The covenant will only be enforced to the extent that it is consistent with the terms of the contract. *Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, 51 A.D.3d 549, 550 (1st Dep't 2008). Here, denying defendant the right to exercise its rights to termination and suspension upon nonpayment would be inconsistent with the Contract's terms.

It is unnecessary to determine whether plaintiff committed other breaches giving defendant the right to suspend and terminate. Nor is it necessary to resolve whether the links defendant gratuitously provided to enable plaintiff to retrieve his data were usable, as the Contract did not require defendant to give plaintiff access to his data upon suspension or termination for nonpayment.

B. Gross Negligence and Intentional Infliction of Emotional Distress

Plaintiff's claim for gross negligence is dismissed. In a commercial contract context, gross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing. *Colnaghi, USA v. Jewelers Protection Servs., Ltd.*, 81 N.Y.2d 821, 823-824 (1993). Defendant's resort to its contractual remedies for nonpayment was reckless disregard for plaintiff's rights or intentional wrongdoing. Plaintiff had no right to his data once he breached the Contract.

The cause of action for intentional infliction of emotional distress is dismissed, because plaintiff has not alleged conduct by defendant that was outrageous and exceeded the bounds of decency tolerable in civilized society. *Fischer v. Maloney*, 43 NY2d 553, 557 (1978). Defendant's exercise of its rights under the Contract does not meet this standard.

C. *Negligent Misrepresentation*

The amended complaint alleges that the phone message left by defendant, "to avoid any interruption of your service, please give me a call back," constituted a negligent misrepresentation. Further, plaintiff alleges that the message caused him "to believe that he only needed to call the Defendant and inform them [sic] that he was sending payment by check as allowed by the contract to avoid suspension of his website."

Here, plaintiff's reliance on the phone message was unjustified. A negligent statement may be the basis for recovery of damages where "(1) the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all, (2) where there is a carelessness in imparting words, (3) upon which others are expected to rely, and (4) upon which they did act or failed to act, (5) to their damage."

Rotanelli v. Madden, 172 A.D.2d 815 (2d Dep't 1991). Defendant could not have expected that plaintiff would rely on the message as an extension of time to pay after November 19, because the message did not say that.

D. Unconscionable Contract of Adhesion and General Business Law §349

The fourth cause of action alleges that the Contract was an unconscionable, illegal, contract of adhesion and that violated General Business Law §349. The sixth cause of action seeks a declaration that defendant violated §349.

Plaintiff has failed to support his allegations that the Contract was a contract of adhesion with facts demonstrating that he was a victim of unequal bargaining power in his commercial enterprise or that he could not have chosen another service provider.

Ranieri v. Bell Atl. Mobile, 304 A.D.2d 353, 354-355 (1st Dep't 2003). Plaintiff's claims that the Contract's limitation on damages and forum selection clauses are unconscionable, are rejected. Limitations on damages are enforceable, with the exception of clauses foreclosing liability for gross negligence. *Obremski v. Image Bank, Inc.*, 30 A.D.3d 1141 (1st Dep't 2006). Forum selection clause also are enforced, unless they are unreasonable, and here the limitation to California courts is not. *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (1996). Moreover, the court has already ruled that plaintiff cannot establish gross negligence or breach of contract, so he has not been harmed by the limitation of damages. *Obremski, supra*. Nor has plaintiff been harmed by the forum selection clause or the other clauses of which he complains, such as the lack of reciprocity of attorneys' fees for the prevailing party or the lack of notice of amendments to the Contract.

In addition, his claim that the loss of data upon suspension and termination is unconscionable, is rejected. An unconscionable contract is one that is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party. *King v. Fox*, 7 N.Y.3d 181 (2006). Unconscionability requires a showing of procedural and substantive unconscionability in light of the mores and business practices of the time and place. *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10-11 (1988). The procedural element requires an examination of the contract formation process, considering factors such as the lack of meaningful choice, the size and commercial setting of the transaction, the employment of deceptive or high-pressured tactics, use of fine print in the contract, the experience and education of the party claiming unconscionability, and the disparity in bargaining power. *Id.* Plaintiff has not demonstrated factors of this type. Substantive unconscionability consists of terms that are unreasonably favorable to one party. *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 12 (1988). In cases of outrageous terms, a contract may be considered unconscionable on the basis of substantive unconscionability alone. *Id.* Here, plaintiff does not dispute that he could have backed up his own data and does not deny that he is a businessman who runs several web-based businesses. Hence, the court does not find that the terms of the Contract are too one-sided with respect to preservation of data.

Finally, a claim under General Business Law §349 rests on a claim that the defendant is engaging in an act or practice that is deceptive or misleading in a material way that has a broad impact on consumers and by which the plaintiff has been injured. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d

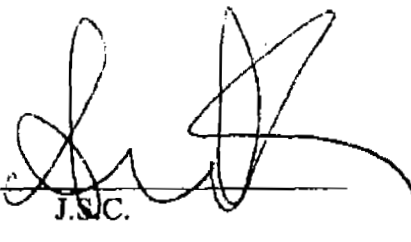
20, 25 (1995). Plaintiff has not shown that defendant engaged in deception. The terms of the Contract are explicit, not misleading. Plaintiff was not injured by the Contract terms. He breached them, and the loss of his data was occasioned by his failure to back it up and to pay his bill.

The court has considered plaintiff's remaining contentions and has found them to be without merit. Accordingly, it is

ORDERED that the amended complaint is dismissed with prejudice and the Clerk is directed to enter judgment accordingly.

Dated: March 5, 2008

ENTER:



J.S.C.

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MAR 10 2009
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