

Ovitz v Bloomberg, L.P.

2009 NY Slip Op 32397(U)

October 2, 2009

Supreme Court, New York County

Docket Number: 603692/08

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 603692/2008

OVITZ, BRUCE

vs.

BLOOMBERG LP.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
 OCT 07 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
 THE ACCOMPANYING MEMORANDUM DECISION.**

*and preliminary conference scheduled for
 November 15, 2009 @ 9:30 am in Part 10
 Room 232*

OCT 02 2009

Dated: _____

 HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10**

-----X
Bruce Ovitz, *on behalf of himself and all
others similarly situated*

DECISION/ORDER
Index No.: 603692/08
Seq. No.: 001

Plaintiff (s),
-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

Bloomberg, L.P. and Bloomberg Finance L.P.,

Defendant (s).
-----X

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):*

Papers

Defs' n/m (§3211) w/SA affirm, exhs 1
Defs' reply w/SA affirm, KPBAffid 2,3

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from an automatic renewal provision in an agreement between the parties. Plaintiff is the lessee of information services and equipment; defendants are, collectively, the information providers. The court has before it defendants' pre-answer motion to dismiss the complaint for failure to state a cause of action and because plaintiff has failed to plead his negligent misrepresentation claim with specificity. CPLR §§ 3211 (a) (7) and 3016 (b). The motion is opposed by plaintiff.

On a motion to dismiss pursuant to CPLR § 3211 *et al*, the pleading is to be afforded a liberal construction and the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v.

Brown & Wood, 243 AD2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976).

Where fraud or misrepresentation is charged, the misrepresentation must be pleaded in detail so as to clearly inform defendant with respect to incident complained of and give notice of allegations plaintiff intends to prove. CPLR 3016 (b).

Facts in the complaint and arguments presented

Plaintiff presents the following facts in his complaint to support each of his claims against the defendants:

Plaintiff is a resident of Illinois. He entered into a subscription agreement with Bloomberg, L.P., a Delaware limited partnership with its principle place of business in New York, New York ("defendants" at times "Bloomberg"). Bloomberg is in the business of providing news, financial information and services ("services") to its subscribers. As per plaintiff's subscription agreement with Bloomberg, made June 15, 2000 ("agreement"), defendants provided him with services, a Bloomberg desktop terminal that delivered real time financial information to him in an electronic format, and a magazine subscription. The agreement was for a two year term with an expiration date of June 15, 2002. Plaintiff never specifically renewed the agreement nor was he notified that it had been renewed. He continued to receive and use defendants services into 2008.

On September 15, 2008 plaintiff called defendants and notified them telephonically that he wanted to cancel his agreement. He followed up the call with

correspondence to defendants dated October 7, 2008. He was advised by defendants that this was not possible because his agreement contained an automatic renewal provision which automatically renewed the agreement every two years. Plaintiff contends the automatic renewal provision is unenforceable and inoperable because defendants never called his attention to it by sending him a renewal notice, as required under sections 5-901 and 5-903 of the General Obligations Law ("GOL § ____").

Despite further demands by him that the defendants cancel his agreement, they refused to do so. In correspondence dated December 15, 2009, Bloomberg threatened to terminate plaintiff's account and take legal action "which would jeopardize your credit standing . . ." Plaintiff alleges that Bloomberg offered him a choice between keeping the agreement until it expired on June 15, 2010, or paying an early termination fee of \$18,720. This termination fee is equal to one year's worth of accelerated subscription payments under the agreement.

Plaintiff contends that defendants' representatives told him it was Bloomberg's policy not to send advance notice of the automatic renewal provision or deadline and that defendants have conducted their business that way for over ten (10) years. Plaintiff brings this case on his own behalf as well as on behalf of all other persons who entered into a subscription/ service agreement with Bloomberg since November 2002. He seeks to have this case certified (at the appropriate time) as a class action. Plaintiff alleges that Bloomberg systematically failed to provide plaintiff and members of the putative class with notice of the automatic renewal provisions in their agreements, as required under GOL §§ 5-901 and 5-903. He alleges further that defendants refused to pick up their equipment when he instructed them to do so, but continued to bill him for

services he did not want. Defendants then began demanding payment, harassing him for overdue payments, and even threatening him with legal action that has damaged his credit worthiness. Plaintiff alleges that having to pay for these services, although he asked for them to be terminated, has unjustly enriched the defendants because the "renewal" agreement is inoperative and unenforceable. He also alleges that defendants' unauthorized renewal of the agreement is a deceptive business practice, within the consumer protection laws of New York State.

The agreement contains the following provision which applies to its duration and term:

"2. Term.

(a) This agreement shall be effective from the date it is accepted by Lessor and shall remain in full force and effect thereafter until the date that is two years after the date that the Services are first provided (the "Term"), unless earlier terminated during the Term or any renewal thereof, as follows: (i) Lessor shall have the right to terminate this Agreement at any time upon not less than 60 days' prior written notice to Lessor and upon payment of the charges set forth in paragraph 3 of this Agreement; and (ii) Lessor shall the right to terminate this Agreement at any time immediately upon written notice to Lessee in the event of a breach by Lessee of any of the provisions of this Agreement.

(b) The Term shall be automatically renewed for successive two-year periods unless Lessee or Lessor elects not to renew by giving not less than 60 days' prior written notice to the other. If this Agreement is so renewed for any additional period beyond the initial Term, the charges payable pursuant to paragraph 3 (a) hereof for such renewal period shall be calculated at the prevailing rates then offered by Lessor, and the Schedule shall be considered to be amended accordingly."

GOL §§ 5-901 applies to automatic renewals of leases of personal property. It provides that such a renewal provision is "inoperative" unless it has been "flagged" for the consumer:

"GOL § 5-901. Certain provisions of leases of personal property inoperative unless notice thereof given to lessee. No provision of a lease of any personal property which states that the term thereof shall be deemed renewed for a specified additional period unless the lessee gives notice to the lessor of his intention to release the property at the expiration of such term, shall be operative unless the lessor, at least fifteen days and not more than thirty days previous to the time specified for the furnishing of such notice to him, shall give to the lessee written notice, served personally or by mail, calling the attention of the lessee to the existence of such provision in the lease. Nothing herein contained shall be construed to apply to a contract in which the automatic renewal period specified is one month or less."

GOL § 5-903 sets forth notice requirements for leases containing automatic renewal provisions. It provides that such provisions are "unenforceable" for a specific period of time, unless the proper notice has been provided:

"GOL § 5-903. Automatic renewal provision of contract for service, maintenance or repair unenforceable by contractor unless notice thereof given to recipient of services.

1. As used in this section, "person" means an individual, firm, company, partnership or corporation.
2. No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract

service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract.

3. Nothing herein contained shall be construed to apply to a contract in which the automatic renewal period specified is one month or less."

Plaintiff claims the automatic renewal provision in his agreement is inoperative and unenforceable because he was not notified that the agreement would be renewed automatically unless he took action to terminate it. Plaintiff states that he should not have to pay for defendants' services after the expiration of the agreement on June 15, 2008.

In addition to his claims ("COA") based upon violations of GOL §§ 5-901 and 5-903 (1st COA), plaintiff alleges these other causes of action: breach of contract - good faith and fair dealing (2nd COA), unjust enrichment (3rd COA), negligent misrepresentation (4th COA), and unfair and deceptive acts in violation of New York's General Business Law ("GBL") § 349 (5th COA). Plaintiff seeks a permanent injunction against defendants automatically renewing their service agreement in this manner, and a declaration that these service Bloomberg agreements are unenforceable, as a matter of law (6th COA).

In support of their motion to dismiss the complaint, defendants first argue that there is no private cause of action for a violation of GOL §§ 5-901 and 5-903, but even if there is, the only consequence of a failure to notify is that the agreement is not renewed for a definite period of time (in this case two years), but plaintiff is still financially responsible for paying for the services he received and used. Defendants argue further that since plaintiff continued to accept the benefits of the service agreement beyond its expiration date (i.e. June 15, 2008), he waived the notice requirements found in GOL §§ 5-901 and 5-903, effectively ratifying the agreement to continue his subscription. Since plaintiff was billed for the services he retained and used, defendants deny they were unjustly enriched, but simply remunerated for they provided.

Defendants argue that the notice requirements of GOL §§ 5-901 and 5-903 cannot be read into or imputed to their agreement with plaintiff and since the agreement itself does not contain a notice provision, they contend there are no facts to support plaintiff's breach of contract cause of action. Defendants argue they performed their obligations under the agreement (i.e. provide services) and plaintiff has not stated what services they withheld or failed to provide. Defendants argue that plaintiff's negligent misrepresentation claim is not distinct from his breach of contract claim, and therefore, this tort claim must be dismissed as well.

Bloomberg contends that the contract was made in Illinois and the services they were provided were also provided to the plaintiff who has his business in Illinois. They

argue that plaintiff has not presented any facts to support their claim that defendants engaged in an deceptive act that misled or affected plaintiff here in New York, which they contend is a necessary requirement for the application of GBL § 349. A separate argument by them is that the agreement is not for consumer goods, but business services and, therefore, by definition, their alleged practices and acts are not consumer oriented.

In support of their motion to dismiss plaintiff's claim for a declaratory judgment, defendants maintain that there is no justiciable controversy because plaintiff stopped making payments after September 2008, and Bloomberg has now waived the money it claimed was due and unpaid. They separately argue that there is no factual basis for plaintiff's claim for a permanent injunction because he has not set forth what the irreparable harm to him would be.

In opposition to these arguments, plaintiff argues that the protections of GOL §§ 5-901 and 5-903 cannot be waived and, in any event, waiver requires the relinquishment of a known right. Plaintiff alleges he did not know the agreement was automatically renewed for two years at a time. He contends defendants breached their agreement by failing to act in good faith, which resulted in plaintiff being deprived of the right to simply cancel the contract after it expired. Plaintiff argues that GBL § 349 does apply to the facts in the complaint because the overdue bills, notices, etc., were sent from New York and Bloomberg deceptive practices and conduct emanated in New York.

Discussion

Assuming that the allegations in the complaint are true, they support plaintiff's claims based upon violations of the automatic renewal statutes (GOL §§ 5-901, 5-903) and the deceptive practices act (GBL§ 349). Furthermore, affording the complaint a liberal construction, plaintiff has also stated a claim for injunctive relief and a declaratory judgment. However, the court find that plaintiff has not set forth facts to support his claims against the defendants for breach of contract, unjust enrichment or negligent misrepresentation. For the reasons that follow, defendants' motion for the preanswer dismissal of the 2nd, 3rd and 4th COAs is granted, but denied as to the 1st, 5th and 6th COAs.

GOL §§ 5-901 and 5-903 (1st COA)

The salutary purpose of GOL §§ 5-901 and 5-903 is to prevent an unsuspecting lessee from being trapped into a renewed service contract or personal property agreement for a fixed period of time. Thus, by statute, an automatic renewal provision in a lease for personal property is "inoperative," or if it is in a service contract," it is "unenforceable," unless the lessor notifies the lessee 15 to 30 days in advance of the automatic renewal. It is well established law that there is a private right of action under the automatic renewal statutes. Protection Industries Corp. v. DDB Needham Worldwide, Inc., 306 AD2d 175 (1st Dept 2003); Concourse Nursing Home v. Axiom Funding Group, Inc., 279 A.D.2d 271 (1st Dept. 2001).

Plaintiff states the automatic renewal provision of the contract was not brought to his attention, as required under GOL §§ 5-901 and 5-903, yet Bloomberg seeks to hold

him responsible for an additional two year term under the "renewed" agreement. These facts support a claim that the agreement was not properly renewed beyond the expiration date of the initial term, even if plaintiff accepted Bloomberg services and made payments to the defendants after the expiration of the initial term. Guerrero v. West 23rd Street Realty, LLC, 45 AD3d 403 (1st Dept 2007) *lv den* 10 NY3d 707 (2008); Protection Industries Corp. v. DDB Needham Worldwide, Inc., 306 AD2d 175 (1st Dept 2003).

GBL § 349 (5th COA)

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." It is an intentionally broad statute, applying "to virtually all economic activity." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324 (2002). To establish a violation of GBL § 349 the conduct complained of must be consumer-oriented and have a broad impact on consumers at large as compared to a private contract dispute that is unique or particular to one of the parties to the lawsuit. New York University v. Continental Ins. Co., 87 NY2d 308, 324 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995).

Although the Bloomberg agreement is for the defendants to provide business related information to plaintiff who is a businessman, he is nonetheless a "consumer" within the meaning, and spirit, of the deceptive practices act because he alleges Bloomberg deceived the "consuming public" at large, not just him. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., *supra*; *also* Protection Industries

Corp. v. DDB Needham Worldwide, Inc., 306 AD2d 175 (1st Dept 2003) (alarm contract for a company). There are, apparently, numerous subscribers who receive Bloomberg services.

Admittedly plaintiff is an out of state resident, he had a computer terminal on his desk at his office in Illinois, and he apparently used the information in that state. To qualify as a prohibited act under the statute, the transaction in which the consumer is deceived, and the deception of the consumer, must occur in New York. GBL § 349 (h); Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 324, 325 (2002); also Drizin v. Sprint Corp., 12 AD3d 245 (1st Dept 2004). Since plaintiff factually asserts that Bloomberg sent him letters from its New York headquarters, and these letters stated he owed money because the renewal agreement was effective, plaintiff has stated facts to support his claim that the deception occurred in New York. The overdue notices and letters threatening to take legal action against him led plaintiff to believe he either had to make the monthly payments under the agreement, even though he notified defendants he had terminated their services, or he had to pay an early termination fee.

Permanent Injunction and Declaratory Judgment (6th COA)

a) *Permanent Injunction*

"A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction." Merkos L'Inyonei Chinuch, Inc. v. Sharf, 59 AD3d 403, 408 (2nd Dept 2009). Such relief is "to be invoked only to give protection for the future ... [t]o prevent repeated violations,

threatened or probable, of the [plaintiffs'] property rights." Merkos L'Inyonei Chinuch, Inc. v. Sharf, 59 AD3d at 408.

Until recently, Bloomberg was sending plaintiff late notices and threatening to take legal action which could harm his credit rating. Presumably, these notices are sent out to other subscribers who, like plaintiff, have a dispute about the expiration date of their subscription agreement. The threat to plaintiff's creditworthiness (and the putative class) is sufficient to establish irreparable injury that warrants the grant of injunctive relief at the end of this case. Four Times Square Associates v. Cigna Investments, 306 AD2d 4, 6 (1st Dept 1994).

b) *Declaratory Judgment*

An action may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur. Cuomo v. Long Island Lighting Co., 71 NY2d 349, 354 (1988) (*internal citations omitted*). However, an action for a declaratory judgment is the appropriate remedy where there is a justiciable controversy. Cuomo v. Long Island Lighting Co., 71 NY2d at 354. Although plaintiff made no payments to defendants after September 2008, and the defendants have "waived" the early termination buy-out fee they had originally charged him, a justiciable controversy still exists.

Breach of Contract: Good Faith and Fair Dealing (2nd COA)

Plaintiff has not set forth facts to support his breach of contract claim. His legal argument is that GOL §§ 5-901 and 5-903 provide statutory requirements pertaining to

renewals that should be implied into his agreement. Thus, he contends that if the requirements were not met, this is a breach of the agreement. A claim for breach of an implied covenant of good faith and fair dealing does not provide a separate cause of action from a breach of contract claim. Consequently, the parties to an express contract are bound by an implied duty of good faith, but if that duty is breached, it is merely a breach of the underlying contract. Canstar v. J.A. Jones Const. Co., 212 AD2d 452 (1st Dept 1995). Applying the law to the facts asserted by plaintiff, they do not support a breach of contract claim against the defendants. He has not identified any obligations of the defendants under the contract that they did not perform. Therefore, defendants' motion for the dismissal of the breach of contract, implied covenant of good faith and fair dealing claim is granted.

Unjust Enrichment (3rd COA)

The legal principles of restitution and unjust enrichment are based upon quasi contract. They provide that someone should not be allowed to enrich him or herself unjustly at the expense of another. Spallina v. Giannoccaro, 98 A.D.2d 103 (4th Dept 1983). Generally, the principle of unjust enrichment applies to a situation where someone has received the money or goods of another which is inequitable or against good conscience for him or her to retain. Miller v. Schloss, 218 N.Y. 400, 407 (1916). The remedy for unjust enrichment is restitution, which is essentially returning the money or property unjustly conferred.

Plaintiff's facts support a claim that there were statutory violations of the automatic renewal statutes. However, after the agreement expired and before he cancelled it, plaintiff had the beneficial use of defendants' services and desktop

terminal. Plaintiff provides no facts to support a claim that he was entitled to have the continued beneficial use of defendants' subscription services and equipment provided by the defendants beyond the term of the agreement without having to pay for them. Concourse Nursing Home v. Axiom Funding Group, Inc., 279 A.D.2d 271 (1st Dept. 2001). While defendants' failure to comply with General Obligations Law §§ 5-901 or 5-903 may result in the leases never having been effectively renewed for a definite term, allowing them to be canceled by plaintiff at any time, the cited statute does not operate to allow plaintiff to continue knowingly and willingly accept the benefit of the agreement (i.e. services and desktop terminal, etc.) without compensating the defendants. Ludl Electronics Products v. Wells Fargo Financial Leasing, Inc., 6 AD3d 397, 398 (2nd Dept 2004); Concourse Nursing Home v. Axiom Funding Group, Inc., *supra*. Therefore, defendants' motion for the dismissal of the unjust enrichment claim is granted.

Negligent Misrepresentation (4th COA)

A claim for negligent misrepresentation requires, in the first instance, a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another. J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 (2007); United Safety of America, Inc. v. Consolidated Edison Co. of New York, Inc., 213 A.D.2d 283 (1st Dept 1995) (*internal citations omitted*). A simple arm's length business relationship is not of a confidential or fiduciary nature; it will not support a cause of action for negligent misrepresentation. River Glen Assocs., Ltd. v Merrill Lynch Credit Corp., 295 AD2d 274, 275 (1st Dept 2002).

The facts supporting this claim are that Bloomberg sent out false bills demanding payment although it was not entitled to collect those payments. There are no facts

tending to show the parties had a special relationship of trust or confidence, the claim is not pled with specificity, and the claim, in any event, is factually indistinguishable from the 1st COA based upon the statutory violations of GOL §§ 5-901 and 5-903.

Defendants' motion for the dismissal of the negligent misrepresentation claim is granted.

Conclusion

Defendants' motion for the dismissal of the complaint is granted as to the breach of contract (2nd), unjust enrichment (3rd) and negligent misrepresentation (4th) causes of action. Those claims are hereby severed and dismissed. The motion is, however, denied as to the claims based upon violations of the General Obligations Law and General Business Law (1st and 5th COA). It is also denied as to plaintiff's claim for a permanent injunction and declaratory judgment (6th COA). Bloomberg's time to answer is hereby extended in accordance with CPLR § 3211 (f).

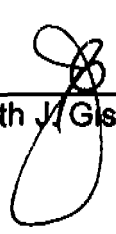
The preliminary conference will be held on November 12, 2009 in Part 10 at 9:30 a.m. No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: October 2, 2009
 New York, New York

So Ordered:



Hon. Judith J. Gische, JSC

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