

Rosicki, Rosicki & Assoc., P.C. v Cochems
2009 NY Slip Op 33134(U)
December 14, 2009
Supreme Court, Nassau County
Docket Number: 012018/2006
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

ROSICKI, ROSICKI & ASSOCIATES, P.C.,
ENTERPRISE PROCESS SERVICE, INC.,
THRESHOLD LAND, INC. and WHITTAKER
LEGAL PUBLISHING CORP.,

Plaintiffs,

INDEX NO.: 012018/2006
MOTION DATE: 11/18/2009
MOTION SEQUENCE: 008 and 009

-against-

PHILIP COCHEMS individually and d/b/a FILMOR
INDUSTRIES, FILMOR INDUSTRIES, INC.,
COMPUTER HELP CENTER, INC., JOHN BUDRIS,
JOAN COCHEMS, CRAIG JENNINGS, POWHATTAN
CONSULTING CORP., FRANK BASANTA, KEVLAR
SOLUTIONS, INC. d/b/a SYSTEMS SOLUTIONS,
ULTRATEK PC INT'L, INC., ARKADI ROSENSON a/k/a
ARRO ROSENSON and JOHN COCHEMS,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Notice of Cross-Motion, Affirmation & Exhibits Annexed	2
Memorandum of Law in Support of Craig Jennings' and Powhattan Consulting Corp.'s Motion for Summary Judgment	3
Reply Memorandum of Law in Further Support of Craig Jennings' and Powhattan consulting Corp.'s Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment	4

This motion by the defendants Craig Jennings and Powhattan Consulting Corp. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is denied.

This cross-motion by the plaintiffs Rosicki, Rosicki & Associates, P.C., Enterprise Process Service Inc., Threshold Land Inc., and Whittiker Legal Publishing Corp. for an order pursuant to CPLR 3212 granting them summary judgment against defendants Craig Jennings and Powhattan Consulting Corp. is denied.

In this action, the plaintiffs seek to recover of Powhattan for its allegedly negligent audit of Rosicki, Rosicki & Associates' computer systems as well as its allegedly false statement "that the software utilized by [the plaintiffs was] fully licensed, and with additional licensing beyond what is currently in use" which plaintiffs allege was made knowingly, willingly and with reckless disregard for its falsity with the purpose of deceiving the plaintiffs.

Both the plaintiffs and Powhattan presently seek summary judgment.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The facts pertinent to these motions are as follows:

The plaintiffs are a law firm and its subsidiaries. The defendants Philip Cochems, individually and doing business as Filmor Industries, Filmor Industries, Inc., Computer Help

Center, Inc., John Budris and John Cochems, serviced the plaintiffs' computer system since 1993. In 2004, the plaintiffs learned that they were being investigated by the Software and Information Industry Association ("SIIA") regarding their computer software licenses. As a result, Cochems hired defendant Frank Basanta and Kevlar Solutions d/b/a Systems Solutions ("Kevlar") to supply software and Powhattan to audit the licensure of their 200+ computers. As the Appellate Division noted in Rosicki, Rosicki and Associates, P.C. v Cochems (59 AD3d 512, 512-513 [2nd Dept. 2009]), "Kevlar wrote a letter dated November 8, 2005 addressed, *inter alia*, to the plaintiffs, that stated, in relevant part: 'Attached you will find a Microsoft license agreement for [the plaintiffs]. As of November 3rd, 2005 [the plaintiffs were] in complete compliance with Microsoft license schema.' Powhattan also wrote a letter dated November 11, 2005 addressed, *inter alia*, to the plaintiffs, in which it explained that it used 'GASP 7' software to conduct the audit, and that the audit took place at five of the plaintiffs' worksites. The Powhattan letter further stated, in relevant part, that 'records of every piece of software installed on every computer, both work-station and server have been made. In addition, the purchase records of [the plaintiffs] have been evaluated, and then input into the software,' but without setting out any limitations as to the results obtained using that software. The Powhattan letter continued, in relevant part: "The comparison with the GASP 7 software has produced the following results: (see attachment.) I hereby certify that the software utilized by [the plaintiffs] are fully licensed, and with additional licensing beyond what is currently in use." Rosicki, Rosicki and Associates, P.C. v Cochems, supra, at p. 512-513.

In this action, "the plaintiffs allege that, based at least in part on these letters, they permitted the SIIA to undertake an audit of their computers [and that] [i]t was subsequently determined, *inter alia*, that the original equipment manufacturers' software installed by the Cochems defendants on the plaintiffs' computers was unlicensed. As a result, the plaintiffs alleged that they had to pay substantial penalties to the SIIA." Rosicki, Rosicki and Associates, P.C. v Cochems, supra, at p. 512-513.

At his examination-before-trial, the defendant John Burdis who assisted the plaintiffs with their computers in 2004 testified that in October 2004, plaintiff Tom Rosicki asked him to obtain 220 Windows XP Office licenses and 220 Word Perfect licenses on Ebay. He testified that

in undertaking that job, he was trying to purchase software which would look like it had been purchased with the computers. He testified that with Tom Rosicki's permission, he purchased software and licenses from J.M. Company in Utah as well as from vendors in Canada and Florida and a Veritas dealer which they were paid for by certified check or cash.

Jennings testified at his examination-before-trial and continues to maintain that he was not told about the SIIA investigation and that although Powhattan was hired to conduct an audit of Rosicki, Rosicki & Associates' computers, that audit consisted only of counting the number of software packages and the number of licenses: According to Jennings, the legality of the licenses was not included. Jennings further testified that neither the scope nor the purpose of his audit was ever discussed and accordingly, he never advised the plaintiffs of his audit's limitations. Powhattan maintains that his conclusion that Rosicki, Rosicki & Associates had more software licenses than software packages was correct. He attests that he was never asked to check the legality of the software licenses, i.e., to conduct a search for "Original Equipment Manufacture" software, and that the program Powhattan used was not even capable of doing that. He in fact testified that he never evaluated the legality of the licenses. As for the "fully licensed" certification in its audit report, Powhattan maintains that its original audit report only stated that there was a proper number of licenses for the number of pieces of software being used by Rosicki, Rosicki & Associates but Rosicki asked for language certifying that the software was "fully licensed." Powhattan has submitted documentation which establishes that Rosicki asked for that language. At his examination-before-trial, Jennings testified that "fully licensed" only meant that the number of licenses were equal to or greater than the software packages. Jennings maintains that the defendants were not hired to correct any defects in the plaintiff's software.

In comparison, Rosicki maintains that a software audit—which is what Powhattan was hired to do—consists of scanning the company's computers to ascertain all of the software, comparing the existing software with the company's software licenses and obtaining proper licenses for any unlicensed software. In support of that position, the plaintiffs cite numerous articles regarding intellectual property audits, including software, which comport with his theory. Rosicki has testified that he specifically told Jennings that Rosicki, Rosicki & Associates was being investigated for having unlicensed software on their computers and that they "wanted an

independent certification audit that [they] were fully licensed.” Rosicki has admitted that he requested that Powhattan’s audit report include a certification that the software in the plaintiffs’ computers was “fully licensed” but Rosicki maintains that Jennings made this certification without inspecting the licenses or even informing him that he had not in fact verified them. Rosicki maintains that adding the “fully licensed” certification without verifying the licenses was negligent.

In seeking summary judgment, the plaintiffs maintain that having been hired to audit their computer software, Jennings and his company had a duty to impart correct information regarding the legality of their software licenses; that the information the defendants provided in their certification report, i.e., that the software utilized by the plaintiffs was “fully licensed” was false; and, that they justifiably relied on it to their detriment.

“ ‘A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information.’ ” Rosicki, Rosicki and Associates, P.C. v Cochems, *supra*, at p. 514, quoting Kimmell v Schaefer, 89 NY2d 257, 263 (1996). “In the commercial context ‘liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party.’ ” Rosicki, Rosicki and Associates, P.C. v Cochems, *supra*, at p. 514, citing Fleet Bank v Pine Knoll Corp., 290 AD2d 792 (3rd Dept. 2002); Grammar v Turtis, 271 AD2d 644 (2nd Dept. 2000); *see also*, Kimmel v Schaefer, *supra*, at p. 263-264. “There may be liability where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant’s understanding of their reliance.” Smith v Torch Enterprises, 2008 WL 2328150 (Supreme Court Suffolk County 2008), citing Grammar v Turits, *supra*; *see also*, Fresh Direct, LLC v Blue Martini Software, Inc., 7 AD3d 487 (2nd Dept. 2004); Reiter Sales, Inc. v Scovill Fasteners, Inc., 9 Misc3d 1109(A) (Supreme Court Nassau County 2005). “Whether the nature and caliber of the relationship between the parties is such that the injured party’s reliance on a negligent

misrepresentation is justified generally involves a question of fact.” Salesian Soc., Inc. v Nutmeg Partners, Ltd., 271 AD2d 671, 673 (2nd Dept. 2000).

At this juncture, it remains unclear precisely what Powhattan originally contracted to do, i.e., to compare the number of licenses with the number of software packages or to verify the licenses’ legality. It is not disputed that Powhattan’s representation that Rosicki, Rosicki & Associates’ software licenses outnumbered their software packages was correct. Furthermore, while it is not disputed that “fully licensed” was inserted at Rosicki’s request, it is not clear what Powhattan was representing in so doing, i.e., that the number of licenses exceeded the software packages or that the licenses were legal. In addition, whether the plaintiffs justifiably relied on Powhattan’s representation that its software was “fully licensed” when that representation was indisputably only provided at Rosicki’s request without further explanation or confirmation by Jennings is also far from clear. And, whether Powhattan’s alleged misrepresentation actually caused the plaintiffs’ damages remains at issue as well. In fact, the plaintiffs allege that shortly after Powhattan’s audit was conducted, International Association of IT Asset Managers, Inc. was hired to conduct another independent audit which revealed unlicensed software leaving it open to \$174,392 in liability. Plaintiffs have done no more than allege that it incurred fines.

Issues of fact preclude a grant of summary judgment to either party.

Dated: December 14, 2009


J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE