Advanstar Communications Inc. v Pollard
2014 NY Slip Op 32398(U)
September 10, 2014
Supreme Court, New York County
Docket Number: 652153/12
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

----------x

ADVANSTAR COMMUNICATIONS INC.,

Plaintiff,

-against-

ANDREW POLLARD, NANCY BERGER, RACHEL ZIMMERMAN, EITAN BRAHAM, GLOBAL APPAREL NETWORK, LTD. and GLOBAL APPAREL NETWORK, INC.,

Defendants.

----------x

Index No.: 652153/12
Mtn Seq. Nos. 010

DECISION AND ORDER

ANDREW POLLARD, RACHEL ZIMMERMAN, EITAN BRAHAM,

Counterclaim Plaintiffs,

-against-

ADVANSTAR COMMUNICATIONS, INC.

Counterclaim Defendant,

JOSEPH LOGGIA,

Additional Counterclaim Defendant.

----------x

JEFFREY K. OING, J.:

Background

Plaintiff, Advanstar Communications Inc. ("Advanstar") offers a wide array of products, services, and events, including online business publications, trade shows, conferences, websites, direct marketing products, databases, and reference products and services (Amended Verified Complaint, ¶ 16). A large portion of Advanstar's business is conducted by Advanstar Fashion Group, which organizes the bi-annual MAGIC Marketplace -- a live, multi-

day business-to-business marketplace comprised of eight trade event marketplaces focused on different segments of the fashion industry (Id., ¶¶ 17 and 18). PROJECT is one of the largest business-to-business live events organized within the MAGIC marketplace (Id., ¶ 18). MAGIC and PROJECT are marketplaces at which fashion brands and fashion retailers can connect, interact, and conduct business, and the fashion brands that take part in MAGIC and PROJECT pay Advanstar for the opportunity to participate in these marketplaces (Id., ¶ 19). As such, Advanstar invests heavily in order to attract large numbers of qualified and influential retail buyers to attend the marketplaces (id.).

Advanstar claims that it invests over $10 million per year in promoting its marketplaces to exhibitors and attendees (Id., ¶ 20). As part of this investment, Advanstar devotes money, time, and other resources to build, maintain, and protect its database of information pertaining to fashion exhibitors and attendees (Id., ¶ 23). Its database includes, among other things, the names, locations, and contact information for over 191,000 different retail fashion buyers and attendees (Id., 24).

Defendant/Counterclaim plaintiff Andrew Pollard began working at Advanstar as president of the PROJECT trade show in May 2010 (Pollard Aff., 2/21/14, ¶ 2). Pollard left Advanstar in May 2012 to work for defendants Global Apparel Network, Ltd. ("GAN, Ltd.") and Global Apparel Network, Inc. ("GAN, Inc.") (GAN, Ltd. and GAN, Ltd. collectively referred to as "GAN"). The

crux of plaintiff's claims against Pollard are that beginning in May 2011, and continuing until he left Advanstar to work at GAN, Pollard conspired to work with GAN's CEO, Joseph Shohfi in order to advance GAN's goals to Advanstar's detriment. In that regard, plaintiff alleges that Pollard advised GAN as to marketing strategies, introduced GAN to Advanstar's competitors, and sent GAN highly sensitive confidential Advanstar information giving GAN the ability to enter the online marketplace without having to invest years and monies that Advanstar had invested to develop its customer relationships, goodwill, and industry information (Response to Statement of Undisputed Facts, 3/24/14, ¶¶ 46-127).

At issue in this motion, Pollard claims that when he began working at Advanstar, an Advanstar staff employee enabled his personal iPhone to access Advanstar's email server (Pollard Aff., 2/21/14, ¶ 2). Thus, Pollard was able to send and receive emails from his Advanstar email account and communicate with business contacts with his personal iPhone (Id.).

On May 16, 2012, Pollard gave notice to Advanstar that he was resigning and that he would be going to work for GAN (Id., ¶ 5). Pollard claims that on that same afternoon the entire contents of his iPhone was remotely wiped by Advanstar at the direction of Joseph Loggia, Advanstar's CEO (id.; Serbagi Affirm., Ex. C, Verified Answer, ¶ 30). Pollard further claims that he lost his personal and business contacts, personal and business notes, text messages, instant-messaging messages, voice mails, several hundred photographs of his family and friends,

personal journals, videos, and music (Id., ¶ 6). Pollard alleges that none of this data was stored elsewhere, and virtually all of this information was permanently lost (id.).

Relief Sought

Pollard now moves for partial summary judgment on his first counterclaim for trespass to chattels, third counterclaim pursuant to the Stored Communications Act (18 USC § 2701[a]), and fifth counterclaim for conversion, all related to Advanstar's remote wiping of his iPhone and the loss of his personal information and data.

Discussion

Trespass to Chattels and Conversion (First and Fifth Counterclaim)

As for the first counterclaim for trespass to chattels and the fifth counterclaim for conversion, those branches of Pollard's motion for summary judgment on these counterclaims are denied.

In order to establish a claim for trespass to chattel, Pollard must prove that counterclaim defendants "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [Pollard's] possession, and that [he] was harmed thereby" (Abrams v Pecile, 2012 NY Misc LEXIS 2606 [Sup Ct, New York County 2012], quoting School of Visual Arts v Kuprewicz, 3 Misc 3d 278 [Sup Ct, New York County 2003]). One is liable for trespass to chattel only if he dispossesses the owner of the chattel or interferes with

the owner's "materially valuable interest in the physical condition, quality, or value of the chattel" or deprives the owner "of the use of the chattel for a substantial time" (Restatement [Second] of Torts § 218, Comment e).

The elements of a conversion claim are: "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (Pappas v Tzolis, 20 NY3d 228 [2012], quoting Colavito v New York Organ Donor Network, Inc., 8 NY3d 43 [2006]).

Counterclaim defendants claim that Pollard has failed to produce his iPhone for inspection. Thus, they cannot verify whether any attempts by remote application to wipe out data on Pollard's iPhone were successful. Further, they cannot know whether Pollard restored any data to his iPhone that he is now claiming was lost. Counterclaim defendants also allege that Pollard backed up data from his iPhone to his personal computer. In that regard, counterclaim defendants explain that in the fall of 2012 the parties agreed that The Oliver Group would serve as a forensic examiner to facilitate forensic analysis of defendants' computers and external hard drives. In addition, Advanstar retained the services of Michael Perry, computer forensic analyst at Elysium Digital, LLC, a technical consulting firm, to provide technical and computer forensic services. Perry states that in July 2013 The Oliver Group delivered two hard drives to Elysium,

which included copies of files from ten devices defendants turned over to The Oliver Group, including Pollard's personal computer (Perry Aff., ¶¶ 6 and 18-27). Perry claims that Pollard's personal computer contained at least five backups to his iPhone from June 10, 2010 through April 25, 2012 (Perry Aff., ¶ 27). Perry lists the following approximate quantities of files and data as included in the most recent backup in April 2012: 319 photos, 3,072 contacts, 844 calendar entries, 17,009 text messages, 25 recordings, 203 voice mails, 22 notes, and 100 call history entries (Perry Aff., ¶ 27a). Counterclaim defendants argue that Pollard retained control of his personal computer with these iPhone backups until approximately December 2012, and that he exercised such custodial retention after his July 9, 2012 affidavit, his interrogatory responses, and his deposition wherein he claimed he had lost the information on his iPhone (see Gouker Aff., Ex. 7, ¶ 50; Ex. 46, p. 7; Ex. 9, pp. 229 to 233). Counterclaim defendants go on to claim that Pollard's iPhone backup files were further discussed at a joint review session on April 3, 2013 of the parties' attorneys and Ken Oliver of The Oliver Group. Oliver was unable to specify exactly which mobile device backup information could be retrieved from the files on Pollard's personal computer using the forensic tools he had access to at the joint session. Ultimately, a further investigation was never pursued to search the mobile device

backup files within copies of Pollard's hard drives to determine whether any of Pollard's iPhone files were recoverable.

Based on the lack of any inspection of Pollard's iPhone or any meaningful account of what exactly Pollard lost when his iPhone was allegedly remotely wiped clean, a factual issue exists as to what information, if any, Pollard lost.

The Stored Communications Act (18 USC § 2701) (Third Counterclaim)

Section 2701(a) of the Stored Communications Act provides for criminal and civil liability by whoever:

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.

"Electronic communication service" is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications" (18 USC § 2510[15]). "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication" (18 USC § 2510[17]). "Facility" is not defined by the section.

Pollard argues that an iPhone constitutes a "facility through which an electronic communication service is provided" under section 2701(a) of the Stored Communications Act. While section 2701(a) does not provide a definition of "facility", it has been found to apply to pagers (United States of America v Reyes, 922 F Supp 818 [SD NY 1996]). Pollard contends that because a smart phone performs the same functions as a pager, this Court should find that Pollard's iPhone is a "facility" under section 2701(a). As such, Pollard argues counterclaim defendants' liability is clear given that there is no dispute that counterclaim defendants intentionally accessed his iPhone, and that Loggia directed Advanstar employees to conduct a wipe of his iPhone. Further, Pollard maintains that the evidence unequivocally shows that he never authorized counterclaim defendants to access and delete the data stored on his iPhone.

Pollard's reading of section 2701(a) is unavailing. Recent federal court decisions have given a more thorough analysis of the application of section 2701(a) to cell phones and personal computers, and have determined that a cell phone is not a "facility through which and electronic communication service is provided" nor is the information on a cell phone in the form of emails, text messages, pictures and the like considered "in electronic storage" (see e.g., Garcia v City of Laredo, 702 F3d 788 [5th Cir 2012] ["Courts have interpreted the [SCA] to apply to providers of a communication service such as telephone

companies, Internet or e-mail service providers, and bulletin board services" and "[T]he text messages and photos stored on [the plaintiff's] phone are not in 'electronic storage' as defined by the SCA and are thus outside the scope of the statute."]; In re iPhone Application Litig., 844 F Supp 2d 1040 [ND Cal 2012] [Putative class' iPhones and other iDevices (e.g., iPad and iPod Touch) do not constitute "facilit[ies] through which an electronic communication service is provided."]; In re Nickelodeon Consumer Privacy Litig., 2014 U.S. Dist. LEXIS 91286 [D NJ 2014] [agreeing with the great majority of decisions to address the issue and finding that the SCA is not concerned with access of an individual's personal computer]).

In addition, contrary to Pollard's argument, the data on his personal iPhone do not fall within the definition of "electronic storage" as required under section 2701(a)[2]. In that regard, Garcia v City of Laredo, supra, provides clear guidance on this issue:

> "Electronic storage" as defined encompasses only the information that has been stored by an electronic communication service provider. Thus, information that an Internet provider stores to its servers or information stored with a telephone company - if such information is stored temporarily pending delivery or for purposes of backup protection - are examples of protected electronic storage under the statute. But information that an individual stores to his hard drive or cell phone is not electronic storage under the statute.

(702 F3d at 788).

Pollard's continued reliance on Reyes, supra, does not alter this finding. Indeed, such reliance is misplaced. In Reyes, the District Court found that the act of retrieving numbers from a pager's memory that had not yet been read or retrieved by the intended recipient is akin to accessing electronic communications that are in electronic storage, and by doing so, constitutes accessing stored electronic communications (922 F Supp at 818). Here, Pollard does not allege that counterclaim defendants accessed the information or data on his iPhone that he had not yet read or received. Rather, Pollard is claiming that counterclaim defendants conducted a remote sweep of his cell phone, thus wiping out information and data he had stored on his phone. Rather, the facts of his case are more analogous to the facts of the recent federal cases referred to by counterclaim defendants wherein the federal courts found that accessing information and data stored on a personal computer or cell phone does not fall within the purview of section 2701 (see Garcia v City of Laredo, 702 F3d 788; In re iPhone Application Litig., 844 F Supp 2d 1040; In re Nickelodeon Consumer Privacy Litig., 2014 U.S. Dist. LEXIS 91286 [D NJ 2014], supra).

Accordingly, that branch of Pollard's motion for partial summary judgment on his third counterclaim premised on the Stored Communications Act (18 USC § 2701[a]) is denied. Upon counterclaim defendants' application to search the record and grant them summary judgment dismissing this counterclaim (CPLR

3212(b), this Court grants their application, and dismisses this counterclaim.

Accordingly, it is hereby

ORDERED that those branches of counterclaim plaintiff Pollard's motion for partial summary on the first and fifth counterclaims for trespass to chattels and conversion are denied; and it is further

ORDERED that counterclaim plaintiff Pollard's motion for partial summary judgment on his third counterclaim pursuant to the Stored Communications Act (18 U.S.C. § 2701[a]) is denied; and it is further

ORDERED that upon searching the record this Court grants counterclaim defendants' application for summary judgment dismissing the third counterclaim, and it is hereby dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/10/14

HON. JEFFREY K. OING, J.S.C.