

<b>J&amp;M Realty Servs. Corp. v SS&amp;C Tech., Inc.</b>
2015 NY Slip Op 31409(U)
July 16, 2015
Supreme Court, New York County
Docket Number: 160123/2014
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

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J&M REALTY SERVICES CORP.,

Plaintiff,

-against-

SS&C TECHNOLOGIES, INC. a/k/a  
SS&C TECHNOLOGIES HOLDINGS INC.,

Defendant.

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**Mtn Seq. No. 001**

**DECISION AND ORDER**

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**JEFFREY K. OING, J.:**

Defendant, SS&C Technologies, Inc. a/k/a SS&C Technologies Holdings Inc., moves, pursuant to CPLR 501, 511, 3211(a)[1], and 3211(a)[7], for an order dismissing the complaint.

**Background**

Plaintiff, J&M Realty Services Corp., is a managing agent which oversees the operations of residential and commercial apartment rentals and building sales (Edelman Aff., Ex. A, Complaint ["Compl."], ¶ 3). Defendant provides software and software related services to the investment community including investment management firms, banks, insurance companies, hedge funds, brokers, and property managers, such as plaintiff (Shalowitz Aff., ¶ 2). One of its products and services is the Skyline Property Management Software (the "software"). Plaintiff has been a licensee of defendant's software since 1993 (Compl. ¶ 5).

Plaintiff contends that in its 2012 version defendant advertised that the software includes a feature known as batch reporting which enables the user to set parameters and run multiple reports at the same time. Plaintiff claims that the software was advertised with the batch reporting feature available in both accounts payable as well as in property management (Compl. ¶ 8). Plaintiff further claims that in relying upon defendant's advertisement and the availability of the batch reporting feature in both accounts payable and property management plaintiff purchased the 2012 version of the software (Compl. ¶ 9).

Plaintiff asserts that contrary to the advertisements the software does not permit batch reporting in accounts payable (Compl. ¶ 10). Plaintiff advised defendant of this problem and in response defendant advised plaintiff that plaintiff needed to wait for the release of the 2014 version of the software (Compl. ¶ 11). After defendant released the 2014 version of the software, plaintiff again contacted defendant and requested assistance with the batch reporting feature in the 2012 version of the software that it had been using. In response, defendant advised plaintiff that it no longer supported the 2012 version of the software and that plaintiff needed to purchase the 2014 version of the software in which batch reporting was functional in accounts payable (Compl. ¶ 14). Plaintiff claims that it

relied on defendant's representation and purchased the 2014 version of the software and downloaded it, however, the batch reporting feature did not work in the 2014 version of the software (Compl. ¶¶ 14-15). Plaintiff again claims that it notified defendant and that defendant's response was that it needed to wait for the release of the 2015 version in which the batch reporting feature will function (Compl. ¶ 17). This action ensued. Plaintiff asserts three causes of action: fraudulent misrepresentation; permanent injunction; and violations of General Business Law ("GBL") §§ 349 and 350.

### **Discussion**

#### **Forum Selection Clause**

Defendant argues that this action should be dismissed so that it can be commenced in Connecticut pursuant to the parties' agreement. In that regard, defendant points out that each version of the software purchased by plaintiff contained a Software Package License Agreement, with an Appendix I (Client Support Agreement) and Appendix II (Update and Enhancement Agreement) (collectively referred to as the "license agreement"). Before using either version of the software, the license agreement required plaintiff to accept and assent to defendant's terms of use (Shalowitz Aff., ¶ 7). During this process, an electronic copy of the license agreement appears and the user is required to select the "I accept the terms of the license

agreement" option in order to complete the installation process and use the software" (Id.). Defendant claims that plaintiff accepted and assented to the terms while installing the software (Id.).

The 2012 and 2013 license agreements contained the following provision entitled "Choice of Law; Choice of Forum", which provides:

This License Agreement shall be interpreted, construed and in all respects governed under the laws of the State of Connecticut without regard to conflicts of law principles. Any action, suit or proceeding related to any dispute, claim or controversy or otherwise related to the rights and obligations of the parties under this License Agreement shall be brought in the Superior Court of the State of Connecticut, Hartford County or in the United States District Court of the District of Connecticut. The parties hereto submit to the exclusive jurisdiction of such courts.

(Shalowitz Aff., Exs. B and C, ¶ 10.2).

Although the forum selection clause is clear, plaintiff argues that the clause is inapplicable because the issues in this action do not arise from or relate to the license agreements. Plaintiff contends that all three causes of action that it asserts in the complaint hinge upon defendant's misrepresentation that the batch reporting feature functioned in accounts payable as well as property management in the 2012 and 2014 versions of the software. Plaintiff argues that this claim was false because the feature does not function in accounts payable in either version

Plaintiff's arguments are unpersuasive. Contrary to its' argument, the claims that the batch reporting feature did not function in accounts payable in the 2012 and 2014 versions of the software fall squarely within the purview of "any dispute, claim or controversy ... under [the] License Agreement." Also, plaintiff's argument that this action falls outside the purview of the forum selection clause because plaintiff is alleging fraudulent misrepresentation, "i.e., Plaintiff's purchase of the software and assent to the Licensing Agreement was procured by a misrepresentation and a third cause of action for false advertising" is equally unavailing.

A forum selection clause will not:

be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court

(Sterling National Bank v Eastern Shipping Worldwide, Inc., 35

AD3d 222 [1<sup>st</sup> Dept 2006] [internal quotation marks omitted]).

Further, any allegations of fraud or overreaching must concern the forum selection clause itself (Id.). A review of the allegations set forth in the complaint demonstrates that any alleged fraud has nothing to do with the forum selection clause itself.

Jerry Edelman, plaintiff's president, contends that the Connecticut courts would be impractical and inconvenient to plaintiff, that prosecuting this action in Connecticut would deprive plaintiff of valuable time that it needs to operate its business, and that defendant would be received and treated favorably in Connecticut courts (Edelman Aff., ¶¶ 16, 18-19).

The mere claim of inconvenience, without more, in prosecuting this action in Connecticut, and that such inconvenience would essentially deprive plaintiff its day in court do not rise to the level of being so "gravely difficult and inconvenient that [plaintiff] would, for all practical purposes, be deprived of his ... day in court" (Sterling National Bank v Eastern Shipping Worldwide, Inc., 35 AD3d at 222). Further, plaintiff sets forth no factual or legal basis whatsoever for its incredible assertion that defendant will be treated more favorably in the Connecticut courts.

Accordingly, that branch of defendant's motion to dismiss based on the forum selection clause in the license agreement is granted and it is hereby dismissed without prejudice to commencement in Connecticut.

In any event, even if consideration were given to the complaint, it would still be dismissed.

## Fraud

In arguing that the fraudulent misrepresentation claim is not pleaded with the requisite specificity under CPLR 3016(b), defendant points out that the necessary elements of a fraudulent misrepresentation claim are virtually identical in New York and Connecticut. Under New York law, a claim for fraudulent misrepresentation must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 [2011] [internal quotation marks omitted]). Under Connecticut law:

[t]he essential elements of an action, in common law fraud ... are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury .... Under a fraud claim of this type, the party to whom the false representation was made claims to have relied on that representation and to have suffered harm as a result of the reliance

(Sturm v Harb Development, LLC, 298 Conn. 124 [2010]).

To begin, plaintiff fails to allege reasonable reliance. In that regard, paragraph 2.1 of Appendix I provides for "Services Not Covered by the [Client Services]" and contains the following: "services related to Licensee's specific computer and network

configurations are outside the scope of the [Client Services Agreement]. The [Client Services Agreement] covers the operation of the Software, not Licensee's computer environment."

Here, plaintiff is not only claiming that it relied upon statements absent from the license agreements, but statements that directly contradict the terms of the license agreements. As such, as a sophisticated entity, such as plaintiff, reliance upon an advertisement or some other statement instead of the contractual terms to which it is agreeing and has agreed to in the past is not reasonable.

In any event, the fraud claim is not pleaded with specificity. The substance of plaintiff's fraud claim set forth in the first cause of action is as follows:

19. Defendant intentionally misrepresented that the batch reporting feature is functional in both accounts payable and property management in the 2012 version of the Software.
20. Defendant intentionally misrepresented that the batch reporting feature is functional in both accounts payable and property management in the 2014 version of the Software.
21. Plaintiff relied upon Defendant's misrepresentation that: (I) the batch reporting feature is functional in both accounts payable and property management in the 2012 version of the Software; and (ii) that the batch reporting feature is functional in both accounts payable and property management in the 2014 version of the Software.
22. In relying upon Defendant's misrepresentations, Plaintiff purchased the 2012 version of the

Software as well as the 2014 version of the Software.

23. The batch reporting does not work in both the 2012 version of the Software or the 2014 version of the Software.
24. As a result of its reliance upon Defendant's misrepresentations, Plaintiff has been damaged in that (I) it paid for both the 2012 version of the Software and the 2014 version of the Software; (ii) Plaintiff had to spend additional time to run separate reports on each building that it manages thereby expending more hours than for which it is paid; and (iii) Plaintiff lost business opportunities because it was forced to spend time running separate reports.
25. By reason of the foregoing, Plaintiffs are entitled to a money judgment in an amount to be determined at trial but in no event less than \$500,000.

In addition, in Edelman's affidavit, he avers the follow:

5. Defendant advertised in its 2012 version of the Software that it included a feature known as batch reporting in both accounts payable and property management which enables the user to set parameters and run multiple reports at the same time.
6. Relying upon the representation that the batch reporting feature was available in both accounts payable and property management, Plaintiff purchased the 2012 version of the Software.
7. After it purchased the Software, Plaintiff learned that the Software was flawed because it does not permit batch reporting in accounts payable.
8. Plaintiff immediately notified Defendant of the defect, and, in response, Defendant advised Plaintiff that it would be unable to address the problem until the 2014 version of the Software was released.

9. The 2014 version was released in October 2013. After it was released, Plaintiff requested assistance with the batch reporting feature in the 2012 version of the Software.
10. In response, Defendant advised that it no longer supported the 2012 version and that Plaintiff need to purchase the 2014 version in which the batch reporting feature was functional in accounts payable.
11. Again relying upon Defendant's representation, Plaintiff purchased the 2014 version of the Software. Despite Defendant's representation, the batch reporting feature did not work in accounts payable.
12. Plaintiff immediately notified Defendant and, in response, Defendants advised Plaintiff that it needs to wait for the release of the 2015 version in which the batch reporting feature will function.
13. Frustrated with Defendant's response, we requested that Plaintiff's counsel send a letter dated September 16, 2014 in which ... we demanded that Defendant address and remedy the batch reporting feature in accounts payable.
14. No one on behalf of Defendant ever responded to the September 16, 2014 letter.

These allegations certainly do not meet the specificity requirements of CPLR 3016. Plaintiff fails to provide even the most basic information about the advertisement. For example, when did plaintiff see the advertisement and where; what precisely did the advertisement promise; and given plaintiff's long history with defendant, did defendant rely solely on an advertisement in making its decision to purchase the 2012 software.

As for plaintiff's allegation that someone at defendant advised plaintiff that it needed to purchase the 2014 version of the software wherein the batch reporting in accounts payable was functional, it is equally lacking, e.g., what was the actual conversation that took place, the specific statements that were made, the identity of a person who allegedly made those statements, the date of such statements, or the medium (phone, e-mail, etc.) through which any statements were made.

The most glaring deficiency in plaintiff's fraud claim, however, is one that defendant points out -- "[p]laintiff fails to make the very simple allegation that the batch reporting feature is not available on either the 2012 or the 2014 versions of the software. Defendant asserts that plaintiff does not make this allegation because it cannot, as it is aware that those features were in fact provided as part of the software. Instead, Plaintiff is alleging that it could not get the feature ... to operate in its computer environment" (Def's Mem of Law, p. 9). Nowhere does plaintiff address this argument, that is, that a batch reporting feature for accounts payable was part of the software, but simply would not function on plaintiff's system.

#### **Permanent Injunction**

"To plead a cause of action for a permanent injunction, a plaintiff must allege, inter alia, a violation of a right presently occurring, or threatened and imminent" (Lemle v Lemle,

92 AD3d 494 [1<sup>st</sup> Dept 2012]). Further, plaintiff must "establish that it does not have an adequate remedy at law, namely monetary damages" (Mini Mint Inc. v Citigroup, Inc., 83 AD3d 596 [1<sup>st</sup> Dept 2011]). In addition, under Connecticut law, "[a] party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law" (Pequonnock Yacht Club, Inc. v City of Bridgeport, 259 Conn 592 [2002]).

In the second cause of action for a permanent injunction, plaintiff asserts the following in relevant part:

33. Plaintiff has no adequate remedy at law.
34. By reason of the foregoing, Plaintiff is entitled to a permanent injunction compelling and directing Defendant: (I) to remedy the Software to cause the batch reporting feature to work in accounts payable; and (ii) to refrain from directing Plaintiff to purchase the next version for the Software until the batch reporting feature works in accounts payable.

Under both New York and Connecticut law, plaintiff clearly has an adequate remedy at law, i.e., money damages. Also, the relief plaintiff is seeking -- to remedy the software and to stop defendant from directing plaintiff to purchase more software -- is not appropriate for an injunction.

**GBL Sections 349 and 350**

"The elements of a cause of action under these statutes are that: (1) the challenged transaction was 'consumer-oriented'; (2)

defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct" (Denenberg v Rosen, 71 AD3d 187 [1<sup>st</sup> Dept 2010]).

These statutes were enacted to protect the consuming public at large, not disputes between two sophisticated business entities who have had a business relationship for more than 20 years. In any event, plaintiff fails to set forth sufficient allegations that defendant engaged in deceptive or materially misleading acts. In that regard, the record demonstrates that the product simply did not operate on plaintiff's system, and not because the software did not contain batch reporting for accounts payable.

#### **Consequential Damages**

Plaintiff's damages are limited by the license agreements. Section 5.4 of the license agreement entitled "Exclusion of Consequential Damages and Absolute Limitation on SS&C's Liability" provides the following:

In no event will SS&C be liable for any indirect, special, incidental or consequential damages of any kind, including without limitation, loss of profits, loss of use, business interruption, loss of data, or cost of cover in connection with or arising out of the furnishing, performance or use of the Software Package, the Software, and Manuals furnished hereunder or for breach of this License Agreement, whether alleged as a breach of contract or tortious conduct, even if SS&C has been advised of the possibility of such damages. In addition, SS&C will not be liable for any damages

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caused by delay in delivery or furnishing the Software Package, the Software and Manuals. SS&C's liability under this License Agreement for damages will not, in any event, exceed the license fee paid by Licensee to SS&C under this License Agreement.

Based on the foregoing, plaintiff's claims for lost time and lost business opportunity are precluded.

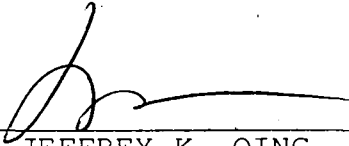
Accordingly, it is

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed without prejudice to commencement in Connecticut; and

ORDERED that the Clerk is directed to enter judgment accordingly.

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

Dated: 7/16/15

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