

**Time Warner Cable Enters., LLC v Accessium  
Group, Inc.**

2020 NY Slip Op 31426(U)

May 8, 2020

Supreme Court, New York County

Docket Number: 653760/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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TIME WARNER CABLE ENTERPRISES, LLC

Plaintiff,

- v -

ACCESSIUM GROUP, INC.,

Defendant.

INDEX NO.	653760/2019
MOTION DATE	10/04/2019
MOTION SEQ. NO.	001
<b>DECISION + ORDER ON MOTION</b>	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 21, 23, 25

were read on this motion to DISMISS COUNTERCLAIMS.

Plaintiff Time Warner Cable Enterprises, LLC (“TWC”) provides internet and cable services. Defendant Accessium Group, Inc. (“Accessium”) is an information technology support company serving businesses in western New York. In March 2016, the parties entered into a Value Added Reseller Agreement (the “Agreement”), by which TWC supplied services to Accessium to bundle and resell along with its own amenities to “End Users.”<sup>1</sup> TWC’s Complaint asserts causes of action for breach of contract and account stated. Accessium’s Answer asserts counterclaims for violation of General Business Law (“GBL”) § 349, breach of

<sup>1</sup> “End Users” are “Company teleworker employee[s] or branch office[s] that meet those certain minimum hardware, software and cable requirements necessary to receive the TWC Services as specified by TWC from time to time.” (See NYSCEF Entry No. 13, Agreement § 1.3). A “Company” is defined as “a customer of [Accessium] that (a) has employees who are geographically located throughout multiple TWC regional service areas and other out of area locations; and (b) purchases TWC Services with added valued in the form of additional Reseller Services.” (*Id.* at § 1.1).

contract, breach of implied covenant of good faith and fair dealing, and negligent misrepresentation.

TWC moves to dismiss Accessium's GBL § 349 and negligent misrepresentation counterclaims on the grounds that: (1) TWC's alleged GBL § 349 violations were not consumer-oriented, nor did they involve a "misleading" act or practice by which Accessium suffered an injury distinct from its breach of contract counterclaim, and (2) Accessium did not plead facts sufficient to show that a special relationship existed between the parties giving rise to a duty of care in relation to alleged negligent misrepresentation.

For the following reasons, TWC's motion to dismiss is granted.

#### ***LEGAL ANALYSIS***

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman, Spira & Carson, LLC v. Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations ... that consist of bare legal conclusions, or that are inherently incredible ..., are not entitled to such consideration." (*Mamoon v. Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]).

#### ***GBL § 349 Counterclaim***

To state a claim under GBL § 349, Accessium must allege that TWC engaged in conduct that was materially misleading and that caused Accessium to suffer injury. (*City of New York v. Smokes-Spirits.com, Inc.*, 12 NY3d 616, 621 [2009]). GBL § 349 does not apply to every improper action, but only to "conduct that tends to deceive consumers." (*Schlessinger v. Valspar Corp.*, 21 NY3d 166, 172 [2013]). Although the statute does not preclude its application to

disputes between businesses, “it does severely limit it.” (*Cruz v. NYNEX Information Resources*, 263 AD2d 285, 289-90 [1st Dept 2000]). The threshold requirement of consumer-oriented conduct can be met by a showing that “the acts or practices have a broader impact on consumers at large” in that they are “directed to consumers” or “potentially affect similarly situated consumers.” (*Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 25-27 [1995]).

Here, Accessium fails to show how the complained-of conduct falls within the realm of GBL § 349. Accessium’s claim relates to how TWC’s billing and collection under TWC’s Agreement with Accessium were inaccurate and caused damages to Accessium. “Private contract disputes, unique to the parties ..., would not fall within the ambit of [GBL § 349].” (*Oswego Laborers’ Local 214 Pension Fund*, 85 NY2d at 25). Further, Accessium’s allegations that TWC’s billing practices negatively affected Accessium’s relationship with its customers do not show that TWC’s actions were directed at Accessium’s customers. (*See, e.g., Violet Realty, Inc. V. Affiliated FM Ins. Co.*, 267 F Supp 3d 384, 391 [WDNY 2017]). In sum, Accessium fails to sufficiently plead a claim for violation of GBL § 349.

TWC’s motion to dismiss Accessium’s GBL § 349 counterclaim is granted.

#### ***Negligent Misrepresentation Counterclaim***

A claim for negligent misrepresentation requires a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another. (*See Kimmell v. Schaefer*, 89 NY2d 257, 263 [1996]). Generally, an “arm's-length business relationship between sophisticated parties will not give rise to a confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation.” (*J.P. Morgan Sec. Inc. v. Ader*, 127 AD3d 506, 507 [1st Dept 2015]).

In this instance, the conclusory allegations of TWC’s superior knowledge and past dealings with Accessium are not sufficient to establish a special relationship. Moreover, Accessium’s negligent misrepresentation claim is duplicative of its breach of contract claim. (See *Stewart v. Maitland*, 39 AD3d 319, 319 [1st Dept 2007]).

Accordingly, TWC’s motion to dismiss Accessium’s negligent misrepresentation counterclaim is granted.

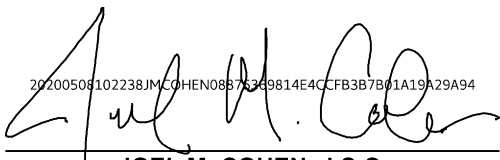
**CONCLUSION**

In accordance with the foregoing, it is

**ORDERED** that TWC’s Motion to Strike Accessium’s GBL § 349 and negligent misrepresentation counterclaims is GRANTED.

This constitutes the Decision and Order of the Court.

5/8/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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