

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NTG TELECOMMUNICATIONS, INC. : CIVIL ACTION
:
v. :
:
INTERNATIONAL BUSINESS :
MACHINES, INC. et al. : 98-5959

MEMORANDUM AND ORDER

J. M. KELLY, J.

MAY , 2000

Presently before the Court is a Motion for Summary Judgment filed by the Defendant, International Business Machines, Inc. (“IBM”). The Plaintiff, NTG Telecommunications, Inc. (“NTG”) brought suit against IBM for fraud resulting from NTG’s purchase of an IBM computer network server. For the following reasons, IBM’s motion is denied.

I. BACKGROUND

Accepting as true the evidence of the nonmoving party and all reasonable inferences that can be drawn there from, the facts of the case are as follows. In the Fall of 1996, NTG was interested in purchasing a computer network for its office. It had recently received a letter from Glenda Dorochak of IBM (the “Dorochak letter”) promoting IBM’s PC Server 310, Small Business Solution (“Small Business Solution”), a computer network server designed for and marketed to small businesses. See Pl.’s Answer to Defs.’ Mot. for Summ. J. Ex. B. Additionally, the letter advertised the IBM PC 340, a personal computer manufactured by IBM. See id. The letter stated that anyone interested in the Small Business Solution should contact their nearest “IBM business partner.” Id. An IBM business partner is an entity authorized to resell IBM products and the only means by which products such as the Small Business Solution can be obtained.

In October or November of 1996, Jud Berkowitz (“Berkowitz”), the President of NTG, contacted Frank Cabbage (“Cabbage”) of Sun Data Services (“SDS”), an IBM business partner, regarding the Small Business Solution. Cabbage and Berkowitz had previously discussed NTG’s network server needs and Berkowitz determined that the Small Business Solution was going to meet all of his requirements. Cabbage then asked Berkowitz whether he intended to buy the accompanying personal computers or whether Berkowitz wanted Cabbage to provide them. Berkowitz inquired as to whether there were any types of personal computers that would not support the server, or what specifications were necessary for the computers. Cabbage provided him with a proposal to buy IBM PC 340s. The proposal included the specifications for the computers and according to it, IBM PC 340s were sold at that time with Windows 95. Additionally, according to Berkowitz, Cabbage stated that “as long as you get the [personal computers] that meet that list of specifications, including Windows 95, . . . you’ll be fine.” Defs.’ Mot. for Summ. J. Ex. B, at 125. Based on his conversation with Cabbage and the letter from Doroachak, Berkowitz purchased the Small Business Solution, peripheral equipment and computers which met Cabbage’s list of specifications, including Windows 95.

In late November or early December, the Small Business Solution and accompanying computers were installed at NTG. Immediately after the Small Business Solution was installed, NTG began suffering significant computer problems. According to Berkowitz, both he and his staff experienced problems when they tried to use the “spell checking” function on the computer. Apparently the computer would “lock up” preventing the user from performing the spell check. Further, when a user attempted to save information, the computer would indicate that the information was saved when it was not, resulting in lost information. Finally, NTG had

problems when it attempted to print documents, obtaining only the first of several requested pages, if at all. These problems continued from the time the Small Business Solution was installed until March of 1997, when NTG installed different operating software on the network.

Apparently, the Small Business Solution that NTG purchased was a combination of hardware and software. The hardware was a PC Server 310, which enabled multiple computers to be connected to the same network. The software included various applications including NetWare, a network operating system, GroupWise, an electronic mail program and Corel PerfectOffice (“PerfectOffice”), a suite of applications that included a word processing and spreadsheet program. Berkowitz alleges that PerfectOffice, as it was sold as part of the Small Business Solution, was incompatible with Windows 95, the operating system installed on each of the networked computers. This incompatibility caused the problems experienced by NTG. He points to the fact that between December and March, SDS, Corel and IBM made numerous, but unsuccessful, attempts to remedy NTG’s computer problems. Specifically, among other things, they tried reinstalling the software, operating the network while utilizing Windows 3.1 and replacing the original CD-ROM, all to no avail. It was not until NTG, at the suggestion of IBM, replaced PerfectOffice with Lotus Smart Suite (“Smart Suite”) for Windows 95, that the computer problems subsided. Indeed, Berkowitz claims NTG has suffered no computer problems since Smart Suite was installed.

NTG’s claim, then, is that IBM falsely misrepresented that the Small Business Solution, as it was sold to NTG, was compatible with Windows 95. It justifiably relied on Cubbage’s representation, which resulted in significant computer problems. Its damages, according to the Complaint, were the hours spent by NTG employees trying to remedy the computer problems.

Accordingly, NTG filed suit in the Court of Common Pleas of Montgomery County. IBM timely removed this action to this Court based on diversity jurisdiction. It now moves for summary judgment.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant’s favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

NTG’s claim against IBM alleges fraudulent misrepresentation. The elements of a cause of action for fraud are: (1) a misrepresentation; (2) made with knowledge of its falsity or reckless

disregard as to whether it is false or true; (3) with the intent of misleading another into relying on it; (4) justifiable reliance on the misrepresentation; and (5) damages proximately resulting from the reliance. See In re Jack Greenberg, 240 B.R. 486, 520 (E.D. Pa. 1999); First Capital Corp. v. Country Fruit, Inc., 19 F. Supp. 2d 397, 401 (E.D. Pa. 1998); Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). In order to prove a claim for fraud, the Plaintiff must establish the elements by clear and convincing evidence. See First Capital Corp., 19 F. Supp. 2d at 401; Snell v. State Examining Bd., 416 A.2d 468, 470 (Pa. 1980). To survive this motion for summary judgment, NTG must present evidence that could lead a jury to find clear and convincing proof of fraud. See Fisher v. Aetna Life Ins. & Annuity Co., 39 F. Supp. 2d 508, 511-12 (M.D. Pa. 1998), aff'd, 176 F.3d 472 (3d Cir.), and cert. denied, 120 S. Ct. 54 (1999).

A. Representation

IBM argues first that NTG has failed to proffer evidence of a representation that the Small Business Solution was compatible with Windows 95. It alleges that the only direct contact it had with NTG occurred in the Doroachak letter and that it made no mention of compatibility. According to IBM, the only statements allegedly made with regard to compatibility came from Cubbage, but those statements cannot be attributed to it because he was not IBM's agent. In support of its motion, NTG argues that Cubbage was acting as an agent of IBM when he suggested NTG purchase computers equipped with Windows 95. This suggestion, it alleges, amounts to a representation that the two systems were compatible.

The Court agrees that IBM represented that the Small Business Solution was compatible with Windows 95, both directly and through Cubbage. First, the Court finds sufficient evidence that IBM itself represented that the Small Business Solution was compatible with Windows 95.

In the Dorochak letter, IBM begins by introducing the Small Business Solution. The letter continues by saying, “And while we’ve got your attention, we’d also like to bring up the perfect companion to the solution, the IBM PC 340 -- the desktop PC for growing businesses and growing networks.” Pl.’s Answer to Defs.’ Mot. for Summ. J. Ex. B. The language of the letter, therefore, indicates that the IBM PC 340 can be used with the Small Business Solution.

Additionally, based on the proposal by Cubbage to NTG, the IBM PC 340 was sold at that time with Windows 95. See id. Attach. to Ex. D. Therefore, there is sufficient evidence that IBM effectively represented that the Small Business Solution was compatible with Windows 95.

Additionally, IBM provided, along with the Small Business Solution, an installation and user’s guide (the “Guide”) to the server. According to the deposition testimony of Ken Dillingham (“Dillingham”), a Program Manager, Marketing-Planning, at IBM, the Guide was drafted in concert by IBM and Novell. See id. Ex. G, at 44. Accordingly, the statements made in the Guide can be attributed to IBM.

On two occasions, the Guide makes reference to using the Small Business Solution with Windows 95. First, in a portion of the Guide dealing with a component of the Small Business Solution called the Administrator Program, the Guide advises that “Windows 95 users can create a short cut to the application INSTALL.EXE that is located in the F:INSTALL directory on the hard disk.” Defs.’ Mot. for Summ. J. Ex. G, at 14. Later, in a section dealing with additional software included in the Small Business Solution, the Guide describes a program called “ARCsolo for Windows 95,” and describes it as “the premier backup solution for desktop computers or small networks. Built from the ground up for the Windows 95 32-bit operating system, ARCsolo for Windows 95 combines the simplicity of the Windows 95 interface with

Cheyenne's proven backup technology." Id. at 29.

Second, IBM represented, through Cabbage, that the Small Business Solution was compatible with Windows 95. As stated in the Complaint and by Berkowitz in his deposition, Cabbage represented that "as long as you get the [personal computers] that meet that list of specifications, including Windows 95, . . . you'll be fine." Id. Ex. B, at 125. IBM argues that these statements cannot be attributed to it because Cabbage was not its agent. While IBM correctly points out that "the mere existence of a formal licensing or dealership agreement will not create an agency relationship," Leon v. Caterpillar Indus., Inc., 69 F.3d 1326, 1334 (7th Cir. 1995), such an agreement does not preclude the existence of apparent agency. See Friedman v. Kasser, 481 A.2d 886, 890 (Pa. Super. Ct. 1984). "Apparent authority arises when the principal leads persons with whom his agent deals to believe that he has granted his agent the power to bind him." Id. at 890-91. In the instant case, the Dorochoak letter states that, "When you're ready to get down to business, give us a call We'll give you the name of the IBM business partner nearest you, as well as answer any questions you might have." Pl.'s Answer to Defs.' Mot. for Summ. J. Ex. B. The language of the letter is sufficient for the purposes of this motion to establish the apparent authority of Cabbage to act on IBM's behalf and therefore be held liable for his statements.

Accordingly, NTG has set forth sufficient evidence of a representation, both by IBM directly and through Cabbage.

B. Knowledge or Reckless Disregard of Falsity

IBM argues secondly that even if it represented that Windows 95 was compatible with the Small Business Solution, NTG has failed to come forth with evidence both that the statement

was false and that IBM knew it to be so. IBM alleges that the only way NTG could meet its burden of proof is through the use of an expert, presumably to testify that the cause of NTG's computer problems was the Small Business Solutions's incompatibility with Windows 95. Because NTG has not proffered any expert testimony on this issue, IBM argues, it has failed to meet the clear and convincing standard necessary to prove the representation was false. Alternatively, NTG argues that in light of the factual circumstances surrounding its computer problems and admissions by IBM employees concerning Windows 95 and the Small Business Solution, utilizing an expert witness would be wasteful and unnecessary.

The Court notes initially that expert testimony is admissible when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. That expert testimony may be admissible in a particular case, however, does not mean that it is necessary in every case. "It is true that expert testimony is needed where the subject is beyond the purview of the ordinary lay jury's experience and knowledge." Schlier v. Milwaukee Elec. Tool Corp., 835 F. Supp. 839, 842 (E.D. Pa. 1993). But, if the jury can understand all of the elements of the plaintiff's claims without speculation and conjecture, then an expert is not needed. See id.

In the instant case, the relevant inquiry is whether IBM knew that the Small Business Solution was not compatible with Windows 95, or whether it recklessly disregarded the truth or falsity of that representation. The Court finds that NTG has produced evidence that IBM recklessly disregarded whether the Small Business Solution was compatible with Windows 95 sufficient to withstand the instant motion.

First, NTG argues that the circumstances surrounding its computer problems create the

inference that Windows 95 and the Small Business Solution were not compatible. Specifically, NTG claims that despite numerous attempts to remedy its computer problems, as long as the Small Business Solution operated with PerfectOffice it did not work properly. When NTG installed Smart Suite, however, it suffered no further computer problems. Second, NTG points to the testimony of IBM employees to the effect that, at worst, IBM knew the Small Business Solution and Windows 95 were incompatible, or, at best, IBM recklessly disregarded whether they were compatible. In the course of trying to resolve its computer problems, NTG received a voicemail message from IBM customer service representative Everett Warren (“Warren”). The message, left March 12, 1997, said:

I spoke with Bob Miller and I was somewhat disappointed that your solution was not supported by Windows 95. He owes you a comeback which says we can make this thing work and get your network up until you make a decision as to what you want to do. He is working on that. Obviously I am as disappointed as you are or even more that the thing didn't work with 95 or it is not supported by 95.

Defs.’ Mot. for Summ. J. Ex. F, attach. Berkowitz also alleges that upon reviewing his notes from conversations with Warren and Bob Miller (“Miller”), another IBM employee, that Miller told him on March 12, 1997 that the Small Business Solution was not designed for Windows 95 and that the documentation was “misleading.” See id.

Additionally, the deposition testimony of two IBM employees indicates that IBM did not pursue whether the Small Business Solution and Windows 95 were compatible. During his deposition, Dillingham was asked:

Q: With this PC Server 310 Small Business Solution bundle, was it anticipated that any Windows product would be used with it?

A: Never. We never even discussed it. To my knowledge --

Q: Why is that?

A: Since it wasn't available at the time.

Q: What wasn't available?

A: I don't think the Windows 95, is that what you're referring to?

Q: Well, I asked any Windows product, but Windows 95, we can answer it on that basis.

A: Yeah, that wasn't available to my knowledge.

Q: When you were considering marketing this product?

A: Right.

Pl.'s Answer to Defs.' Mot. for Summ. J. Ex. G, at 32. Further, Miller was asked:

Q: Do you know what testing was done on the Small Business Solutions before it was marketed?

A: I only know what testing I was told was done by Mr. Dillingham.

Q: What were you told by him?

A: I was told that the product was designed and tested within a Windows 3.1 environment.

Id. Ex. E, at 21-22.

Taken in a light most favorable to the nonmoving party, there is evidence sufficient to withstand summary judgment that the Small Business Solution was incompatible with Windows 95 and that IBM knew or recklessly disregarded this fact. This is the case despite NTG's failure to retain an expert on the matter. Obviously, NTG must prove at trial that IBM knew or recklessly disregarded that the representation was false, but, in light of the evidence thus far presented, the Court is not going to deny it the opportunity to do so just because it does not have an expert.

C. Intent to Cause Reliance

IBM argues thirdly that NTG has failed to come forward with any evidence of intent on its part. IBM characterizes this element, however, as requiring fraudulent intent in making the representation. To the contrary, once it is established that the representation was made with knowledge of its falsity or recklessness with regard there to, NTG need only prove that IBM

intended for it to rely on the representation. See Gibbs, 647 A.2d at 889. To this end, the Doroachak letter and Cubbage's statements set forth a basis sufficient to withstand summary judgment, or, put differently, to find that IBM intended NTG to rely on its representation. By its language, IBM seemed to intend for customers to buy both the Small Business Solution and the IBM PC 340, apparently equipped with Windows 95. Additionally, Cubbage offered to sell NTG the PC 340, indicating an intent that it rely on the representations. Finally, the Guide, offering directions on how to use the Small Business Solution with Windows 95, indicates an intent on IBM's part that the Small Business Solution be used with Windows 95, or, in other words, an intent that customers rely on its representation and purchase the server to be used with computers equipped with Windows 95. Accordingly, NTG has met its standard of proof on this element.

D. Justifiable Reliance

The fourth element of a fraudulent representation claim is that the claimant justifiably relied on the representation. IBM does not dispute that NTG in fact purchased both the Small Business Solution and several computers equipped with Windows 95. According to Berkowitz, NTG purchased the Small Business Solution as a result of the Doroachak letter and his discussions with Cubbage. Accordingly, there is sufficient evidence that NTG relied on the representations of IBM with regard to the purchase of the Small Business Solution.

Regarding the computers, Berkowitz testified that it was on Cubbage's recommendation that he purchase computers equipped with Windows 95. See Defs.' Mot. for Summ. J. Ex. B, at 125. Additionally, the Doroachak letter suggests the IBM PC 340 as the "perfect companion" to the Small Business Solution. See Pl.'s Answer to Defs.' Mot. for Summ. J. Ex. B. The IBM PC 340, as indicated on Cubbage's proposal to Berkowitz, included Windows 95. From these facts,

there is sufficient evidence that NTG relied on IBM's representation with regard to the computers as well.

With regard to the representations included in the Guide, the Court simply is without evidence to determine whether Berkowitz justifiably relied on the representations made therein. According to the parties, however, as an authorized reseller of IBM products, Cubbage was familiar with those products, specifically the Small Business Solution. Additionally, he testified that he installed NTG's Small Business Solution. See Defs.' Mot. for Summ. J. Ex. E, at 52-53. It is therefore reasonable to infer that he was familiar with the Guide and its statements regarding use of the server with Windows 95, and that this contributed to his statements regarding using the Small Business Solution with Windows 95. Because the Court is without sufficient evidence to disprove this theory, and giving the benefit of all reasonable inferences to NTG, it cannot say there is no genuine issue of material fact as to this issue.¹

E. Damages

Lastly, IBM argues that NTG has failed to set forth a legitimate claim for damages. NTG alleged in the Complaint that during the time in which the computer problems occurred, its employees devoted approximately 800 hours of time attempting to correct the problems. NTG estimates that the lost time cost it approximately \$87,250.00. Clearly a genuine issue of material fact exists as to the damages suffered by NTG as a result of IBM's representation.

IV. CONCLUSION

¹ The Court recognizes that neither party addressed the justifiable reliance element in the context of direct liability. Accordingly, while the benefit of the inferences precludes the Court from granting summary judgment on this issue, it is anticipated that both parties will address justifiable reliance in a direct liability context, as well as all of the elements, more fully at trial.

For the reasons stated above, the Court finds that from this evidence, viewed in a light most favorable to the nonmoving party, a jury could find, by a clear and convincing standard, that IBM represented that the Small Business Solution was compatible with Windows 95. Further, there is sufficient evidence that IBM either knew that it was not compatible or was reckless as to the truth or falsity of this fact. Finally, a jury could conclude that NTG justifiably relied on these representations and was proximately damaged thereby. Accordingly, IBM's motion for summary judgment is denied.

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ORDER

AND NOW, this day of May, 2000, in consideration of the Defendant International Business Machines's Motion for Summary Judgment (Doc. No. 13), the response of the Plaintiff, NTG Telecommunications, Inc., and the reply thereto, it is ORDERED that the motion is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.