

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

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

BENCH OPINION AND ORDER

J. M. KELLY, J.

MAY 17, 2000

Presently before the Court is a Rule 50 motion for Judgment as a Matter of Law raised by IBM. In considering a motion for judgment as a matter of law, the Court must view the evidence in a light most favorable to the nonmoving party and determine whether the record contains the “minimum quantum of evidence from which a jury might reasonably afford relief.” Mosley v. Wilson, 102 F.3d 85, 89 (3d Cir. 1996). The Court must therefore consider whether NTG has proven all of the elements of its fraud action by clear and convincing evidence. See First Capital Corp. v. Country Fruit, Inc., 19 F. Supp. 2d 397, 401 (E.D. Pa. 1998). The six elements of a cause of action for fraud are: (1) a representation; (2) that is material to the transaction in issue; (3) made falsely, with knowledge of its falsity or reckless disregard as to whether it is false or true; (4) with the intent that the recipient be induced to rely on the misrepresentation; (5) justifiable reliance on the misrepresentation by the recipient; and (6) damage to the party that relied on the misrepresentation. See Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). Taking all of the evidence in this case in a light most favorable to NTG, the Court finds that NTG has not proven all of the elements of fraud by clear and convincing evidence.

To begin, NTG did not present sufficient evidence that Frank Cabbage was IBM’s agent. Under Pennsylvania law, 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. See Friedman v. Kasser, 481 A.2d 886, 890 (Pa. Super. Ct. 1984). In this case, the only evidence of a communication from IBM to NTG was in the letter referring NTG to an IBM business partner. Neither Cabbage nor Sun Data Services were named in the letter. Further, IBM played no role in referring NTG to Cabbage; Jud Berkowitz, the President of NTG, testified that he knew Cabbage from prior transactions and that he had outside information that he was an IBM business partner. Finally, there was testimony that Cabbage also sold competing products, such as those manufactured by Hewlett Packard. Based on this evidence, even considered most favorably to NTG, the Court finds that NTG could not have reasonably believed that Cabbage was IBM's agent, capable of binding it by its actions.

Additionally, NTG's evidence that Cabbage actually represented that the two systems were compatible is lacking. NTG asserts that the representation is evidenced by Cabbage's proposal regarding the personal computers and his course of conduct during the transaction. When asked whether Cabbage actually said the Small Business Solution was compatible with Windows 95, however, Berkowitz had no recollection. Therefore, the Court finds that NTG has not shown by clear and convincing evidence that Cabbage made a representation nor that the representation can be attributed to IBM under an agency theory.

Further, to the extent that NTG proffered evidence that IBM itself represented that the Small Business Solution and Windows 95 were compatible, it did not show that it justifiably relied on that representation. NTG showed that IBM referred in its letter to the PC 340 as the "perfect companion" to the Small Business Solution and that the PC 340 was equipped with Windows 95. There is no evidence to show, however, that NTG considered the recommendation

in the letter to be a representation that the Small Business Solution and Windows 95 were compatible nor was there any evidence that NTG relied on this statement in selecting which server and computers to purchase. Therefore, even though NTG may have proffered evidence of a representation by IBM in this circumstance, it has not produced clear and convincing evidence that it justifiably relied on that representation.

Also, NTG has not presented clear and convincing evidence that the representation was false. The only evidence tending to establish that the Small Business Solution was incompatible with Windows 95 was the testimony of Berkowitz and the other NTG employees that they suffered computer problems with the system as originally installed, and that those problems stopped as soon as the new software was installed. While this is evidence that an incompatibility between the Small Business Solution and Windows 95 could have been the cause of NTG's problems, it falls short of establishing this fact by clear and convincing evidence. First, there are numerous possible explanations for NTG's computer problems besides an incompatibility with Windows 95 such as negligent installation, defective software and defective computers. Second, Cabbage testified that he installed two other Small Business Solutions to be used with computers equipped with Windows 95 and he received no complaints about their performance. Third, Robert Miller provided uncontroverted testimony that he received no other complaints about the Small Business Solution and its operation with Windows 95.

NTG's evidence that the Small Business Solution was not tested with Windows 95 in mind does not change this analysis. Assuming for the purposes of this motion that this is the case, it still does not establish that the two products were incompatible. It merely establishes that IBM did not know whether they were compatible. This is the case for the voicemail messages as

well; while the IBM employees apologized that NTG's Small Business Solution did not work with or was not supported by Windows 95, they did not say that an incompatibility between the two systems caused the problem. Given these facts, the Court finds that NTG has not produced sufficient evidence that any representation by IBM was false.

Overall, in light of the evidence presented in this case, considered most favorably to NTG, the Court finds NTG has not presented a minimum amount of evidence from which the jury could afford it relief. NTG's evidence does not establish a representation by IBM that was relied upon by NTG, nor does it establish that any representation that IBM made was false.

Therefore, for the foregoing reasons, it is ORDERED that IBM's Motion for Judgment as a Matter of Law is GRANTED. Judgment is entered in favor of IBM and against NTG.

BY THE COURT:

JAMES MCGIRR KELLY, J.