HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington corporation,

Plaintiff,

v.

IMMERSION CORPORATION, a Delaware corporation,

Defendant.

No. CV 07-936-RSM

REPLY IN SUPPORT OF PLAINTIFF MICROSOFT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING IMMERSION'S COUNTERCLAIM

NOTED ON MOTION CALENDAR: MAY 9, 2008

I. INTRODUCTION

Immersion does not deny that it has failed to produce *any* evidence that it was harmed by Microsoft's inadvertent and limited disclosure of two terms relating to the Sony Option in the Sony/Immersion Agreement. Immersion has not asserted that even one potential licensee or customer read the information, much less that a potential licensee or customer used the information to Immersion's detriment.[1]

Without proof of some actual injury, Immersion cannot prevail on its claim and is

[1] Immersion makes baseless assertions that Microsoft admits it breached the Confidentiality Agreement (it has not). Microsoft has not admitted breach of the Confidentiality Agreement. The issue of breach is not before the Court on this motion because Immersion's failure to prove any damage resulting from the alleged breach alone allows the Court to dispose of its counterclaim.

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not entitled to damages – actual or nominal. Suffering damages is an element of a claim for breach of contract, which must be proved in order to survive dismissal. Even when Washington courts have allowed nominal damages, they have done so only where some injury has been established, but the amount could not be shown accurately. Here, Immersion has failed to demonstrate any injury at all.

Immersion also suggests that despite its complete failure to produce any evidence of harm, it should be given an indefinite amount of time to search for such evidence. The time for producing evidence of harm is now. Immersion has not satisfied this requirement. Its counterclaim should be dismissed.

II. AUTHORITY AND ARGUMENT

A. Immersion is Not Entitled to Nominal Damages.

1. Proof of Actual Damage is Required as an Element of a Claim for Breach of Contract.

Under Washington law, it is well settled that a breach of contract cause of action requires, among other elements, that the plaintiff prove damage as a result of the alleged breach. Lehrer v. DSHS, 101 Wash. App. 509, 516, 5 P.3d 722 (2000); Northwest Independent Forest Mfgs. v. Dep't of Labor and Industries, 78 Wash. App. 707, 712, 899 P.2d 6 (1995). Failure to prove damage when seeking damages is failure to prove the substance of the issue, entitling a defendant to a judgment, a nonsuit, or a judgment that the appellant take nothing by his action. Woodhouse v. Powels, 43 Wash. 617, 86 P. 1063 (1906); see also Ketchum v. Albertson Bulb Gardens, Inc., 142 Wash. 134, 252 P. 523 (1927); Jacob's Meadow Owners Assoc. v. Plateau 44 II, LLC, 139 Wash. App. 743, 754, 162 P.3d 1153 (2007) (stating "in suits for damages only . . . a court may dismiss a breach of contract action if damages have not been suffered"); Akins v. Williams Communications, Inc., No. 27657-7-II, 2003 WL 1521999 *3 (Wash. App. March 25, 2003) (Unpublished) (providing that "failure to prove damages warrants dismissal"). "Uncertainty as to the fact of damage is fatal" to the claim. Wenzler & Ward , 53 Wash.

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2d at 100; Dunseath v. Hallauer, 41 Wn.2d 895, 902, 253 P.2d 408 (1953); see also Wilkerson v. Wegner, 58 Wash. App. 404, 409, 793 P.2d 983 (1990) (stating that the "claim rests only on conjecture and does not support a cause of action for damages"); Wenzler & Ward Plumbing & Heating Co. v. Sellen, 53 Wash. 2d 96, 100, 330 P.2d 1068 (1959) (explaining that uncertainty as to the fact of damage is fatal to claim); see also Sorrel v. Eagle Healthcare, Inc., 110 Wash. App. 290, 296, 38 P.3d 1024, review denied, 147 Wn.2d 1016, 56 P.3d 992 (2002).

Mere proof of breach is not sufficient to maintain a cause of action. As clearly explained by Ketchum:

> Since the action was for damages suffered, mere proof that there was a breach of the contract without more did not warrant a verdict in favor of the respondent, even for nominal damages.

Id. at 139; cf. Karuza v. Law Offices of Paul N. Luvera, WL 523930 (unpublished) (1997) (dismissing action where plaintiff proved breach of confidentiality agreement, but failed to prove damages). This view is based, in part, upon the ancient principle that the law "does not concern itself with trifles." Ketchum, 142 Wash. at 139 (citation omitted); Sorrel, 110 Wash. App. at 296.

Nominal damages may be appropriately awarded when damage is proven but the quantum of damage is uncertain. The traditional statement regarding "nominal damages" is as follows:

> Nominal damages never purport to be real damages. They are awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show.

See Bellingham Bay & British Columbia R. Co. v. Strand, 4 Wash. 311, 314, 30 P. 144, 145 (1892). For example, the case Immersion cites in support of its argument, Ford v. Trendwest Resorts, Inc., 146 Wash. 2d 146, 158, 43 P.2d 1223 (2002), quotes this exact language from Bellingham Bay, and remanded for an award of nominal damages because

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the plaintiff in that action demonstrated an injury . Id. at 158.[2] Unlike Immersion, Ford demonstrated an injury before being entitled to an award of nominal damages.

Nominal damages may also be awarded where damages are not sought. For example, in cases seeking injunctive relief or cases involving the determination of property rights sometimes allow for the recovery of nominal damages without proof of damage. Cf. Sorrel, 110 Wash. App.at 296. As stated by the Washington Supreme Court in Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063 (1906):

> It is only where the verdict of the jury will determine some property or permanent personal right that the verdict must be taken regardless of the question whether the amount returned is substantial or nominal.

Id. at 624. See e.g. Seymour v. Jaffe, 78 Wash. 1, 138 P. 276 (1914), Immersion's breach of contract cause of action, where Immersion specifically pled damages (Dkt. No. 8 (Immersion's Answer Affirmative Defense, Countercl.) at ¶ 69.), does not fall within these exceptions.

Accordingly, Immersion's failure to present any damage resulting from Microsoft's alleged breach of the Confidentiality Agreement is fatal to its claim. Claiming nominative damages now cannot defeat this motion for partial summary judgment without proof of actual injury as a result of the alleged breach. Without injury there is no claim to assert. See, e.g., Wenzler & Ward, 53 Wash. 2d at 100; Woodhouse, 43 Wash. at 624; Ketchum, 142 Wash. at 139; Jacob's Meadow, 139 Wn. App. at 754; Akins, 2003 WL 1521999 *3.

2. Washington Law Applies to Immersion's Counterclaim.

In its opposition, Immersion relies upon California law, which is inapplicable and in conflict with Washington Law on the subject of nominal damages. "Federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural law."

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[2] The unpublished decision of Merrell v. Renier, No. C06-040 JLR (W.D. Wash. Nov. 16, 2006), relied upon by Immersion, after quoting the traditional recitation regarding nominal damages, was decided in part upon evidence from which a jury could award damages for emotional and non-pecuniary injury to reputation. See id. at 5-6.

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Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996). Courts sitting in diversity apply the choice of law rules of the state in which the Court sits, in this case Washington. Kohlrautz v. Oilmen Participation Corp., 441 F.3d 827 (9th Cir. 2006).[3]

Washington applies the law of the state with the most significant relationship to the transaction. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 555 P.2d 997 (1976); Under the most significant relationship test, when the parties have not expressly chosen the law to be applied, courts will apply "the law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." Restatement (Second) Conflict of Laws § 188 (1971).

Applying the five factors used to determine the most significant relationship, it is apparent that Washington law applies to Immersion's counterclaim:

(a) The place of contracting: It is undisputed that Microsoft signed the Confidentiality Agreement in Redmond, Washington, (see Declaration of Ken Lustig). That signature was the last act necessary to give the contract binding effect, and therefore Washington is considered the place of contracting. National Flood Services, Inc. v. Torrent Technologies, Inc., No. C05-1350Z (W.D. Wash. June 13, 2006);

(b) The place the contract was negotiated: The Confidentiality Agreement was negotiated over the phone and email between Microsoft in Washington, and Immersion in California. Lustig Decl. This factor is therefore neutral.

(c) The place of performance: Microsoft employees and counsel located in Washington were tasked with performing the contract. (see Dkt. No. 95- Ex. 2 (Confidentiality Agreement) at 1). And all of the alleged breaches of the contract occurred in Washington (id. at Ex. 4). This factor weighs in favor of Washington law;

(d) The location of the subject matter of the contract: The Sony/Immersion Agreement was the subject of the Confidentiality Agreement. It was delivered to Microsoft in Redmond, Washington to be used in a lawsuit that was pending in Washington. This factor also weighs in favor of applying Washington law;

[3] An actual conflict between the law of Washington and the law of another state must exist before Washington courts engage in a conflict of law analysis. Rice v. Dow Chem. Co., 124 Wn.2d 205, 210, 875 P.2d 1213 (1994). To the extent that California law and Washington law conflict regarding the availability of nominal damages in a breach of contract case, a conflict of law analysis is appropriate. Washington law regarding nominal damages is discussed in detail, below.

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(e) The domicile, residence, nationality, place of incorporation and place of business of the parties: Immersion is not a party to the Confidentiality Agreement (Lustig Decl.), and therefore its domicile is irrelevant. Microsoft is a Washington corporation, with its principal place of business in Redmond, Washington.

See Fluke Corp. v. Harford Accident & Indem. Co., 102 Wn. App. 237, 249, 7 P.3d 825 (2000). In addition to the numerous contacts between the Confidentiality Agreement and Washington, Washington has a strong policy against awarding "punitive" type of damages, including nominal damages. It also has an interest in establishing predictability and uniformity regarding contract rights and liabilities among its residents by applying of its own contract rule regarding burden of proving damages as an essential element of a breach of contract cause of action, and its own standards for possible recovery of nominal damages. See Potlatch, 76 Wash. 2d at 81; Fluke Corp., 102 Wn. App. at 252; Restatement (Second) Conflicts of Law, supra § 6. Washington's contacts with the contract and its policy interest in determining its enforceability indicate that Washington has the most significant relationship with the contract.

3. Punishment Is Not a Proper Basis for Immersion's Counterclaim.

Immersion also appears to seek punitive damages, since it has no proof of actual damages. It states, "To vindicate its rights, and to make sure that Microsoft gets the message that it cannot ignore the agreements it makes with others, Immersion asserted a counterclaim against Microsoft for breach of the Confidentiality Agreement." (Opposition at 1-2). Not only are punitive damages for breach of contract claims not permitted in Washington, Barr v. Interbay Citizens Bank of Tampa, Florida, 96 Wash. 2d 692, 699, 635 P.2d 441, 649 P.2d 827 (1981), but "[t]he central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds. . ." Ford v. Trendwest Resorts, Inc. 146 Wash. 2d 146, 155, 43 P.3d 1223 (2002) (citing the Restatement (Second) of Contracts § 356 cmt. a (1981)).

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B. Immersion Is Not Entitled to More Time.

Microsoft met its initiation burden of demonstrating that no material issue of fact exists with regard to whether Immersion was harmed by Microsoft's inadvertent and limited disclosure of the allegedly confidential information in the Sony Option. Immersion, on the other hand, has failed to "go beyond the pleadings and 'set forth the specific facts' that show a genuine issue for trial." Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002).

Immersion points out that Microsoft's PR firm sent the Original Complaint to CNet, ARS Technica, the Seattle PI, and the Seattle Times (See Declaration of Joffrey McWilliam (Dkt. # 95), Exhibit 4, Microsoft's Responses to Immersion's First Set of Interrogatories). However, there is no evidence that any potential licensee or customer ever saw the allegedly confidential terms, or that any knowledge of these terms harmed Immersion in any way. Mere identification of some reporters who were given the Original Complaint, which contained two allegedly confidential numbers in the middle of its eight pages, is not enough to survive summary judgment. See Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002).

For almost a year, Immersion has known that Microsoft's Original Complaint contained two numbers relating to the Sony Option. Since September 2007, Microsoft has been requesting information from Immersion regarding the alleged "harm" that it pled in its counterclaim. (See Kundtz Decl., Ex. D (Dkt. # 75)). Since February 2008, Immersion has known the identity of the persons and entities who received copies of the Original Complaint (McWilliam Decl., Ex. 4). Yet, only now, a little over a month before the discovery cutoff, Immersion claims it has plans to issue subpoenas to investigate further to whom Microsoft sent the Original Complaint. (Opposition at 9).

By this response, Immersion reveals not only that it is not aware of any potential licensee or customer who has knowledge of the allegedly confidential information or who

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used such knowledge against Immersion in any negotiation, but also that it has not investigated this allegation. Under Rule 11, Immersion had to have evidence of damages at the time it filed the counter claim, and has had an obligation to discover this information before now. Immersion's time has run out. It is not entitled to pursue its counterclaim on the hope that it will find evidence of damage in the future.

Immersion inappropriately asks the Court to deny summary judgment and retain jurisdiction over Immersion's counterclaim indefinitely on the theory that one day Immersion might be able to show damages. However, the Court's scheduling order in this case provides that discovery must be completed by June 16, 2008, about the time that the court will be ruling on this motion. There is no further time for discovery or follow up discovery if Immersion finds and discloses any evidence of damage..

Moreover, the cases cited by Immersion in support of its "future damages" theory have no application here. All of these cases involved actions where actual damages had been proved and additional damages were expected to be calculable in the near future. See, e.g., U.S. v. Burnett, 262 F.2d 55, 59 (9th Cir. 1958) (slip and fall case where court entered judgment for $11,249.60, and held "the question of permanent total or partial disability is reserved for future determination at the expiration of six months."); U.S. Lib. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal 3d 586 (Cal. 1970) (judgment entered for actual damages sustained as a result of defendant's negligence; court reserved jurisdiction to amend the judgment by adding thereto amounts expended by plaintiff on claims pending at the time of judgment); Carlson Indus. v. E.L. Murphy Trucking Co., 168 Cal. App. 3d 691 (Cal. 1985) (holding court could retain jurisdiction to award actual cost of repair to damaged truck crane because disassembly required to determine full extent of damage). These cases do not support Immersion's argument that where no evidence of harm is presented in a breach of contract case, a court should deny summary judgment and wait indefinitely for a party to show harm.

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Under certain circumstances, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. . ." Fed. R. Civ. P. 56(f). Relief is granted under Rule 56(f) where the non-moving party makes: "(a) timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists." VISA Int'l Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472, 1475(9th Cir. 1986). "A party requesting a continuance pursuant to Rule 56(f) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." Tatum v. City & County of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006). The non-moving party must also set forth the specific reasons why such evidence cannot be presented at the present time. Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir.1991). "A district court may, within its discretion, deny a Rule 56(f) motion for further discovery if the moving party failed to "diligently pursue[ ] its previous discovery opportunities." Qualls v. Blue Cross of California, 22 F.3d 839, 844 (9th Cir.1994.Krav Maga Ass'n of America, Inc. v. Yanilov, 464 F.Supp.2d 981 (C.D.Cal., 2006) (finding that plaintiffs had more than ample time to conduct discovery; that plaintiffs failed to diligently pursue previous discovery opportunities; and holding "[t]he plaintiffs' failure to demonstrate any compelling reason as to why they could not depose key defendants since the filing of this lawsuit in October 2005 [a little over a year prior to the summary judgment motion], weighs heavily against their Rule 56(f) motion. . .").

In its opposition, Immersion fails to specifically identify any information that would support a claim for damages or any basis for believing that the information sought actually exists, or if it does exist, why Immersion has not been able to obtain this information to date. After several months of discovery, Immersion cannot identify a single potential licensee or other customer that knew of the terms of the Sony Option and used that

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knowledge against Immersion. Immersion should not be permitted to delay Microsoft's motion for summary judgment based on vague assertions about possible additional discovery, especially when it has not diligently pursued other discovery opportunities.

C. Immersion Cannot Maintain an Action in Hopes of Obtaining Attorney Fees.

Immersion cannot meet its burden of showing damages for breach of contract by asserting that it "may be entitled to recover its attorneys' fees." If, as here, a party cannot meet its burden of raising a genuine issue of material fact showing that it can establish each element of its claim, the claim should be dismissed. The hypothetical possibility that the party could get attorney fees if it could in fact establish all elements of its claim cannot save its claim.

Moreover, Immersion would not be entitled to attorney fees on its breach of contract claim. Under Washington law, a party is not entitled to recover attorney fees unless there is an attorney fee provision in the contract, attorney fees are provided by statute, or under a recognized ground of equity. Lay v. Hass, 112 Wn.App. 818 (2002). None of these exist here.

Immersion cites to RCW 4.84.250, which allows an award of attorney fees to the "prevailing party" when the amount "pleaded" is less than $10,000. Immersion cannot invoke this statute. First, Immersion did not plead an amount of damages less than $10,000. Second, and more importantly, the "prevailing party" is defined in RCW 4.84.260 as follows:

> The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

RCW 4.84.260 (emphasis added). Immersion has not made any settlement offers with respect to its counterclaim, and therefore the amount it could hypothetically recover cannot be more than the "amount offered in settlement." Indeed, Immersion can not make a

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meaningful settlement offer when it has no damages. And there is no indication that the legislature intended this statute to provide for attorney fees to party who otherwise had no damages.

Immersion also cites to Merrell v. Renier, No. C06-404JRL, 2006 WL 3337368, at *5 (W.D. Wash. 2006), claiming that attorney fees are awardable in a breach of contract action seeking no pecuniary damages. (Opposition at 8). Immersion fails to acknowledge that in Merrell, the plaintiff was seeking injunctive relief for specific enforcement of a settlement agreement and more importantly, that the settlement agreement provided for attorney fees. Id. Conversely, Immersion has no contractual right to attorney fees.

III. CONCLUSION

Immersion has failed to provide any evidence that the presence of the two Sony Option numbers in the original complaint for 10 days caused Immersion any damage. Therefore, the counterclaim should be dismissed.

If the Court does not grant Microsoft's motion in whole, Microsoft requests that the Court limit Immersion to seeking only nominal damages.

DATED May 9, 2008.

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By /s Wendy E. Lyon

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of May, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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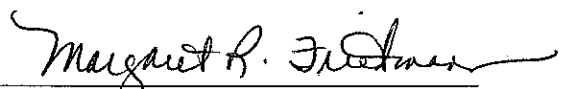
Executed at Seattle, Washington this 9th day of May, 2008.



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