

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

N. JAMES VALENTINE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 3:03CV153 (DJS)
	:	
NATIONAL SPORTS SERVICES;	:	
SMASHMOUTH SPORTS; SCOTT	:	
SPREITZER; JIM FEIST; JOHN	:	
DOES 1-2 AND XYZ CORPORATIONS	:	
1-5 (such names being	:	
fictitious);	:	
	:	
Defendants.	:	

MEMORANDUM OF DECISION

Plaintiff N. James Valentine brings this action against defendants, National Sports Services, Inc. ("NSS"), Smashmouth Sports, Scott Spreitzer, Jim Feist Sports, and Jim Feist. Plaintiff asserts the following claims against defendants: (1) violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a-42-110q, (2) breach of contract, (3) fraudulent misrepresentation, and (4) negligent misrepresentation. Plaintiff seeks judgment against defendants, jointly and severally, for actual damages, punitive damages, costs and reasonable attorneys' fees. Defendants deny liability on all counts and assert several affirmative defenses. Defendants have filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (dkt. # 47).

For the following reasons, defendants' motion is **GRANTED**.

I. FACTS

Plaintiff N. James Valentine is a Connecticut citizen. Defendant Jim Feist is the President, Secretary, Treasurer, and the Chairman of the Board of Directors for defendant NSS. Defendants Smashmouth Sports and Jim Feist Sports are unincorporated divisions of NSS. Defendant Scott Speitzer is a sports gaming consultant retained as an independent contractor by NSS.

NSS provides sports handicapping and information services. NSS advertises its services in certain nationally distributed periodicals. NSS lists toll-free telephone numbers in some of its advertisements and maintains various web sites including www.JimFeist.com. Occasionally, NSS advertises on national television networks.

Valentine subscribed to a magazine called Pro Football Weekly, in which Jim Feist Sports advertised a free prediction for a college football game. Valentine called the listed toll-free phone number for the free pick, and shortly thereafter, beginning on or about September 24, 2000, representatives of NSS started soliciting him by phone. Valentine purchased services from NSS beginning on or about September 24, 2000 that were worth, in the aggregate, more than \$100,000.

Valentine complained to Jim Feist Sports about the accuracy of its picks at various times in October, November, and December of 2000. In response to his complaints, Tom Margoglio, a sales manager at Jim Feist Sports, faxed Valentine the following offer:

This letter is to confirm our intent to issue a credit in the amount of \$5000.00 to your Master Card #. . . . The credit will be issued as soon as we are in receipt of the signed statement below. However, it may take up to one full billing cycle to appear on your credit card statement. December 12, 2000.

(Dkt. # 50, Ex. O at 1). Valentine signed the following:

I hereby authorize all charges made to Jim Feist Sports prior to December 12, 2000. I understand that my Master Card # ... will be credited as soon as I sign and return the statement below. Once my account has been credited, I agree to take no further action on any charges I may have incurred on Master Card # . . . , Visa Card # . . . and American Express Card # . . . with Jim Feist Sports prior to this date. . . .

(Id.). After signing this document, Valentine did not purchase services from NSS.

II. DISCUSSION

Valentine alleges four causes of action relating to his purchase of sports information and handicapping services from the defendant: (1) violation of CUTPA, (2) fraudulent misrepresentation, (3) negligent misrepresentation, and (4) breach of contract. Defendants move for summary judgment with respect to all counts of the complaint and raise numerous defenses.

A. STANDARD

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" American Int'l Group, Inc. v. London Am. Int'l Corp., 664 F.2d 348, 351 (2d Cir. 1981) (quoting Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975)). A dispute concerning a material fact is genuine "if evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. See Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). "Only when reasonable minds could not differ as to

the import of the evidence is summary judgment proper." Id.

B. COVENANT NOT TO SUE

Valentine is barred from advancing his claims against the corporate defendants because he signed a covenant not to sue.

"Courts use contract principles to evaluate the scope of releases and covenants not to sue." Hunter Douglas, Inc. v. Comfortex

Corp., No. 98-CV-0479, 1999 U.S. Dist. LEXIS 10907, at *12

(N.D.N.Y. May 10, 1999). "Summary judgment is generally proper

in a contract dispute only if the language of the contract is wholly unambiguous. . . . The question of whether the language

of a contract is clear or ambiguous is a question of law to be

decided by the court." Compagnie Financiere de CIC et de L'Union

Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc., 232

F.3d 153, 157-58 (2d Cir. 2000) ("Compagnie Financiere").

"Contract language is ambiguous if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated

agreement.'" Id. at 158 (quoting Sayers v. Rochester Tel. Corp.

Supplemental Management Pension Plan, 7 F.3d 1091, 1095 (2d Cir.

1993)); see Sayers, 7 F.3d at 1094 ("If the language is

susceptible to different reasonable interpretations, and 'where there is relevant extrinsic evidence of the parties' actual

intent,' then the contract's meaning becomes an issue of fact

precluding summary judgment.") (quoting Seiden Assocs. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992)). "No ambiguity exists when contract language has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" Sayers, 7 F.3d at 1095 (quoting Breed v. Ins. Co. of North America, 46 N.Y.2d 351, 355 (1978)). "[W]here the language of the contract is clear and unambiguous, the contract is to be given effect to its terms, and resort to parol evidence is not only unnecessary but improper. . . . If a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." Lee v. BSB Greenwich Mortg. L.P., 267 F.3d 172, 178 (2d Cir. 2001).

The statement "I agree to take no further action," (dkt # 50 Ex. O at 1), is unambiguous. An "action" is defined as "[a] legal proceeding by which one demands or enforces one's right in a court of justice." Webster's Third New International Dictionary 21 (1993). Valentine waived his right to bring a claim against the corporate defendants when he signed the document in consideration for the \$5,000.00 credit. As such, judgment shall enter in favor of the corporate defendants on all

Valentine's claims.¹

C. CAUSE OF ACTION AGAINST THE INDIVIDUAL DEFENDANTS

Valentine's claims against Jim Feist and Scott Speitzer also fail as a matter of law. To the extent Valentine asserts his claims against Jim Feist and Scott Spreitzer individually, the evidence submitted does not, as a matter of law, prove that these individuals personally committed a tort against Valentine. "[A]n officer of a corporation does not incur personal liability for its torts merely because of his official position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." Scribner v. O'Brien, Inc., 169 Conn. 389, 404 (1975). In order to hold an officer or agent of the corporation personally liable for a tort, plaintiff "must allege facts setting forth the nature of the individual's participation." Suitt Const. Co., Inc. v. Bottling Group, LLC, No.

X06-CV-02-0176332S, 2003 WL 22598196, at *10 (Conn. Super. Ct.

¹ The covenant not to sue applies to Jim Feist Sports and Smashmouth Sports, which are unincorporated divisions of NSS. An unincorporated division of a corporation is not a distinct legal entity, and, therefore, cannot be liable if the corporation itself is not liable. Greenbaum v. Svenska Handelsbanken, 26 F. Supp. 2d 649, 654 (S.D.N.Y. 1998).

Oct. 23, 2003).

Valentine's claims are based upon alleged misrepresentations about the quality of defendants' services. With respect to Jim Feist, Valentine admitted that he never spoke with Jim Feist, and there is no evidence in the record that reflects any other form of direct communication between Jim Feist and Valentine. Although Spreitzer did speak to Valentine over the telephone, Valentine has not provided a sufficient basis for holding Spreitzer liable for any tort alleged in the amended complaint. Therefore, judgment shall enter in favor of the individual defendants on all claims set forth in the amended complaint.

III. CONCLUSION

For the reasons stated herein, defendants' motion for summary judgment (dkt. #47) is **GRANTED**. Judgment shall enter for all defendants, on all counts. The Clerk of the Court shall close this file.

So ordered this 18th day of May, 2005.

/s/DJS

DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE