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Back

Docket No.:	**00-0962**
Parties:	MARK WILLIAMS and another(1) vs. AMERICA ONLINE, INC.
County:	**MIDDLESEX, ss.**

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

In the complaint, plaintiffs allege that their computers were damaged by software distributed by defendant. This matter is before the court on the motion to dismiss of America Online, Inc. ("AOL") for lack of proper forum under Rules 12(b)(3) and 12(b)(6).(2) Alternatively, AOL moves for dismissal on forum non conveniens grounds.

Specifically, plaintiffs allege that installation of AOL Version 5.0 ("AOL 5.0") caused unauthorized changes to the configuration of their computers so they could no longer access non- AOL Internet service providers, were unable to run non-AOL e-mail programs and were unable to access personal information and files. Plaintiffs' legal claims include G.L. c. 93A, negligence, breach of good faith and fair dealing, breach of implied warranties, fraud, negligent misrepresentation and tortious interference with contract.(3) Plaintiffs' primary legal claim is that defendant's conduct constitutes unfair or deceptive acts or practices in violation of Chapter 93A.

Defendant contends plaintiffs filed this action in Massachusetts in breach of a forum selection clause in a Terms of Service agreement (the "TOS") and argues that Virginia is the exclusive forum for all AOL consumer suits. In opposing the motion, plaintiffs claim that the forum selection clause does not apply in this case because, among other things, the alleged harm to their computers occurred before they were asked to agree to the TOS and occurred even if a user declined to accept the TOS.

For the following reasons, after a hearing, AOL's motion to dismiss is **DENIED**.

BACKGROUND

Plaintiffs Mark Williams and Sandra Mastroianni seek to represent a class of similarly situated Massachusetts residents. After this case was filed, on April 7, 2000, AOL removed this action to the local United States District Court. That court remanded the case.

Essentially the same factual claims plaintiffs make in this case have been made by other claimants in numerous federal cases throughout the country, including in the Eastern District of Virginia. On June 2, 2000, with the agreement of AOL, the Judicial Panel on Multi-district Litigation ("the MDL Panel") transferred pending federal cases, including the Virginia case, to the Southern District of Florida for coordination and consolidation of pretrial proceedings. The MDL Panel subsequently transferred more than 40 related cases to Florida. The transfer order states in relevant part:

Common factual questions arise because, although the legal theories vary, all actions relate to use of Version 5.0 of the AOL software and name AOL as the sole defendant. More specifically, plaintiffs in these actions, computer users who installed AOL Version 5.0 on their computers, allege that AOL Version 5.0

makes it difficult or impossible to access competing Internet service providers and disables, interrupts, or interferes with the operation of various types of non-AOL software.

DISCUSSION

As noted above, plaintiffs argue that the forum selection clause should not be enforced because their computers or the computers of others in the putative class were altered before they were offered an opportunity to agree to the TOS. Thus, plaintiffs contend, their computers would have been damaged whether or not they agreed to the forum selection clause. Plaintiffs also contend that the forum selection clause is unfair and unreasonable because they did not receive adequate notice of the provision and because the expense and inconvenience of litigating in Virginia would effectively prevent them from seeking redress for their relatively small damages.

The forum selection clause at issue provides in relevant part:

You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the court of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute . . . .

A reasonable forum selection clause is generally enforceable. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585; Cambridge Biotech Corporation v. Pasteur Sanofi Diagnostics, 433 Mass. 122 (2000)(forum selection clause in freely negotiated international transaction should be enforced "so long as it is fair and reasonable to do so"). In Jacobson v. Mailboxes Etc., U.S.A., Inc, 419 Mass. 572 (1995), applying California law, the SJC concluded that the forum selection clause did not apply to harm which occurred before the parties entered into a contractual relationship. That forum selection clause specifically stated that "venue and jurisdiction for *all actions enforcing this agreement"* were agreed to be in California.. The SJC stated that if the majority of plaintiffs' claims arose from the contract itself, all claims should be decided in California. If, however, the majority of the claims arose from *precontract* conduct, the forum selection clause should not be enforced. Id. at 579.

AOL argues that its forum selection clause is broader than that in Jacobson because the provision in this case applies to "any claim or dispute with AOL." However, that argument does not address plaintiffs' claim that their injury, or those of others similarly situated, occurred before they had an opportunity to accept or reject the forum selection clause.

Based on affidavits of David Cass, a computer and database consultant, and plaintiff Mastroianni, plaintiffs contend that the AOL 5.0 program performed the change in computer configuration at the beginning of the installation process before plaintiffs or other putative class members had an opportunity to agree to the TOS. Both affidavits show that plaintiffs and others similarly situated could reasonably claim inadequate notice of the AOL forum selection clause.

Cass, who has more than 20 years experience with mainframe and personal computers, owns and operates Cass, Inc., a provider of database and computer support services. In his affidavit, Cass describes in detail the AOL 5.0 installation process. He states that the alleged harm occurs before the user clicks " I agree". He describes a complicated process by which subscribers "agree" to the TOS after configuration of the computer has been altered. AOL sets the default for reviewing the TOS to "I Agree." A customer who merely clicks "I Agree" is instantly bound by the terms of a TOS she has never seen. The customer's only other option is to click off the default and select "Read Now." That option also fails to provide a customer with an opportunity to read the TOS. A customer who selects "Read Now" is presented with another choice between the default "OK, I Agree" and "Read Now". Thus, the actual language of the TOS agreement is not presented on the computer screen unless the customer specifically requests it by twice overriding the

default.

In his affidavit, Cass also states that although he canceled the AOL 5.0 installation and did not accept the presented Terms of Service agreement, his computer configuration had already been "extensively modified" and his "previously working internet connection was rendered non- functional since AOL's installation software added to and changed the configuration of (his) network settings" (Cass Aff. at ¶14). In other words, his computer changes were not reversed despite his cancellation of the installation. (Cass aff. at ¶15).

Mastroianni corroborates Cass in describing problems with configuration of her computer. She states that after downloading AOL 5.0, "the software immediately began to run and make all sorts of noises." (Mastroianni Aff. at ¶10). Immediately after, she was "unable to access other Internet Service Providers" (Mastroianni Aff. at ¶4). She was not given the opportunity to read the TOS agreement until the download was complete, when the configuration of her computer had already been altered (¶10). She states that she did not click the default "I Agree" but attempted to read the TOS on the screen. (Mastroianni Aff. at ¶10).

In support of its motion to dismiss, AOL submits affidavits of Carrie F. Davis, a senior paralegal at AOL, and Laura E. Jehl, AOL's Assistant General Counsel for Litigation. Davis says that because the named plaintiffs were already AOL subscribers when they installed AOL 5.0 they were bound by the July 15, 1998 version of the TOS agreement, which included a forum selection clause. Davis also states that when AOL 5.0 was released in October 1999, Williams had been an AOL subscriber since July 1999 and Mastroianni since February 1998.

Because any AOL subscriber was required to agree to a new TOS as a condition of installing AOL 5.0, the TOS in the AOL 5.0 installation is the governing agreement for purposes of the pending motion. As noted above, Cass and Mastroianni state that their computer modifications occurred before subscribers had an opportunity to agree to the new TOS, and they state that the reconfiguration would have occurred whether or not the subscriber agreed to the new TOS. Therefore, the fact that plaintiffs may have agreed to an earlier TOS or the fact that every AOL member enters into a form of TOS agreement does not persuade me that plaintiffs and other members of the class they seek to represent had notice of the forum selection clause in the new TOS before reconfiguration of their computers.

A second reason for denying the motion to dismiss is that plaintiffs seek to represent a class of Massachusetts residents, including those who may not be AOL subscribers. Public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars(4) should not have to pursue AOL in Virginia.

A third factor weighing against dismissal is the decision of the MDL Panel to transfer all federal cases raising similar claims against AOL to the state of Florida rather than Virginia. Thus, the forum selection clause is not being enforced in any federal case. AOL argues that it did not waive its right to seek enforcement of the forum selection clause by its conduct before the MDL Panel. However, AOL did not ultimately oppose transfer of the federal cases to Florida rather than Virginia. Such a posture may not necessarily mean AOL waived its right to seek enforcement of the forum selection provision, but it undercuts AOL's position here. If AOL can make its witnesses and documents available in Florida for every federal case, defending this action in Massachusetts should cause AOL no harm.

Defendant also urges dismissal of the complaint on forum non conveniens grounds. Massachusetts courts rarely grant dismissal for forum non conveniens. See Kearsage Metallurgical Corp. v. Peerless Ins. Co., 383 Mass. 162, 169 (1981). In a forum non conveniens determination, the court should not disturb a plaintiff's choice of forum unless the balance of public and private concerns clearly weighs in defendant's favor. See Green v. Manhattanville College, 40 Mass. App. Ct. 76, 79 (1996) quoting New Amsterdam Cas. Co. v. Estes, 353 Mass. 90, 95 (1967). That is not the case here. Plaintiffs reside in Massachusetts; their alleged

injuries occurred in the Commonwealth; the theory of liability is based on the Massachusetts Consumer Protection Act,(5) and AOL disseminates its software and has numerous contacts in this state. Thus, in my discretion, I deny the forum non conveniens motion.

ORDER

For the foregoing reasons, defendants' motion to dismiss the first amended complaint is **DENIED**.

Margaret R. Hinkle

Justice of the Superior Court

DATED: February , 2001

Footnotes

(1) Sandra Mastroianni, on behalf of themselves and others similarly situated. Plaintiffs seek class certification. No motion to certify has yet been filed.

(2) Courts throughout the country differ as to whether a motion to dismiss based on a forum selection clause is properly brought for lack of subject matter jurisdiction, lack of venue or failure to state a claim on which relief can be granted. See e.g., Jacobson v. Mailboxes, Etc. U.S.A., Inc., 419 Mass. 572, 576, n.6 (1995) ("Although the words ?venue' and ?jurisdiction' appear in the forum selection clause, this issue involves neither venue nor jurisdiction in the traditional sense.") The First Circuit follows the minority view, treating such motions under Rule 12(b)(6). See Lambert v. Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir.1993), citing LFC Lessors v. Pacific Sewer Maintenance Corp., 739 F. 2d 4, 7 (1st Cir. 1984). In this memorandum I make no ruling on this issue. In one respect I treat the pending motion as a Rule 12(b)(3) motion — despite my use of affidavits I do not convert the motion to one for summary judgment.

(3) The relevant pleading is the First Amended Complaint. In their most recent filing, a supplemental motion in opposition to AOL's motion to dismiss, plaintiffs state that they are moving to amend their complaint further to state only a claim under G.L. c. 93A, § 9. No such motion has been filed as of the date of this decision.

(4) Mastroianni states that she paid a computer consultant $130.00 to remedy the damage to her computer. (Aff. at ¶17).

(5) Nothing in the record suggests that Virginia would not enforce Chapter 93A.

*** *SLL* Home ***

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