

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AFFY TAPPLE, LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N18C-07-216 MMJ CCLD
)	
SHOPVISIBLE, LLC and)	
APTOS INC.,)	CONFIDENTIAL - FILED UNDER
)	SEAL
)	
Defendants.)	

Submitted: December 11, 2018

Decided: March 7, 2019

**Upon Defendants' Motion to Dismiss Plaintiff's Complaint
GRANTED IN PART
DENIED IN PART**

OPINION

Kevin M. Coen, Esq., Jarrett W. Horowitz, Esq., Morris, Nichols, Arsht, & Tunnell, LLP, Wilmington, DE; Jennifer A. Beckage, Esq. (Argued), Beckage, PLLC, Buffalo, NY, *Attorneys for Plaintiff*

John A. Sensing, Esq., Jennifer Penberthy Buckley, Esq., Potter, Anderson, & Corroon LLP, Wilmington, DE; James F. Bogan III, Esq. (Argued), Jeffrey H. Fisher, Esq., Kilpatrick, Townsend, & Stockton, LLP, Atlanta, GA, *Attorneys for Defendants*

JOHNSTON, J.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute arose in the aftermath of computer hacking. Plaintiff Affy Tapple, LLC (“Affy Tapple”) is a manufacturer of caramel apples and confection products that distributes its products nationally through multiple sales channels. Defendants ShopVisible, LLC (“ShopVisible”) and Aptos Inc. (“Aptos”) are e-commerce service providers that offer a software platform to manage clients’ customer information. Affy Tapple entered into a Master Services Agreement (“MSA”) with ShopVisible. In 2015, ShopVisible merged into Aptos.¹ Under the MSA, Aptos provided and maintained an e-commerce software platform (“Platform”) to manage all of Affy Tapple’s user data, including its customers’ information.

According to Aptos, on or about November 28, 2016, Aptos detected potential unauthorized access to the Platform by a third party. The Federal Bureau of Investigation (“FBI”) became involved. Aptos notified Affy Tapple of the incident the first business day after expiration of the FBI’s 60-day non-disclosure period following an investigation of the data breach. Aptos advised Affy Tapple

¹ In 2015, Epicor Software Corporation (“Epicor”) completed its acquisition of ShopVisible. Epicor’s retail solutions business separated and was formed into a new and separate entity that was renamed Aptos. As part of Epicor’s acquisition of ShopVisible and subsequent formation of Aptos, Aptos assumed ShopVisible’s contractual obligations, duties, and liabilities. Aptos also assumed responsibility for servicing ShopVisible’s customers.

that the unauthorized access to the Platform occurred from approximately February 2016 to December 2016.

Before entering into the MSA, Affy Tapple had sought an e-commerce service provider that could provide a high level of security to prevent data breaches. Affy Tapple required the provider to comply with applicable laws and regulations and industry standards for data security, including the Payment Card Industry Data Security Standards (“PCI DSS”). Aptos contractually committed to maintain a PCI Level 1 Certification – the highest level of certification. This certification required Aptos to protect data and the Platform against common coding vulnerabilities, such as “SQL injection.” It is undisputed that there was a lapse in this certification from December 1, 2016 through March 17, 2017.

The parties entered into the MSA on March 6, 2014. The MSA contains pertinent information regarding Affy Tapple’s need for an e-commerce vendor that specializes in data security. The MSA purports to reflect an understanding of this need and Aptos’ alleged promise to fulfill that need.

Aptos was informed in July 2017 of another round of unauthorized activity.

Affy Tapple filed its Complaint on July 26, 2018 alleging the following causes of action:

- I. Breach of Contract;
- II. Declaratory Judgment;

- III. Breach of Express Warranties;
- IV. Breach of Implied Warranty of Fitness for a Particular Purpose;
- V. Breach of Implied Warranty of Merchantability;
- VI. Breach of Implied Covenant of Good Faith and Fair Dealing;
- VII. Intentional Misrepresentations to Induce the Agreement;
- VIII. Intentional Misrepresentations After Entering into the Agreement;
- IX. Gross Negligence;
- X. Negligent Misrepresentations;
- XI. Unjust Enrichment; and
- XII. Illinois Consumer Fraud Act, 815 ILCS 505/2.

Aptos filed a Motion to Dismiss on September 14, 2018. Oral argument was heard on December 11, 2018.

MOTION TO DISMISS STANDARD

In a Rule 12(b)(6) motion to dismiss, the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”² The Court must accept as true all well-pleaded allegations.³

² *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

³ *Id.*

Every reasonable factual inference will be drawn in the non-moving party's favor.⁴ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.⁵

ANALYSIS

Affy Tapple argues that this is not a data breach case. Rather, Affy Tapple claims this is a "lemon" case, specifically that the Platform was a "lemon." Affy Tapple argues that Affy Tapple was damaged as a result of Aptos' misrepresentations about the quality of its service, and that Aptos was grossly negligent in failing to maintain the Platform as promised.

The MSA states: "ShopVisible shall comply with all applicable laws relating to User Data and the handling, security and transfer thereof. If ShopVisible has knowledge of any unauthorized disclosure of or access to Personal Data, ShopVisible shall promptly notify Client of such unauthorized disclosure or access."⁶ The MSA further provides that "ShopVisible will maintain annual PCI Level 1 Certification."⁷ Aptos also agreed to several warranties. Aptos promised to promptly repair and replace nonconforming elements of the Platform.⁸

⁴ *Wilmington Sav. Fund. Soc 'v, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del.2005)).

⁵ *Spence*, 396 A.2d at 968.

⁶ Master Services Agreement § 10.3.

⁷ Master Services Agreement § 6.4.

⁸ Master Services Agreement § 6.1.

Affy Tapple argues that it relied on Aptos' representation that any defect in the site's security system would be remedied to prevent any further issues. Affy Tapple claims that following the lapse in PCI Certification, Affy Tapple was induced to stay on the Platform. Affy Tapple contends that Aptos abandoned the Platform and failed to repair or replace the Platform.

COUNT VII – Intentional Misrepresentation/Fraudulent Inducement

Section 6.5 of the MSA states:

6.5. CLIENT UNDERSTANDS AND AGREES THAT THE LIMITED EXPRESS WARRANTIES SET FORTH IN THIS SECTION 6 ARE EXCLUSIVE, AND SHOPVISIBLE SPECIFICALLY DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SITE, SYSTEM, SHOPVISIBLE MATERIALS, ECOMMERCE SERVICES AND ANY OTHER TECHNOLOGY OR SERVICE PROVIDED HEREUNDER, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR TITLE. SHOPVISIBLE MAKES NO REPRESENTATION THAT THE OPERATION OF ANY OF THE FOREGOING WILL BE UNINTERRUPTED OR ERROR-FREE OR THAT ANY OF THEM WILL PROVIDE SPECIFIC RESULTS. SHOPVISIBLE DOES NOT WARRANT THAT ANY INTEGRATION WITH CLIENT'S AND, AS APPLICABLE, CLIENT'S PARTNERS' SYSTEMS, EVEN IF SUPPORTED BY SHOPVISIBLE, WILL BE COMPLETE, ACCURATE, OR ERROR-FREE. CLIENT FURTHER ACKNOWLEDGES THAT WITHOUT ITS AGREEMENT TO THE LIMITATIONS CONTAINED IN THIS AGREEMENT, INCLUDING SECTIONS 6 AND 12, THE FEES AND CHARGES CHARGED BY SHOPVISIBLE HEREUNDER WOULD BE HIGHER.

