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Order on Motion for Judgment on the Pleadings (DEBORAH EAVES)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEBORAH EAVES on behalf of herself and all others similarly situated	*	
Plaintiff,	*	
v.	*	Civil Action No. 2005-CV-97274 (Business Division 1—AB)
EARTHLINK, INC.	*	
Defendant.	*	

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

Counsel appeared before the Court on February 9, 2009, to present oral argument on Defendant's Motion for Judgment on the Pleadings. After reviewing the motions and briefs submitted on this matter, the arguments presented by counsel, and the pleadings in this case, the Court finds as follows:

Standard

A motion for judgment on the pleadings under O.C.G.A. § 9-11-12(c) requires that the Court take all well-pled material allegations by the non-movant as true. A motion for judgment on the pleadings shall be granted if the averments in the complaint "disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim." Cox v. Turner, 268 Ga. App. 305, 305 (2004) (citations omitted). In order to decide a motion for judgment on the pleadings, the Court may look to the pleadings, as well as to any other exhibits, such as agreements, attached to the complaint. Gold Creek SL, LLC v. City of Dawsonville, 290 Ga. App. 807, 809 (2008).

Facts

This class action suit involves claims regarding Defendant's practice of charging early termination fees ("ETFs") to consumers' on-file credit cards. Three subcategories exist within the Plaintiff Class: (1) those who have cancelled their EarthLink service and paid an ETF, (2) those who have cancelled their EarthLink service, but refused to pay an ETF, and (3) those subject to an ETF charge upon cancellation of services. Defendants bring this Motion for Judgment on the Pleadings with regard to the first identified subcategory of Plaintiffs, those who have cancelled their EarthLink services and paid an ETF.

Upon the initiation of services, the individual members of the Plaintiff Class and EarthLink entered into a Service Agreement, which was attached as Exhibit A to the Complaint.[1] The Service Agreement stated that cancellation of the service prior to the initial term of the agreement would result in a $149.95 charge.[2] Additionally, pursuant to the Service Agreement, customers agreed to keep a current credit card on file with EarthLink.[3]

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1. The Plaintiff Class does not dispute that the Service Agreement entered into between the individual members of the Plaintiff Class and EarthLink is substantially similar to the form attached as Exhibit A to the Complaint.

2. (4) Cancellation. "If you are dissatisfied with the Service or any related terms, conditions, rules, policies, guidelines, or practices, your sole remedy is to discontinue using the Service, cancel your account, and pay any cancellation fees that apply.... Cancellation of the Service by you before the initial term of the agreement ends will result in a $149.95 charge."

3. (6) Payment "You are responsible for any charges to your account....Charges are billed to your credit card or debit card, as applicable, each month for the Service and any additional usage or services. ... You agree to maintain valid and current credit card information on file with EarthLink at all times."

Voluntary Payment Doctrine

EarthLink moves for judgment on the pleadings fees pursuant to the *voluntary payment doctrine* on claims by members of the Plaintiff Class who have already paid the early termination fee. Pursuant to the voluntary payment doctrine, "[p]ayments of claims through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered." O.C.G.A. § 13-1-13. The Plaintiff Class, as the party seeking to recover payment, bears the burden of establishing that the voluntary payment doctrine does not apply. Telescripps Cable Co. v. Welsh, 247 Ga. App. 282 (2001).

Georgia has developed a robust body of case law pertaining to the voluntary payment doctrine. For example, in Telescripps, the Georgia Court of Appeals held that voluntary payment of a cable provider's late fee by subscribers who did not know that the late fee was an unenforceable penalty were made "under ignorance of the law" and thus not recoverable under the voluntary payment doctrine. Telescripps, 247 Ga. App. at 285. Additionally, in Liberty Nat. Life Ins. Co. v. Radiotherapy of Ga., 252 Ga. App. 543 (2001), the Georgia Court of Appeals held that the voluntary payment doctrine barred the recovery of excessive Medicare payments by the plaintiff insurance company because the Medicare rules were matters of public record and there was no evidence of fraud or misplaced confidence. While the situations of application may vary, the law is clear that "[w]hen money is paid with full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back..." Telescripps, 247 Ga. App. at 285.

The Plaintiff Class opposes the application of the voluntary payment doctrine in this case on the grounds that the manner in which the ETF was collected was deceptive and involuntary. The Plaintiff Class asserts that the ETF charges were not authorized to be automatically billed to the on-file credit cards because such fees do not qualify as "charges" or "additional services or usage" under the terms of the Service Agreement. The Court reads paragraphs 4 and 6 of the Services Agreement as unambiguously authorizing the ETF charge of $149.95 to be made to the on-file credit card. Thus, the Court finds that the ETF charges were made with prior knowledge by and authorization of the individual members of the Plaintiff Class.

Alternatively, the Plaintiff Class distinguishes this case from Telescripps and its predecessors based upon the automatic manner in which the ETFs were charged to customers arguing that it is deceptive and involuntary. Unlike previous forms of billing that required a bill to be sent to a customer who must then affirmatively act to pay the bill (*i.e.*, provide cash, write a check, provide a credit card number, etc.), the ETF was charged directly to the credit card on file. Therefore, there was no time for notice to or action by the customer during the time between when the ETF was billed by EarthLink and subsequently "paid" by the customers.[4]

The Plaintiff Class argues that if the voluntary payment doctrine is applied to bar recovery of automatic charges to on-file credit cards as presented in this case, then ***any*** fee concocted by EarthLink and charged to customers' credit cards would be

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4. Those members of the Plaintiff Class falling in the second subcategory, those who cancelled their service and refused to pay the ETF, had to take action after the charge appeared on their credit card bill (i.e., contacting the company, charging back the fee through their credit card, etc.).

unrecoverable. Such a case is not before the Court. Here, the Service Agreement specifically provided for the payment of an ETF as well as the requirement that a credit card be kept on file. While the exact terms of the service contract in this case are distinguishable from Telescripps, the principle enunciated in that case—that the voluntary payment doctrine applies to payments made with knowledge of the facts—is applicable to and binding on this case.

Accordingly, the Court finds that the claims of the members of the Class who paid an early termination fee are barred by the voluntary payment doctrine and hereby **GRANTS** Judgment on the Pleadings in favor of EarthLink on the claims of those Class members.

SO ORDERED this 18 day of Feb., 2009.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

David Worley, Esq.
Page Perry LLC
1040 Crown Pointe Parkway
Suite 1050
Atlanta, GA 30338
(770) 673-0047

Bruce V. Spiva, Esq.
Kathleen Hartnett, Esq.
Spiva & Hartnett LLP
1776 Massachusetts Avenue, N.W.
Suite 600
Washington, D.C. 20036

Steven N. Berk, Esq.
Chavez & Gertler, LLP
1225 15th Street, N.W.
Washington, D.C. 20005

David L. Balser, Esq.
Nathan L. Garroway, Esq.
Tracy Klinger, Esq.
McKenna Long & Aldridge LLP
303 Peachtree ST. NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4170
(404)527-4198 (fax)
dbalser@mckennalong.com