

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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ROBERT J. HARRIS, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICH

DIRECTV, a California corporation

Case No. 1:02cv0924

Plaintiff,

v.

KENNETH MCFADDEN,

Hon. Gordon J. Quist

Defendant.

Norman C. Ankers (P30533)
Bradley H. Darling (P63176)
Brigham Cook Smith (P63037)
Attorneys for Plaintiff
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226-3583
(313) 465-7346

Jon J. Schrotenboer (P34452)
Nelson, Kreuger & Schrotenboer, PC
Attorneys for Defendant
3310 Central Blvd.
Hudsonville, MI 49426
(616) 662-7280

**BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
PURSUANT TO RULE 56**

*** ORAL ARGUMENT REQUESTED ***

In its Complaint, Plaintiff alleged the Defendant possessed a device capable of decrypting Plaintiff's signal with the intent to use it illegally. Plaintiff also alleged the Defendant then used the device, or assisted others in using the device, to actually decrypt the Plaintiff's signal to avoid payment to the Plaintiff for his use of its signal. In order to prevail in this case, Plaintiff will have to prove the following elements of their claims:

First Claim: "Defendant received and assisted others in receiving DIRECTV'S satellite transmissions of television programming without authorization, in violation of 47 U.S.C. 605(a). (Paragraph 12, Plaintiff's Complaint)

Second Claim: "Defendant intentionally intercepted, endeavored to intercept or procured other persons to intercept or endeavor to intercept, DIRECTV'S satellite transmission of television programming, in violation of 18 U.S.C. 2511(1)(a)." (Paragraph 16, Plaintiff's Complaint)

Third Claim: "Defendant has used a Pirate Access Device to decrypt and view DIRECTV'S satellite transmission of television programming, with intent to avoid payment of the lawful charges therefore, by trick, artifice, deception, use of a device or decoder, and other fraudulent means, without authority from DIRECTV, in violation of 18 U.S.C. 2512(1)(b)." (Paragraph 20, Plaintiff's Complaint)

"Defendant has possessed Pirate Access Devices, with intent to avoid payment to DIRECTV of the lawful charges for its programming." (Paragraph 21, Plaintiff's Complaint)

Fourth Claim: "By importing, possessing and using Pirate Access Devices, Defendant has unlawfully converted to their own use and benefit property belonging to DIRECTV." (Paragraph 25, Plaintiff's Complaint)

In summary, in order to prevail on any of its claims in this case, Plaintiff must prove two essential elements. First, that Defendant Kenneth McFadden possessed a “Pirate Access Device” with the intent to decrypt and view Plaintiff’s signal to avoid payment of Plaintiff’s fees to view its signal. Second, that Defendant Kenneth McFadden actually used a Pirate Access Device to decrypt and view Plaintiff’s signal.

Plaintiff will not be able to meet its burden of proof as to the essential elements of any of its claims because there is no evidence to prove either of the essential elements. Therefore, there is no genuine issue of fact that Kenneth McFadden did not damage the Plaintiff in any way, and he is entitled to Judgment as a matter of law.

Standard for Summary Judgment

Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Further, when a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Finally, if the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(c)(e)

Facts/Argument

DIRECTV is a satellite television service that beams a coded signal to its subscribers. A customer can purchase a satellite receiver and an electronic “box” which decodes the satellite signal and displays it on the customer’s television screen. The type of programming a customer can watch is controlled by an “access card” in the “box” which determines which portion of the DIRECTV signal can be decoded. Of course, DIRECTV charges a premium for extra channels or for special events.

On or about April 23, 2000, Ken McFadden purchased an access card from a website called White Viper. Ken was under the impression that by purchasing the access card he would be able to use the microchip inside of the card to access and view charges placed on his personal credit card, as well as view and verify weekly work expense reports. However, when he received the device, there were no instructions included or any type of software explaining how the access card worked. At no time did Ken ever connect the device to the DIRECTV system, and at no time did Ken ever use the device to access any satellite television signal. (See Affidavit of Kenneth McFadden, attached Exhibit A)

As attested by the affidavit attached hereto, the Defendant did not purchase or possess the device with the requisite intent to defraud the Plaintiff, nor did he use the device to access the Plaintiff’s signal or any other signal or assist anyone else to do so.

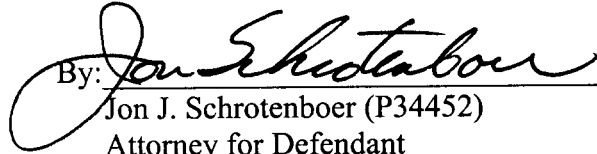
Because the Plaintiff cannot establish the essential elements of its case, as outlined above, there is no material fact in dispute with respect to the Plaintiff’s allegations of violation of law by the Defendant, and the Defendant is entitled to Judgment as a matter of law.

Respectfully Submitted,

Nelson, Kreuger & Schrotenboer, P.C.

Dated:

8/14/03

By: 
Jon J. Schrotenboer (P34452)
Attorney for Defendant