

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

FILED

MAR 17 2003

DIRECTV, INC., a California corporation,
Plaintiff,
Stephen Nicholson,
Defendants.

Case No.: 8 08-004218-PROPPES, CLERK
CHARLESTON, SC

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION PARTIAL
SUMMARY JUDGMENT**

TO: THE HONORABLE ROBERT S. CARR
United States Magistrate Judge

STATEMENT OF THE CASE

Plaintiff filed this action alleging damages and seeking relief against defendant for alleged violations of common law and numerous federal statutes. Plaintiff generally alleges defendant purchased an 'allegedly illegal device, and either intercepted or assisted others in illegally intercepting plaintiff's satellite transmissions. Plaintiff bases its entire complaint on a suspected purchase of a device which never ruled illegal¹ may be used to intercept a signal by an unscrupulous individual. Plaintiff's third cause of action requests relief based on alleged violations of 18 U.S.C. §2512(1)(b); a subsection of the Electronic Communications Privacy Act. Defendant now moves this Court for Partial Summary Judgment with regard to plaintiff's third cause of action relating to private causes of action under 18 U.S.C. §2512.

LAW AND ARGUMENT

Although Title 18 of the United States Code is generally considered the "criminal code,"

¹ Defense counsel cannot find any statute, case law, or any example of any governmental entity ruling the alleged devices *illegal per se*.

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a the portion known as the Electronic Communications Privacy Act permits limited civil action based on proved violations of the Act's express provisions. However, the entire Act does provide a private cause of action for the recovery of damages.

I. **A PRIVATE CAUSE OF ACTION UNDER 18 U.S.C.A. §2512 DOES NOT EXIST, THUS REQUIRING THIS COURT TO DISMISS PLAINTIFF'S THIRD CAUSE OF ACTION.**

The relevant portion of 18 U.S.C.A. §2512 (1) titled, **Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited**, which plaintiff asserts in its third claim states;

- (1) Except as otherwise specifically provided in this chapter, any person who intentionally --
- (b) manufactures, assembles, possesses, or sells any electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce;

shall be fined under this title or imprisoned not more than five years, or both.

The Fourth Circuit clearly prohibits plaintiff from asserting a civil cause of action against defendant under 18 U.S.C.A. § 2512. Flowers v. Tandy Corp. 773 F.2d 585 (4th Cir. 1985). Flowers, the Fourth Circuit Court of Appeals addressed this issue in an appeal from the South Carolina District. Id. The Flowers plaintiff alleged civil recovery, as set forth in 18 U.S.C.A. §2520 applied to violations of 18 U.S.C.A. §2512. Judge Matthew Perry agreed with the Flowers plaintiff and the Appellate Court reversed, clearly stating, "At the outset we hold that the district court erred in permitting the jury to consider the criminal statute, 18 U.S.C. §2512 as a basis for imposing civil liability." Id. at 588. In its analysis, the Court stated;

Looking first to the language of the statute, we find no merit in appellees' assertion that §2520 expressly provides a private cause of action for violations of the criminal proscriptions of §2512. Though §2520 provides an action for any person whose communication is "intercepted, disclosed or used *in violation of this chapter*," (emphasis added), the language defining the class of persons liable is not comparably broad. The statute expressly limits those against whom the private action lies to the person who "intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications." This language tracks very closely the criminal offenses set out in §2522, whereas the criminal offenses set out in §2511, whereas, the criminal offenses set out in §2512 are defined in such terms as "manufacture," "assemble," "possess," and "sell." *Id.*

The Flowers Court also rejected Appellants' pleas to imply the presence of a private cause of action under the provisions of §2512, stating

It is of course true that "provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages," . . . nevertheless, implied causes of action are disfavored and should be found only where a statute clearly indicates that the plaintiff is one of a class for whose benefit the statute was enacted and there is some indication that Congress intended such a cause of action to lie. . . . Congressional intent may be gleaned from the language of the statute, the legislative history, and the purpose and focus of the statute. (Citations only omitted)

We believe that neither criterion is satisfied in the statute in issue here. Though any criminal statute is in part enacted for the benefit of the victims of the crime, . . . §2512 appears to have been designed for benefitting the public as a whole by removing such devices from the market. Section 2511, which makes criminal the actual practice of wiretapping, is more properly aimed at protecting the particular victim, and indeed, Congress recognized that purpose by expressly providing in §2520 a private cause of action for victims of acts made criminal in §2511. (Citations only omitted). *Id.* at 589.

II. THE ELECTRONIC COMMUNICATIONS PRIVACY ACT DOES NOT SUPERCEDE THE FLOWERS HOLDING.

This Court should note portions of the Flowers case were superceded by amendments to

18 U.S.C. §2520. See Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir 2000). However, that amendment only dealt with the issue of whether or not a civil action could be maintained against one for procuring allegedly unlawful actions. The Fourth Circuit still follows the portion of Flowers which prohibits a private cause of action under §2512. The rationale clearly follows public policy and common sense. In order to suffer damage, (an integral component of any lawsuit), such damage only comes from unlawful interception. 18 U.S.C.A. §2511 covers unlawful interception and §2520 provides a means to recover for damages incurred through one's illegal interception.

18 U.S.C.A. §2512 addresses those who manufacture, assemble, possess, or sell unlawful devices. These actions do not create a direct economic damage to plaintiffs. Only when used do they create an economic damage which §2511 addresses. Under no circumstances may plaintiff gain a windfall by allowing double recovery for the actual theft and secondly for possession. Allowing a private cause of action under §2512 also opens the door for numerous plaintiffs to recover against a single defendant for possession of the same device which results in double, triple, etc. payment. Accordingly, the logic behind Flowers clearly follows public policy and common sense as the Court stated, "§2512 appears to have been designed for benefitting the public as a whole by removing such devices from the market. Section 2511, which makes criminal the actual practice of wiretapping, is more properly aimed at protecting the particular victim" Id. at 589.

Nothing in the language of the amendments added damages for violations of 18 U.S.C. § 2512, nor do the changes to § 2520 add damages to the provisions of § 2512. Furthermore, in 1998, since the enactment of the amendments, at least one Federal Court held;

claims must be for conduct which falls within the private right of action in § 2520. Section 2520 provides that any person whose wire, oral, or electronic communication is intercepted,

disclosed, or intentionally used in violation of the statute may recover in a civil action from the person or entity which engaged in that violation such relief as may be appropriate. 18 U.S.C. § 2520. Therefore, even if AGES showed that there is a material question of fact as to whether Wackenhut [Defendant] possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, AGES [Plaintiff] must also create a question of fact as to whether communications were intercepted, disclosed, or intentionally used. *See Flowers v. Tandy Corp.*, 773 F.2d 585 (4th Cir. 1985) (holding that the express language of § 2520 does not provide a cause of action for one who engages in conduct which is a violation of § 2512, but which is not violative of § 2511). In other words, a plaintiff does not have a private right of action against a defendant based on evidence that the defendant possessed surveillance equipment within the meaning of the statute.

The Ages Group, L.P., v. Raytheon Aircraft Co., Inc., et al., 22 F. Supp 2d 1310, 1315 (M.D.Ala 1998).

The Ages case clearly demonstrates that long after the amendments to the act, the courts still apply and follow Flowers. Accordingly, Ages shows that jurisdictions following the Flowers line of reasoning still find the holding by the Fourth Circuit valid despite any amendments to the Act. Id.

III. IN THE INSTANT CASE, PLAINTIFF LACKS STANDING TO BRING A PRIVATE CAUSE OF ACTION AGAINST DEFENDANT.

In the instant case, the law, public policy, and common sense clearly prohibit plaintiff from maintaining a private cause of action against defendant based on suspected violations of 18 U.S.C.A. §2512. That option and right rests solely with the South Carolina U.S. Attorney's Office, not DIRECTV, Inc.

In ruling on this matter, the Court must review the evidence in the light most favorable to the non-moving party. Although plaintiff did not and most likely cannot produce any scintilla of evidence indicating the following, for the purpose of this motion only, the Court

may assume;

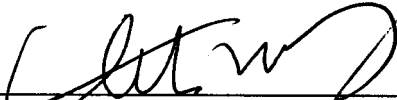
- 1) defendant manufactured, assembled, possessed, or sold devices;
- 2) the device(s) were unlawful; and
- 3) such actions violate §2512.

Assuming these facts, which goes well beyond the *most favorable light* standard, plaintiff may not recover on its 18 U.S.C. §2512 cause of action as a matter of law.

CONCLUSION

This Court must grant Summary judgement when no disputes of material facts exist and the moving party demonstrates its entitlement as a matter of law. For purposes of this motion only, defendant conceding plaintiff's most favorable facts removes any dispute of fact, thus entitling defendant to summary judgement. The black letter law of this Circuit clearly requires defendant receive summary judgment as a matter of law. Accordingly, this Court should grant defendant's Motion for Partial Summary Judgment on plaintiff's third cause of action.

Respectfully submitted,


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March 12, 2003.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

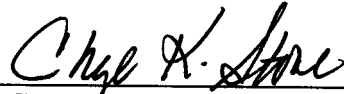
DIRECTV, INC., a California corporation,
Plaintiff,
vs.
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Defendants.

Case No.: 8 03 0042 18

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of DEFENDANT STEPHEN NICHOLSON NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT has been served on plaintiff by mailing a copy properly addressed with sufficient postage affixed thereto this 17 day of March, 2003, to:

Donald B. Clark, Esquire
Rosen, Goodstein & Hagood, LLC
PO Box 893
Charleston, SC 29402



CHERYL K. STONE