

Olive Branch Funding, LLC v J.G. Wentworth

2011 NY Slip Op 30986(U)

April 13, 2011

Supreme Court, New York County

Docket Number: 115491/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
HON. JUDITH J. GISCHE

DECEENT.

PART 10

Index Number : 115491/2010
OLIVE BRANCH FUNDING, LLC
vs
J.G. WENTWORTH
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

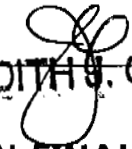
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APR 13 2011

Dated: _____


HON. JUDITH J. GISCHA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Olive Branch Funding, LLC,

Plaintiff (s),

-against-

J.G. Wentworth, a/k/a 321 Henderson
Receivables Origination, LLC, and JLL
Partners,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 115491/2010
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m w/ABM affid, exhs	1
Defs' opp w/SZ affirm, exhs	2
Pltf's reply	3

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff, Olive Branch Funding ("Olive Branch"), has asserted claims for defamation and tortious interference with prospective business against defendants, J.G. Wentworth ("JGW") and JLL Partners ("JLL")(collectively "defendants"). Defendants now move, pre-answer, to dismiss each of the causes of action asserted in the complaint. CPLR § 3211.

Facts Presented and Arguments Considered

Plaintiff and JGW are "factoring companies." Factoring companies purchase settlements and annuities with future payouts at a discount rate and in exchange, provide their clients with lump sum cash discounted for present value. Clients seeking these

services usually contact numerous factoring companies in an effort to obtain the best deal available. Defendant, JLL, is the parent company of JGW.

Plaintiff alleges that an unidentified employee of JWG contacted multiple potential clients of Olive Branch by telephone in an attempt to solicit their business. In the course of the conversation the unidentified JGW employee told the potential clients, "Olive Branch is a small company that does not have the money or resources needed to fund your case. They are not a direct funder." Plaintiff has chosen not to disclose the identity of the clients/potential clients in order to protect their privacy, but will do so at the court's request. Plaintiff asserts that Olive Branch is, in fact, a "direct funder," and that it is plainly stated on their website. As a result of JGW's interference, plaintiff alleges that Olive Branch has lost and continues to lose multiple clients, thereby incurring lost profits.

Plaintiff sets forth the following causes of action its complaint: (1) JGW's statements about Olive Branch were defamatory as they misled and defrauded potential clients of plaintiff; and (2) tortious interference with prospective business relations. Plaintiff seeks damages in an amount to be proven at trial in excess of \$1,000,000.

Discussion

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty

Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]).

Where the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994).

Parent Company Liability

Under New York law, a parent corporation is not liable for the acts of a subsidiary, unless it can be shown that the parent company exercises complete dominion and control over the subsidiary. Dempsey v. Intercontinental Hotel Corp., 126 A.D.2d 477, 478 (1st Dept. 1987); Serrano v. N.Y. Times Co., Inc. 19 A.D.3d 577 (2nd Dept. 2005). Olive Branch does not allege that JLL exercises complete dominion and control over JGW. Therefore, plaintiff has not established that JLL is liable for the actions of its subsidiary, JGW. The court dismisses all causes of action against JLL.

Defamation

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of slander are: (1) the statement was defamatory, meaning it had a tendency to expose plaintiff to public hatred, contempt, ridicule, or disgrace; (2) the statement referred to plaintiff; (3) defendant published or broadcasted the statement to someone other than the plaintiff; and (4) the statement was a substantial factor in causing plaintiff to suffer financial loss. Epifani v. Johnson, 65 A.D.3d 224 (2d Dept. 2009); Rufeh v. Schwartz, 50 A.D.3d 1002, 1003 (2d Dept. 2008).

A plaintiff does not need to prove special damages, if he or she can establish that the alleged defamatory statement constituted slander per se. Rufeh v. Schwartz, *supra* at 1003. Where, as here, the case alleges defamation of a business corporation, the law holds that a statement which impugns the basic integrity or creditworthiness of a business, injury is conclusively presumed. However, if the statement is confined to denigrating the quality of the business' goods or services, it could support an action for defamation, but will do so only if malice, special damages, and falsity are proven. See Hamlet Dev. Co. v. Venitt, 95 A.D.2d 798 (2nd Dept. 1983); Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 440 (1960).

The statements made by JGW's employee referred to the quality of Olive Branch's services and not to the integrity of the company. The statement that Olive Branch is "not a direct funder" implies that plaintiff's services will be of a lesser quality than a company that does direct funding. Direct funder means that the factoring company will work directly with banks, equity firms, or insurance companies to fund the client's transaction. Direct funders do not use a middleman, such as a broker, which means the clients receive more money from their lump sum. Therefore, Olive Branch is required to set forth facts supporting claims of malice, special damages, and falsity of the statement by defendants. Although providing plaintiff with the benefit of every inference and taking plaintiff's argument, that the statement is false, plaintiff has failed to show any facts that defendants made the statements with malice, they knew the statements were false or that plaintiff sustained damages. At best, plaintiff has only presented facts that defendants made these statements to show their own services were better and to gain a competitive advantage. The court finds that even affording the complaint a liberal construction,

plaintiff has not stated a claim for defamation. Therefore, the 1st cause of action is dismissed.

In any event, the complaint is bereft of allegations of special damages. Plaintiff's claim that it is trying to protect its clients' confidentiality is not a justification for failing in its pleading requirement. Moreover, there is no legal basis for the "confidentiality" it states, other than, perhaps, protecting its own customer lists.

Tortious Interference with Prospective Business Relations

Tortious interference with business relations is a distinct and separate claim from tortious interference with contract. It applies to those situations where a third party would have entered into, or extended a contractual relationship with plaintiff but for the wrongful and intentional acts of the defendant. Where, as here, the alleged interferer is a business competitor, then, unless wrongful means are employed, an interference that is intended to advance the competing interest of the interferer is not actionable. In order to constitute "wrongful means" the conduct by the competitor must: (1) amount to a crime or (2) constitute an independent tort or (3) be for the sole purpose of inflicting intentional harm on plaintiffs. Carvel Corp. v. Noonan, 3 NY3d 359 (2004); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88 (1st Dept. 2009).

The parties are competitors in a free market economy, and as such, a certain amount of aggressive business practices are expected. Both JGW and Olive Branch were in contact with the same potential clients and competed to attract the clients' business.

Plaintiff has failed to provide any facts establishing that the defendant interfered with business relations through "wrongful means." "Wrongful means" includes physical violence, fraud or misrepresentation, civil litigation, criminal prosecution and some degree of economic pressure. NBT Bancorp. Inc. v. Fleet/Norstar Fin. Group, Inc., 87 N.Y.2d

614, 497 (1996). Plaintiff alleges "wrongful means" by fraud or economic pressure; however, the court is not persuaded by plaintiff's argument that there was economic pressure by defendants simply because persons seeking these lump sum payments are often in economic distress. Applying this logic, then all factoring companies, including Olive Branch would be exerting economic pressure on prospective clients who contact them for services.

As for plaintiff's fraud claim, plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendants, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478 (2007). Plaintiff does not make any allegation of fraud in the complaint, rather plaintiff raises them for the first time in opposition to the motion to dismiss. Even so, the claims made in this motion are not sufficient to meet the specific requirement of fraud. CPLR § 3016. Plaintiff asserts that JGW's employee should or would have known that such statements were false because the information appears on Olive Branch's website. This not only assumes that JGW's employee had an obligation to visit Olive Branch's website, but that the employee did so and then deliberately misrepresented that information. There are absolutely no facts asserted to support this conclusion and the court is not persuaded that the statements made by JGW's employee constituted fraud.

Furthermore, JGW and Olive Branch each had an opportunity to sway or persuade the potential clients, who contacted them. The court finds no support in the complaint for plaintiff's claim that but for JGW's interference, plaintiff would have consummated a contract with any potential client in particular. Plaintiff also had the opportunity to

persuade the potential clients that it is capable of funding their cases and even possibly offering them a better deal.

Failure to identify the clients it lost in plaintiff's complaint is also a substantial defect in the pleading. Plaintiff cannot, on the one hand, claim it lost valuable business opportunities, but then refuse to identify who those opportunities were with. It is not up to the court to request this information.

After careful consideration, defendant's motion's for the pre-answer dismissal of this action must be and hereby is granted and this action is dismissed. Plaintiff has failed to state a cause of action even allowing the complaint a broad construction and accepting all plaintiff's facts as true.

Conclusion

In accordance with the foregoing:

It is hereby

ORDERED that clerk shall enter judgment in favor of defendants, J.G. Wentworth a/k/a 321 Henderson Receivables Origination, LLC and JLL Partners, against plaintiff, Olive Branch Funding, LLC, dismissing this action; and it is further


ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 13, 2011

So Ordered:

FILED



HON. JUDITH J. GISCHE, J.S.C.

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