

Interweb, Inc. v iPayment, Inc.
2004 NY Slip Op 30217(U)
March 1, 2004
Supreme Court, New York County
Docket Number:
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MERRAN CAHILL
Justice

PART 49

INTERWEB, INC.

INDEX NO. 601541/03

MOTION DATE 11/17/03

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

IPAYMENT, INC.

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 _____

PAPER NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR - 5 2004

NEW YORK COUNTY CLERK'S OFFICE

**MOTION IS GRANTED IN ACCORDANCE
WITH THE ABOVE ORDER AND
DECISION AND MOTION SEQUENCE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/1/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----x
INTERWEB, INC.,

Plaintiff,

-against-

iPAYMENT, INC.,

Defendant.

Index No
601541/03

FILED

MAR - 5 2004

NEW YORK
COUNTY CLERK'S OFFICE

Herman Cahn, J.:

Defendant moves to dismiss the complaint for failure to state a cause of action, CPLR 3211 (a)(7)

Plaintiff is in the business of selling gift items essentially for personal use, through its website "fortheoneilove.com." Affidavit of Geoff Lange, dated September 21, 2003, ¶ 3 Upon setting up the e-business, plaintiff contacted non-party Charge.com in order to set up an account to process its customers' credit card transactions. Charge.com sent plaintiff an application for a "Merchant Account," which account was to be provided by Humboldt Bank through iPayment Technologies, Inc. Id., ¶¶ 4-7. Plaintiff alleges it completed and signed the seven-page form, and returned it to Charge.com. Id., ¶ 7; see Exhibit A to Lange Aff. Plaintiff further asserts that, on or about March 5, 2003, its account was activated, and defendant began processing plaintiff's customers' credit card transactions on behalf of plaintiff's customers. Id., ¶¶ 15; see Exhibit E to Lange Aff.

By letter dated April 16, 2003, iPayment Inc. informed plaintiff that its account was terminated for "Excessive Declines." and because the nature of plaintiff's business posed a security risk. Exhibit F to Lange Aff. This action was then commenced.

The complaint contains claims for breach of an implied contract and tortious interference with prospective economic advantage. Specifically, plaintiff alleges that when it entered into the agreement with Humboldt Bank, by way of the "Merchant Application," it also entered into an implied contract with defendant relating to the processing of credit card transactions. Complaint, ¶ 4. It claims that a term of that implied contract was that defendant would at all times act "reasonably and in good faith." Complaint, ¶ 5. Plaintiff alleges that defendant terminated the implied contract without notice and without cause, with malicious intent, and with knowledge that the termination would cause harm and damage to Interweb. Id., ¶¶ 6, 8. The complaint asserts that the termination breached defendant's contractual obligation of good faith, and resulted in the termination of the contract between plaintiff and Humboldt Bank. Id., ¶¶ 7, 9.

Defendant seeks dismissal on several grounds. It contends that the complaint fails to allege mutual assent to a contract. Further, it urges that plaintiff fails to allege the nature of the breach. It maintains that the complaint fails to allege that the implied oral contract contained terms constraining defendant's ability to terminate the alleged agreement. If the claimed implied oral contract contained a termination-only-for-cause provision, defendant asserts that it is subject to the Statute of Frauds, which bars the claim here.

With respect to the tortious interference claim, defendant contends that there is no duty, independent of the contractual one, allegedly violated. Further, defendant asserts that plaintiff does not and cannot allege any wrongful means, or that defendant acted for the sole purpose of harming plaintiff.

In opposition, plaintiff asserts that its complaint sufficiently alleges that defendant intended to be bound by the contract, and, in fact, processed plaintiff's credit transactions. and.

thus. showed mutual assent. As to the nature of the breach, plaintiff contends that its allegations that defendant terminated the contract without justification are sufficient. It urges that the Statute of Frauds is no bar here, since it submits the Merchant Application as the written evidence of the contract. With respect to the tortious interference claim, plaintiff contends that the interference did not simply lie in defendant's breach of contract, but that the interference was with plaintiff's contract with Humboldt Bank.

In its reply, defendant submits what it contends is the complete written contract between plaintiff, as one party, and Humboldt Bank and iPayment Technologies, Inc., as representative of Humboldt, as the other party. Exhibit A to Affidavit of Richard W. Schubert, dated September 29, 2003. Defendant contends that the copy of the Merchant Application submitted by plaintiff was not a complete copy, and omitted the two pages, entitled Merchant Processing Agreement (MPA), which were referred to in the Merchant Application form. The MPA submitted by defendant contains a termination provision, in section 22, which provides that Humboldt Bank, which is represented by iPayment Technologies, Inc., "in addition to any rights of immediate termination without notice as may be contained elsewhere" in the MPA, may terminate for any reason or cause upon 30 days prior written notice to plaintiff. Exhibit A, § 22. The MPA gave plaintiff the same termination right, provided that it had paid or agreed to pay certain minimum discount and statement fees. Defendant points to the fact that the Merchant Application expressly references the MPA, and asserts that the Merchant Application constitutes a part of the MPA.

By letter to this court plaintiff sought to submit a sur-reply affidavit, asserting that the Merchant Application received and signed by plaintiff did not contain the two-page MPA. This

[* 5]

letter was accepted and considered in lieu of the sur-reply affidavit.

DISCUSSION

The motion to dismiss is granted, and the complaint is dismissed. Taking the allegations of the complaint, and the affidavit in opposition, as true, and giving plaintiff the benefit of every favorable inference, the facts as alleged do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83 (1994).

With respect to the claim for breach of the implied duty of good faith, the allegations are insufficient to state such a claim. First, plaintiff fails to allege that the implied oral agreement was for a specific duration, and thus, it was terminable at will. A contract that is terminable at will is not subject to the covenant of good faith and fair dealing. See Lake Eric Distributors, Inc. v Martlet Importing Co., 221 AD2d 954 (4th Dept 1995). The covenant of good faith cannot imply an obligation, such as termination-only-for-cause, which would be inconsistent with other terms of the contractual relationship. Id. at 956, citing Murphy v American Home Prods. Corp., 58 NY2d 293 (1983). To the extent that plaintiff argues that by terminating the agreement without cause, defendant was depriving it of the right to receive the benefits of the agreement, the argument is rejected. Following plaintiff's line of argument, all contracts would contain a termination-only-for-cause provision, imposed by the duty of good faith, since terminating would deprive the non-terminating party of the contract benefits. This result would be inconsistent with the terms of many contracts, including the one plaintiff alleges here. In addition, while plaintiff also alleges that the implied contract was terminated without notice, annexed as an exhibit to its opposition affidavit, plaintiff submits a copy of the April 16, 2003 letter from defendant giving plaintiff notice of termination.

To the extent that plaintiffs claim is for breach of an alleged oral agreement not to terminate the oral credit processing agreement without cause, that claim is barred by the Statute of Frauds. NY General Obligations Law § 5-701 (a)(1) (GOL). GOL § 5-701 (a) (1) provides that an agreement that is not to be performed within one year must be evidenced by some writing, subscribed by the party to be charged. The complaint pleads that there is no written agreement. In addition, according to plaintiff, the credit processing agreement could not be terminated by defendant unless plaintiff failed to perform satisfactorily. Where an oral agreement calls for performance of an indefinite duration, and could only be terminated within one year by its breach during that period, it falls within the Statute of Frauds, and is void. D & N Boeing, Inc. v Kirsch Beverages, Inc., 63 NY2d 449 (1984). While in its opposition plaintiff submits the Merchant Application, and several letters from iPayment Inc., as writings evidencing the parties' agreement, these writings do not contain all of the essential terms of the purported agreement, including the duration of the agreement, and, thus, are insufficient. See Lake Erie Distributors, Inc. v Martlet Importing Co., *supra* at 957.

In view of the above, even giving plaintiff the benefit of the inference that the MPA was not part of its agreement with defendant, it has no viable claim for breach of contract.

Plaintiffs tortious interference claim fails for several reasons. First, plaintiff fails to allege the breach of a legal duty independent of the alleged contract between the parties. Channel Master Corp. v Aluminum Ltd. Sales, Inc., 4 NY2d 403, 408 (1958); S & S Hotel Ventures Ltd. Partnership v 777 S.I.Com., 108 AD2d 351 (1st Dept 1985). Second, plaintiff fails to allege any duration with respect to the contract with Humboldt Bank. Thus, it is presumed to be terminable at will. See Rutecki v S.H. Gow & Co., 289 AD2d 1066 (4th Dept 2001); Lerman v Medical

Assocs. of Woodhull, P.C., 160 AD2d 838 (2d Dept 1990). "Agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts." American Preferred Prescription, Inc. v Health Mgt., Inc., 252 AD2d 414, 417 (1st Dept 1998), citing Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, 191-92 (1980). Where only prospective contractual rights have been interfered with, the plaintiff must show more culpable conduct. NBT Bancorp, Inc. v Flect/Norstar Fin. Group, Inc., 87 NY2d 614, 621 (1996). Thus, it must allege that the interference was accomplished by "wrongful means," consisting of fraud, misrepresentation, physical violence, civil suits, criminal prosecutions or some degree of economic pressure, "but more than simple persuasion is required," (Snyder v Sony Music Entertainment, Inc., 252 AD2d 294, 299-300 [1st Dept 1999], citing Guard-Life Corp. v S. Parker Hardware Mfg. Corp., supra at 191), or that defendant acted for the sole purpose of harming the plaintiff. Id. Bare allegations of malice are insufficient to state a claim where they are contradicted by the plaintiff's claims that defendant's actions were financially motivated. Ruha v Guior, 277 AD2d 116 (1st Dept 2000).

Here, plaintiff fails to meet these pleading requirements. The complaint is devoid of any allegations that defendant employed such "wrongful means," or that defendant was acting solely to hurt plaintiff. Defendant's April 16, 2003 letter, submitted by plaintiff, shows that defendant's actions were financially motivated. Therefore, the tortious interference claim fails to state a claim.

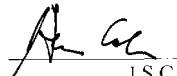
Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February , 2004
March 1

ENTER:



J.S.C.

FILED
MAR - 5 2004
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