

Mehmet v A-1 Technology, Inc.
2006 NY Slip Op 30786(U)
March 10, 2006
Supreme Court, New York County
Docket Number: 110478/05
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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BADISSE DAVID MEHMET,

Plaintiff,

-against-

A-1 TECHNOLOGY, INC.,

Defendant.

-----X

HON. LOUIS B. YORK, J.S.C.:

Index No.: 110478/05
DECISION/ORDER

FILED
MAR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

In this breach of contract action, defendant moves to dismiss the complaint, and plaintiff cross-moves to dismiss defendant's counterclaims and for injunctive relief (motion sequence number 001). For the following reasons, the motion and the cross motion are both denied.

BACKGROUND

Plaintiff Badisse David Mehmet is a New Jersey resident who is engaged in the business of computer programming (Mehmet). See Notice of Motion, Exhibit A (complaint), ¶ 1. Defendant A-1 Technology, Inc. is a New York State corporation that also engages in the business of computer programming (A-1). Id., ¶ 2. In this action, the dispute between the parties centers around a computer program that Mehmet designed and created for use by attorneys and their support personnel in connection with case management and settlement management duties. Mehmet hoped to develop his prototype computer program into formats that could be sold commercially. On December 29, 2003, Mehmet and A-1 executed a "Services Agreement," under the terms of which A-1 was to develop Mehmet's prototype computer program into both web-based and stand-alone software formats (the contract). Id., ¶ 4; Exhibit A-1. The relevant portions of the contract provide as follows:

5. Confidentiality: Ownership of Information. ...

a. Definition. ... Confidential information shall consist of, for example, and not intending to be inclusive, ... (b) information concerning any matters relating to the business of [A-1] or [Mehmet], or any of the Properties of their customers, prospective customers, customer contacts, licenses, the price they obtain or have obtained for its products and services, or any other information concerning the business of [A-1], [Mehmet], or any or all Properties, and [A-1]'s, the Properties or [Mehmet]'s good will.

b. No Disclosure. During the Term and at all times thereafter, each party shall not disclose or use in any manner, directly or indirectly, and shall use its best efforts and shall take all reasonable precautions to prevent the disclosure of any such Confidential Information, without express prior written consent of a duly authorized officer or director of the other party.

6. Remedies: Injunction. In the event of a breach or threatened breach by either party of any of the provisions of this Agreement, the parties agree that the non-breaching party, in addition to and not in limitation of any other rights, remedies or damages available to the non-breaching party at law or in equity, shall be entitled to a permanent injunction without the necessity of proving actual monetary loss in order to prevent or restrain any such breach by the breaching party... . It is expressly understood between the parties that this injunctive relief or other equitable relief shall not be the non-breaching party's exclusive remedy for any breach of this Agreement, and the non-breaching party shall be entitled to seek any other relief or remedy which it may have by contract, statute, law or otherwise for any breach hereof.

7. Arbitration. The parties agree that all disputes or questions arising in connection with this agreement and/or the termination of [A-1]'s arrangement hereunder shall be settled by a single arbitrator pursuant to the rules of the American Arbitration Association in the city of New York, N.Y. and the award (not to exceed Consultant insured limits) of the arbitrator shall be final and enforceable in a court of competent jurisdiction; provided, however, notwithstanding the foregoing, in no event shall any dispute, claim or disagreement arising under this Agreement that requires injunctive or other equitable relief be required to be submitted to arbitration pursuant to this provision or otherwise.

See Notice of Motion, Exhibit A-1 (contract), at 2, 3.

Mehmet claims that A-1 breached the contract by delivering a defective web-based version of his program and by failing altogether to deliver a stand-alone software version of the

program. See Notice of Motion, Exhibit A (complaint), ¶¶ 5-6. A-1 denies this and responds that, as a result of his dissatisfaction, Mehmet improperly began contacting A-1's current and prospective clients and warning them not to use A-1's services. Id., Exhibit B (answer), ¶¶ 22-36.

Mehmet commenced this action on June 13, 2005. Id., Exhibit A (complaint). The complaint sets forth causes of action for: 1) breach of the contract; 2) negligence; and 3) breach of the contract's non-disclosure provision. Id., ¶¶ 4-32. Mehmet's complaint also requests preliminary and permanent injunctions ordering A-1 not to reveal any of Mehmet's business secrets; specifically, the operating codes of his computer program (for which he has a patent application pending with the U.S. Patent and Trademark Office). Id., ¶¶ 33-34.

On June 28, 2005, A-1 commenced another action in this court naming Mehmet and two other parties as defendants, which the court will refer to as "the second action."¹ See Notice of Cross Motion, Exhibit A. A-1's supplemental summons and complaint sets forth causes of action for: 1) defamation per se; 2) defamation; and 3) tortious interference with prospective business relations. Id., ¶¶ 25-43. Neither Mehmet nor the other two named defendants has filed an answer in the second action.

A-1 served its answer in this action on August 5, 2005. See Notice of Motion, Exhibit B (answer). The answer sets forth counterclaims for: 1) a declaratory judgment; 2) defamation per

¹ The second action bears a lower Index Number (10703/05) than this action does (i.e., 110478/05), which would indicate that the second action was actually filed first. However, the fact that the date on the supplemental summons and complaint in the second action (i.e., June 28, 2005) fell after the date on the complaint in this action (i.e., June 13, 2005) would indicate that this action was commenced first. The matter is unclear. In any event, issue was joined in this action, but not in the second action.

se; 3) defamation; and 4) tortious interference with prospective business relations. Id., ¶¶ 14-58. A-1's answer also requests temporary and permanent injunctions ordering Mehmet not to contact any of A-1's current or prospective clients or to publish any "false defamatory statements" about A-1. Id. at 8. Both parties now move to dismiss each other's claims.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). Pursuant to CPLR 3211 (a) (1), however, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. Scott v Bell Atl. Corp., 282 AD2d 180, 183 (1st Dept 2001) affd as mod Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 (2002), citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 (1st Dept 1994).

Here, A-1 argues that the complaint must be dismissed because Mehmet's causes of action are all barred by documentary evidence - namely, the arbitration provision in paragraph 7 of the contract. See Notice of Motion, Singh Affidavit, ¶¶ 5-6. Mehmet responds that A-1's motion should be denied because paragraph 6 of the contract specifically permits both parties to

seek injunctive relief from the courts of this state. See Notice of Cross Motion, Mehmet Affidavit, ¶ 2. The court notes that neither party submitted a memorandum of law to support its respective arguments. In any event, both of those arguments are incomplete.

In the first place, it is clear that paragraph 7 of the contract requires the parties to arbitrate any legal claims that they may have against each other. Indeed, the courts of this state routinely enforce arbitration provisions in commercial contracts. See e.g. Matter of Curtis, Mallet-Prevost, Colt & Mosle, LLP v Garza-Morales, 308 AD2d 261 (1st Dept 2003). However, the courts of this state also hold that, where a party commences an action that asserts claims that are subject to an arbitration provision, the correct procedure is to stay the action and compel arbitration, not to dismiss the complaint. See e.g. Ogoe v New York Hosp., 99 AD2d 968 (1st Dept 1984); Merrill Lynch, Pierce, Fenner & Smith Inc. v Griesenbeck, 28 AD2d 99 (1st Dept) affd 21 NY2d 688 (1967). Here, neither party has moved to compel the arbitration of their claims, pursuant to CPLR 7503. Nevertheless, the court strongly urges the parties to submit their applications for such relief quickly. However, for the reasons stated above, the court will not dismiss either the complaint or the counterclaims at this juncture, and denies the portions of A-1's motion and Mehmet's cross motion that seek such relief.

In the second place, it is clear that paragraph 6 of the contract specifically permits the parties to submit claims for equitable injunctive relief to this court. Because both parties have done so, the court may and will review their respective claims. The court also notes in passing that, even if paragraph 6 were not part of the contract, CPLR 7502 (c) specifically permits the court to entertain applications for provisional remedies even in cases where the legal claims are subject to arbitration. Therefore, the court also denies the portions of A-1's motion and

Mehmet's cross motion that seek dismissal of each others' equitable claims as barred by documentary evidence.

Mehmet also seeks dismissal of A-1's counterclaims pursuant to CPLR 3211 (a) (4), on the ground that A-1 has asserted those same claims as causes of action in the second action. See Notice of Cross Motion, Mehmet Affidavit, ¶ 4. CPLR 3211 (a) (4) permits dismissal of a complaint where "there is another action pending between the same parties for the same cause of action in a court of any state of the United States" However, the courts will decline to grant such relief where the parties have abandoned the other action by behaving in a manner that demonstrates that they did not "treat the prior proceeding as a viable action which they intended to further pursue." Broder v Broder, 91 AD2d 302, 306 (1st Dept), affd 59 NY2d 858 (1983). Here, as the court previously observed, it is possible that the second action was filed before this action. However, as the court also observed, issue was never joined in the second action, and it appears that A-1 has not moved for the entry of a default judgment. Instead, A-1 chose to file an answer in this action that asserts the same claims that it raised in the second action - and one new one² - in the form of counterclaims. This behavior indicates that A-1 preferred to pursue its rights in this action instead of in the second action. Accordingly, the court deems that the parties have abandoned the second action, and therefore denies the portion of Mehmet's cross motion that seeks dismissal of A-1's counterclaims in this action pursuant to CPLR 3211 (a) (4).

Finally, Mehmet also moves for a preliminary injunction against A-1, pursuant to CPLR 6311 and paragraph 6 of the contract. See Notice of Cross Motion, Mehmet Affidavit, ¶¶ 5-8.

² In this action, A-1 also requests a declaratory judgment limiting the amount of prospective damages that it may or may not owe to Mehmet pursuant to the terms of the contract. A-1 did not request this relief in the second action.

“To prevail in a motion for preliminary injunction, the party seeking injunctive relief must demonstrate a likelihood of success on the merits, that it will suffer irreparable injury if the relief is not granted, and that the equities balance in its favor.” Pultz v Economakis, 8 Misc 3d 1022(A), *3 (Sup Ct, NY County 2005), citing W.T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981).

The Appellate Division, First Department, has additionally observed that “[a] preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits.” Wall St. Garage Parking Corp. v New York Stock Exch., Inc., 10 AD3d 223, 226 (1st Dept 2004), quoting Residential Bd. of Mgrs. of Columbia Condominium v Alden, 178 AD2d 121, 122 (1st Dept 1991); see also Ryan v McLean, 209 AD2d 913, 914 (3d Dept 1994) (“since a permanent injunction is a final judgment, it normally may be granted only after trial”). Here, of course, the merits of Mehmet’s claims will be determined by arbitration. Nonetheless, in connection with his cross motion, Mehmet argues: 1) that A-1 breached the non-disclosure provision of the contract by posting information on the internet about the computer program that he is in the process of developing and patenting; 2) that this activity will harm his pending patent application; and 3) that A-1 has engaged in this improper activity solely in order to attract customers to itself by advertising projects that it has worked on. See Notice of Cross Motion, Mehmet Affidavit, ¶¶ 7-8. The court notes that A-1 has submitted no opposition to Mehmet’s cross motion. However, the court finds that Mehmet has not presented sufficient evidence to merit the entry of a preliminary injunction at this time.

As previously noted, the clear terms of paragraph 5 of the contract forbid either party

from disclosing “confidential information” about the other. See Notice of Motion, Exhibit A-1 (contract) at 2. That provision also clearly defines the term “confidential information” to include “information concerning any matters relating to the business” of either party. Id. To support his cross motion, Mehmet also presents a copy of an internet search result of the records of the U.S. Copyright office that indicates that he has copyrighted the computer program that he is seeking to patent. See Notice of Cross Motion, Exhibit B. From the foregoing, the court finds that Mehmet has adequately demonstrated the merits of his claim that A-1 breached the non-disclosure provision of the contract, but that his proof of the other two prerequisite elements for the entry of a preliminary injunction is insufficient. First, he has not demonstrated irreparable harm, because he has not presented any evidence to support his statement that A-1 posted the code for his computer program on the internet. His copyright search does not constitute such proof. Mehmet has also not sufficiently explained his claim that A-1’s actions will so prejudice the U.S. Patent and Trademark Office against him as to jeopardize his patent. Finally, he has not demonstrated how the equities of this case balance in his favor. Although the court might credit his allegations that A-1 acted improperly by representing to prospective clients that it had performed complete and satisfactory work on Mehmet’s computer program, it must also credit the evidence of improper activity on Mehmet’s part that A-1 presents, in the form of the letters that Mehmet has sent to A-1’s current (and prospective) clients that warn them not to use A-1’s services. See Notice of Motion, Exhibit B-1, B-2. It would be reasonable to conclude from this that both parties have “unclean hands.” In any event, because Mehmet’s proof fails under the standards that apply to CPLR 6311, the court denies the portion of his motion that seeks a preliminary injunction. This denial is without prejudice to Mehmet’s right to renew his application upon

proper supporting evidence, however. Taken by themselves, the pleadings indicate that evidence may well exist that would bear out Mehmet's request for injunctive relief. Should he present such evidence and proper supporting legal argument, the court will review his application anew. The court also notes that it appears equally likely from the pleadings that A-1 might prevail on a request for a preliminary injunction against Mehmet. However, because CPLR 6311 only permits the court to enter a preliminary injunction on notice to the affected party, the court may not now grant A-1 such relief sua sponte. The court can only urge the parties to submit their applications and their supporting evidence, in correct form, with all due speed.

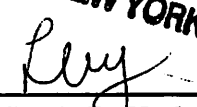
DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendant A-1 Technology, Inc. is in all respects denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211 and 6311, of plaintiff Badisse David Mehmet is denied with leave to renew within 20 days of the service of a copy of this decision with notice of entry.

Dated: New York, New York
 March 10, 2006

FILED
 MAR 17 2006
 COUNTY CLERK'S OFFICE
 ENTER: NEW YORK

 Hon. Louis B. York, J.S.C.

LOUIS B. YORK
 J.S.C.