

Total Communications Group, Inc. v Attea
2007 NY Slip Op 30301(U)
March 9, 2007
Supreme Court, New York County
Docket Number: 0603689
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
Justice

TOTAL COMMUNICATIONS GROUP
PLAINTIFF

INDEX NO. #603689-2005

MOTION DATE _____

- v -

ATTEA, THOMAS

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

DEFENDANT

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

PAPERS NUMBERED

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MAR 13 2007
JAS MOTION

Dated: 3/9/07

B. J. Fried
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

M. J. P.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X

TOTAL COMMUNICATIONS GROUP, INC

INDEX NO.:
603689-2005

Plaintiff,

-against-

THOMAS ATTEA, VIRGINIA STROMBERG
AS TESTATRIX FOR THE ESTATE OF HANK
STROMBERG and LEAPFROG ADVERTISING

Defendants.

-----X

THOMAS ATTEA, VIRGINIA STROMBERG
AS TESTATRIX FOR THE ESTATE OF HANK
STROMBERG and LEAPFROG ADVERTISING

Third-Party Plaintiffs,

THIRD-PARTY
INDEX NO.:

590025-2006

-against-

GERALD WOLFF,

Third-Party Defendant

FILED

MAR 15 2007

NEW YORK
COUNTY CLERK'S OFFICE

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FRIED, J.:

On October 18, 2005, Plaintiff, Total Communications Group, Inc. ("Total"), a media buyer, filed a complaint against Defendants, Leapfrog Advertising ("Leapfrog"), Thomas Attea ("Attea") and Hank Stromberg ("Stromberg") (an

advertising agency and its partners, collectively, “Defendants”), alleging one cause of action: that Defendants breached an agreement with Plaintiff to pay for advertising placed and purchased by Total for Leapfrog and its customers (Complaint ¶¶17-18).

Total alleges that, beginning in 2002, and over a period of approximately four years, it placed and paid for in excess of \$6,650,000.00 in advertising for Defendants and for Leapfrog’s clients. Total further contends that Defendants fully collected payment from the clients, but only made partial payment to Total and allegedly owe Total over \$560,000.00 (Compl. ¶¶19-21).

Defendants served an Answer on or about December of 2005 and asserted seven counterclaims on behalf of Leapfrog.

The first counterclaim, a breach of contract claim, alleges events giving rise to the other six counterclaims and asserts that the “Plaintiff agreed to pay Defendant Leapfrog a media-buying fee (“Finder’s Fee”) for the introduction and securing of each new account.” (Answer ¶¶ 31-34). Defendants also contend that this agreement provided that the Finder’s Fee would be 10% of the first year’s media billing and 5% of the second year’s media billing on each new account introduced and retained. (*Id.*). Additionally, Defendants claim that “payment of such a Finder’s Fee is standard practice in the advertising industry.” (*Id.*).

The second and third counterclaims allege fraud related to Plaintiff’s failure to pay the Finder’s Fee. (*Id.* at ¶¶ 35-44). The fourth counterclaim asserts breach of the obligation of the duty to deal fairly and in good faith in connection with the Finder’s Fee. (*Id.* at ¶¶ 45-47). The fifth counterclaim charges civil conspiracy. (*Id.*

at 48-52). The sixth counterclaim contends that Plaintiff's action constitutes "unlawful harassment of the Defendants." (*Id.* at ¶¶ 53-55). Finally, the seventh counterclaim adds a RICO charge. (*Id.* at ¶¶ 56-62).

On January 5, 2006, Attea, Stromberg, and Leapfrog (collectively "Defendants") brought a Third-Party Complaint against Third-Party Defendant Gerald Wolff ("Wolff"), the chief executive officer and principal shareholder of Total. This Third-Party Complaint annexes Defendants' Answer and Counterclaim and re-alleges every allegation set forth in their Answer and Counterclaims against Third-Party Defendant. It further asserted, that a total unity of interest existed between Wolff and Total, that Wolff completely dominated and controlled Total, and that Total was a "mere instrumentality" of Wolff, used to "perpetuate its wrongful acts against the Defendant-Third-Party Plaintiffs." (Third-Party. Compl. at ¶4-5). Defendants' Third-Party Complaint, repeats the counterclaims alleged in the Answer, asserting that the acts of Total, under Wolff's control, constitute fraud and that Total, under Wolff's control, breached its agreement with Plaintiff. (Third Party Compl. at ¶¶ 6-9).

Plaintiff seeks summary judgment, dismissing Defendants' counterclaims. Defendants have cross-moved (1) to dismiss Total's Complaint as against Attea and Stromberg and (2) to deny Plaintiff's motion for summary judgment in its entirety. At oral argument, on October 12, 2006, I denied Defendants' cross-motion to dismiss, having determined that Plaintiff's complaint was sufficient on its face. (Tr. p. 36). Additionally, I dismissed each of Defendants' counterclaims except for

Defendants' second and third counterclaims for fraud, as to which I reserved decision. I now turn to these remaining counterclaims.

In their second counterclaim, Defendants allege: (1) that representations were made by Total and Wolff in order to induce Defendant Leapfrog to enter into multiple agreements with Total with the knowledge that Total would "properly" purchase and negotiate for media advertising; (2) that Defendant Leapfrog relied upon said representations when it agreed to enter said agreements; and (3) that the representations by Total and Wolff were false and fraudulent when first made and were known by them to be false and fraudulent in that, at that time, Wolff had no intention of "properly invoicing" the costs of Total's services and/or media purchases to which Leapfrog was entitled, to the benefit of Total, and to the detriment of Defendant Leapfrog

In their third counterclaim, Defendants allege: (1) That Total, as represented by Wolff, did significantly inflate the cost of media on a regular basis to Defendant Leapfrog and Defendants' clients in order to defraud them of funds delivered to Total for media planning and buying; (2) that Total's significant misrepresentation of the costs of such media, through the acts of Wolff, have prevented Defendants' clients from purchasing sufficient media to achieve their stated advertising goals; and, (3) that the over-billing created a significant loss of business income from prior and current clients of Leapfrog and that Total's refusal to fulfill the obligations for which it has been paid by Leapfrog irreparably damaged Leapfrog's reputation in the advertising industry.

With regard to each counterclaim, Defendants repeat and re-allege all prior allegations in their Answer and also claim that Defendant Leapfrog was damaged in an amount of compensatory damages not yet determinable, but to be ascertained at trial, plus the sum of \$500,000.00 in punitive damages.

Total argues that these counterclaims should be dismissed for two reasons. First, Total contends that the Statute of Frauds bars the second and third counterclaim, because each stems from Defendants' first unsupported counterclaim for breach of contract and simply attempts to allege the contract claim in a different form (Plaintiff's M.O.L.) Second, Total argues that these counterclaims must be dismissed for the additional reason that Plaintiff has failed to specifically plead the facts relating to the alleged fraud with particularity, as required by CPLR §3016(b).

Defendants did not respond to Plaintiff's Statute of Frauds argument, either in their cross-motion or by submitting opposition papers; thus, the second and third counterclaims could be dismissed for this reason alone. For this reason, and because neither the second nor the third counterclaim is stated with particularity, I need not discuss whether these counterclaims duplicate Defendants' contract claim and are thereby barred under the Statute of Frauds.

Even if either or both of Defendants' fraud-based counterclaims are not barred by the Statute of Frauds, these counterclaims do not satisfy the particularity requirement of §3016(b), which mandates that, when a party pleads fraud, "the circumstances constituting the wrong shall be stated in detail." This has been construed to mean that, while §3016(b) does not necessitate dismissal of "an

otherwise valid cause of action in situations where it may be impossible to state in detail the circumstance constituting a fraud,” the complaint must set forth the misconduct complained of in sufficient detail to “clearly inform a defendant with respect to the incidents complained of.” (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780 [1977]).

Defendants’ second counterclaim is incomprehensible as written. Furthermore, while some of the language in this sparsely stated counterclaim hints that Defendants may have been attempting to allege fraudulent inducement, Defendants’ attorney identified the second counterclaim at oral argument as a fraud claim. (Tr. p. 16-17; Answer ¶36). In either case, Defendants’ attorney admitted at oral argument that particularized allegations of falsity were not delineated as to the second counterclaim. Consequently, this claim is dismissed.

Similarly Defendants do not identify a specific cause of action in their third counterclaim. At oral argument, Defendants’ attorney described the counterclaim as one for fraudulent misrepresentation. He admitted that this counterclaim was not stated with particularity in the pleadings, but submitted the affidavit of Attea, Vice-President of Defendant Leapfrog Advertising, and argued that the Attea affidavit contained the required particularity.

To state a claim for fraudulent misrepresentation, a party must allege, with particularity, that: (1) the opposing party made a material false representation, (2) the opposing party intended to defraud the claimant thereby, (3) the claimant reasonably relied on the misrepresentation, and (4) the [plaintiff] suffered damage as a result of

its reliance. (*Swersky v. Dreyer and Traub* 219 A.D.2d 321, 326 [1st Dept. 1996]).

When Defendants' third counterclaim is read alongside the Attea affidavit, it appears that Defendants' may be able to state a claim for fraudulent misrepresentation. However, neither Defendants' Answer nor their cross-motion sets forth the elements of this claim with sufficient particularity to survive a motion to dismiss.

First, Defendants do not specify on which allegedly false representation this counterclaim is based. Defendants' mention in their counterclaim that Wolff significantly inflated the cost of media on a regular basis to Leapfrog and Leapfrog's clients in order to defraud them of funds delivered to Plaintiff for media planning and buying. (Answer ¶41). This statement, alone, does not clearly identify the misrepresentation at issue or provide adequate detail to satisfy the §3016(b) particularity requirement.

In their Memorandum of Law, Defendants also state that invoices sent from Total to Leapfrog misrepresented the actual cost of advertising purchased. Specifically, they cite an invoice for Dade Media, Inc. as one example of over-billing and argue that Total invoiced Leapfrog anywhere from \$23,500.00 to \$24,500.00 for advertising that actually cost \$13,500.00. (Def. M.O.L.). Again, however, it is unclear which of the misrepresentations alleged, including many concerning the contract cause of action, Defendants' intend as the basis of their counterclaim for fraudulent misrepresentation.

Moreover, the third element of a fraudulent misrepresentation cause of action,

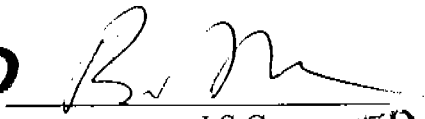
reasonable reliance, is also absent in the third counterclaim. The closest Defendants' come to alleging this element with particularity is to incorporate the earlier portion of the Answer, in which reliance is mentioned at ¶37 of the second counterclaim. As with the element of material misrepresentation, if one looks to the Attea affidavit, it appears from the facts and allegations asserted therein, that Defendant may be able to allege this element with particularity, despite the fact that is not so pled in Defendants' Answer or clarified in the Memorandum of Law in support of their cross-motion.

While Defendants' third counterclaim is, for the most part, pled in vague and conclusory language, which clearly fails to allege fraudulent misrepresentation with the particularity required by §3016(b), it is possible to glean a complete cause of action when this counterclaim is considered alongside the Attea affidavit. Nevertheless, Defendants' have not stated a comprehensible cause of action in their pleadings, and, for this reason, Defendant's third counterclaim is dismissed. Defendants, if so advised, may seek leave to replead.

Accordingly, the remaining portion of Plaintiff and Third-Party Defendant's motion for summary judgment dismissing Defendants' second and third counterclaims, is GRANTED.

Dated: 3/9/07

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