

CVT Prepaid Solutions, Inc. v Kare Distribution, Inc.
2007 NY Slip Op 34364(U)
July 2, 2007
Supreme Court, New York County
Docket Number: 0112918/2007
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JUDITH J. GISCHÉ**
J.S.C.

PART _____

Index Number : 112918/2007

CVT PREPAID SOLUTIONS

VS.

KARE DISTRIBUTION

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

Justice

INDEX NO. 112918-07

MOTION DATE #001

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ 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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

JUL 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/2/08

HON. JUDITH J. GISCHÉ
J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate

☐ DO NOT POST

☐ REFERENCE

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

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

-----X
CVT PREPAID SOLUTIONS, INC.,

Plaintiff,

- against -

KARE DISTRIBUTION, INC., CREATIVE
CALLING CARDS, INC., CREATIVE
CALLING CARDS OF TEXAS, LP,
SEAN MCBRIDE, DENISE MCBRIDE, and
JASON MCBRIDE,

Defendants.
-----X

Decision/Order

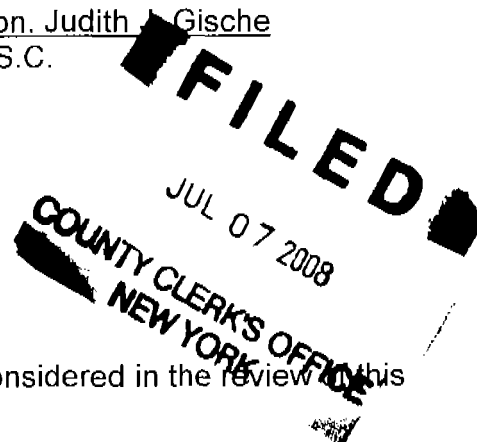
Index No. 112918/07

Seq. No. : 001

Present:

Hon. Judith A. 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

Def Kare pre-answer motion [dismiss] w/DS affirm in support, exhs	1
Def Creative Calling Cards, Inc and McBrides LC affirm	2
Pltf's LC affirm in opp	3

-----X

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

In this action to recover damages for, *inter alia*, breach of contract, defendant Kare Distribution, Inc. ("Kare") brings this pre-answer motion, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the Complaint against it. Defendants Creative Calling Cards Inc. ("Creative"), Sean McBride, Denise McBride and Jason McBride (hereinafter jointly referred to as the "McBride Defendants") also ask the court in their submitted papers to issue an order dismissing plaintiff's complaint with prejudice, pursuant to CPLR 3211 (a) (1) and (7). However, Creative and the McBride Defendants have failed to comply with CPLR 2215, which requires a cross-moving party to serve an explicit "notice of cross-motion" (see Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept

2001]; Guggenheim v. Guggenheim, 109 AD2d 1012 [3d Dept 1985]). The McBride defendants have merely submitted the affidavit of Robert G. Leino, Esq., wherein these defendants request dismissal of plaintiff's complaint. Nonetheless, inasmuch as these arguments were raised early in the life of this motion sequence, and have been refuted at length by plaintiff in an additional memorandum of law, and because resolution of the issues raised herein at this stage of the proceedings may well serve to avoid future motion practice, Creative and the McBride Defendants requested relief will be addressed herein (Guggenheim, *supra*).

The court also acknowledges that neither the movant nor the cross-movants have provided copies of the pleadings in this action, including the summons and complaint. However, plaintiff has not raised any objection. Since the court has a sufficiently complete record, which includes copies of the summons and complaint, defendant Jason McBride's answer and the answer by defendants' Creative, Sean McBride and Denise McBride, all of which are contained in the County Clerk's file in this action, the court will address the merits of the motion and cross-motion.¹

Relevant facts and arguments of the parties

Plaintiff, CVT Prepaid Solutions, Inc. ("CVT"), commenced this action seeking to recover damages from defendants for breach of contract, fraud, and tortious interference with a business relationship arising out of CVT's business relationship with defendants Creative and Creative Calling Cards of Texas, LP ("Creative of Texas").

CVT manufactures prepaid calling cards, which it sells to distributors, pursuant to oral agreements. Creative and Creative of Texas reportedly agreed to market and

¹ Notwithstanding that Creative and the McBride Defendants have joined issue, the relief they seek and thus the relief considered is pursuant to CPLR § 3211.

promote CVT prepaid calling cards in Arizona, Nevada, and Texas.

CVT claims that prior to July 2007, Creative was making weekly purchases of prepaid calling cards worth approximately \$180,000 in revenue to CVT. CVT further asserts, however, that beginning on July 6, 2007, Creative stopped activating its prepaid calling cards and declined to pay it approximately \$259,243 for the prepaid calling cards it had already activated and resold, as well as approximately two million inactive prepaid calling cards. CVT asserts that Creative and Kare conspired to force its prepaid calling cards out of the market by pressuring retail outlets not to sell its products.

Kare is a direct competitor of CVT, engaged in the manufacture and sale of prepaid phone cards. There is a factual dispute about the exact nature of the relationship between Kare and Creative. CVT alleges that "Creative is either (a) a wholly owned subsidiary of Kare Distribution; or (b) is a division of Kare Distribution." These claims are based on a press release dated July 23, 2007 (the "Press Release"), wherein Sean McBride, an alleged former owner of Creative and Creative of Texas and now allegedly employed by Kare, writes:

... there have been many rumors spreading throughout the Valley in regards to the status of our company. From going bankrupt, to selling out. With that said, the TRUTH of what is happening is that, Creative Calling Cards, Inc., is merging with Kare Distribution (The makers of Digame) in order to better serve Arizona. This union is beneficial for many reasons. Creative brings their expertise in customer service and route management, and KARE provides the BEST PRODUCTS IN THE WORLD.

On the other hand, Kare maintains it did not purchase Creative, but rather, on April 23, 2007, Creative entered into a written agreement to market and promote Kare prepaid phone cards in Arizona, Nevada, Washington, and Oregon (the "Kare/Creative

Agreement"). Kare has provided a copy of the Kare/Creative Agreement. Paragraph

19.1.2 of the Kare/Creative Agreement states, in part:

The relationship of Kare and [Creative] established by this Agreement is that of independent contractors, and nothing contained in this Agreement shall be construed to (i) give either party the power to direct and control the activities of the other, (ii) constitute the Parties as partners, joint venturers, co-owners or otherwise as participants in a joint undertaking, or (iii) allow either party to create or assume any obligation on behalf of the other party for any purpose whatsoever. Each party is solely responsible for all of its employees and agents and its labor costs and expenses arising in connection therewith

Creative of Texas is an Arizona limited partnership, also engaged in the business of advertising and distributing prepaid calling cards, and is allegedly a wholly owned subsidiary of Kare.² The McBride Defendants were allegedly the owners of Creative and Creative of Texas and are allegedly currently employed by Kare.

CVT commenced this action seeking to recover damages from defendants for their role in allegedly harming its competitive position in favor of Kare. CVT seeks to hold Kare and the other defendants liable as successors-in-interest of Creative's contractual obligations.

The Complaint alleges causes of action for breach of contract against Creative and Creative of Texas (first and second causes of action, respectively); breach of contract against Kare (third cause of action); fraudulent inducement against all defendants (fourth cause of action); tortious interference with contractual relations against Kare (fifth cause of action); an account stated against Creative and Creative of Texas (sixth and seventh causes of action, respectively); and unjust enrichment against Creative and Creative of

² Based on the record before the court, it is unclear whether the summons and complaint have been served on Creative of Texas. In any event, Creative of Texas has not appeared in this action.

Texas (eighth and ninth causes of action, respectively).

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (*see* Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Under CPLR § 3211 (a) (1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law” (Leon, *supra*). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

The court will first address Kare’s motion to dismiss.

Breach of contract

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages (*see* Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]). Here, however, the Complaint fails to allege any facts to

establish the existence of a valid and enforceable agreement between CVT and Kare.

The court rejects plaintiff's contention that "[i]n light of [the Announcement]... [Kare] has either acquired and/or assumed the liabilities of Creative" because this claim is refuted by documentary evidence in the form of the written agreement between Kare and Creative. A written agreement that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms (Greenfield v. Phillies Records, 98 NY2d 562 [2002]; Van Kipnis v. Van Kipnis, 840 NYS2d 36 [1st Dept 2007]). The Kare/Creative Agreement unequivocally establishes that Kare has no contractual obligation to Creative. The loose language of the Press Release is not a document that establishes the legal relationship between Kare and Creative. CVT has not alleged any facts which otherwise support its contention that Kare is a successor-in-interest to Creative. Based upon documentary evidence, the third cause of action for breach of contract against Kare is hereby severed and dismissed.

Fraudulent inducement

Similarly, CVT's attempt to hold Kare liable for fraudulent inducement as a successor-in-interest to Creative must also fail. Moreover, constituting separate grounds for dismissal, this cause of action as framed against Kare does not allege the necessary elements of representation of a material existing fact, falsity, scienter, justifiable reliance, and damages with the requisite specificity(CPLR 3016[b]; see Raytheon Co. v. AES Red Oak, LLC, 37 AD3d at 365; Brown v. Wolf Group Integrated Communications, Ltd., 23 AD3d 239 [1st Dept 2005]). Thus, the fourth cause of action for fraudulent inducement against Kare is hereby severed and dismissed.

Tortious interference with contract

However, CVT has sufficiently stated a claim for tortious interference with contract against Kare to survive the instant motion. The essential elements of a cause of action for tortious interference with contract are: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional procurement of the third-party's breach of that contract, without justification, and (4) damages (see Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883, 884 [1st Dept 1982]).

Kare's assertion that the Kare/Creative Agreement conclusively establishes that Kare did not intentionally interfere with Creative's contract with CVT is unavailing.

Paragraph 14.1.4 of the Kare/Creative Agreement states that:

[Creative] has not entered into any agreements in writing with any other telecommunications provider or that [Creative] by entering into this Agreement is not violating any other agreements or covenants of any kind with any other party.

Paragraph 14.1.4. does not constitute documentary evidence of Kare's knowledge of Creative's obligations to CVT, but rather, refers to representations made by Creative at the time of execution of the Kare/Creative Agreement. In any event, Kare cannot look to the terms of a contract as conclusive evidence of its own knowledge so as to defend against allegations by CVT, a non-party to that contract, of tortious interference with CVT's contract with Creative; this is simply not outcome determinative at this juncture.

Accordingly, Kare's motion to dismiss is granted only to the extent that the third cause of action for breach of contract and the fourth cause of action for fraudulent inducement against Kare are hereby dismissed. Kare's motion is otherwise denied.

The cross-motion to dismiss

The cross-motion by Creative and the McBride Defendants, pursuant to CPLR § 3211 (a) (1), must fail because there is no documentary evidence submitted in support (see generally Blonder & Co., Inc. v. Citibank, N.A., 28 AD3d 180 [1st Dept 2006]). The cross-movants may not rely on an attorney's affirmation, as "documentary evidence" to support a motion to dismiss pursuant to CPLR § 3211 (a) (1) (see Demas v. 325 West End Ave. Corp., 127 AD2d 476 [1st Dept 1987]).

Further, the cross-motion pursuant to CPLR § 3211 (a) (7) fails as well. Although on a dispositive motion pursuant to CPLR § 3212 or at trial, the burden will be on the plaintiff to prove its claims, plaintiff's burden now is far easier, which is to present facts that state a cause of action against Creative and/or the McBride Defendants. Argo Corp. v. Greater New York Mutual Insurance Company, 4 NY3d 332 (2005). Plaintiff has easily met its burden because, at this stage, the facts alleged are afforded every favorable inference. EBC I, Inc v Goldman, Sachs & Co., *supra*.

Breach of contract against Creative

CVT has alleged that it entered into several oral contracts with Creative, whereby CVT granted Creative "the exclusive right to sell specific CVT [calling] cards in [Creative's] designated market", and in exchange, Creative was obligated to pay CVT the cost of the cards, less Creative's marketing expenses, subject to CVT's approval. CVT alleges that Creative breached the alleged oral contracts by when it failed to pay CVT for the costs of the cards and when Creative deducted more than the approved marketing allowances from CVT's invoices. These allegations sufficiently state a cause of action for breach of contract (see Furia, *supra*).

Account stated against Creative

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 AD2d 868 (3d Dept. 1993), *lv. denied* 82 NY2d 660 (1993). CVT alleges that it sent and delivered invoices to Creative for calling cards, showing \$259,243 as the total amount due and owing from Creative. CVT further maintains that Creative has not disputed the invoices, yet has failed to make payments due to CVT thereon. Based on these allegations, plaintiff has sufficiently pled its sixth cause of action for account stated.

Unjust enrichment against Creative

Alternatively, CVT has asserted a cause of action against Creative sounding in unjust enrichment. If plaintiff does not prevail on its legal claims, plaintiff may nonetheless prevail on a quasi-contractual claim sounding in unjust enrichment, since there is a dispute as to whether a valid and enforceable contract between Creative and CVT exists, by which CVT sold the calling cards to Creative. Clark-Fitzpatrick v. L.I.R.R., 70 NY2d 382 (1987).

Fraudulent inducement against Creative and the McBride Defendants

CVT's fraudulent inducement cause of action is not "merely a legal conclusion lacking in substantive facts" as the cross-movants contend. CVT alleges that Creative, "via Sean McBride, Denise McBride and Jason McBride, made multiple and various representations to CVT regarding the efforts they intended to make in order to sell, market, and promote CVT calling cards in the retail market." CVT states that these representations were made "with the intention of inducing CVT to reduce the amounts due pursuant to card invoices by approving and underwriting discounts and incentives to Creative." CVT alleges that these representations were "false and misleading", and that it

detrimentally relied on these representations. CVT claims that but for Creative and the McBride Defendants false representations, "CVT would not have provided the marketing allowances and other investments requested by [Creative and the McBride Defendants]." CVT seeks its compensatory damages resulting from "the amounts paid by CVT for marketing and promotion efforts for the cards that were to be distributed by [Creative]." Thus, CVT has made a *prima facie* showing of fraudulent inducement by Creative, and by the McBride Defendants on behalf of Creative (see National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 257 AD2d 228 [1st Dept 1999]).

Accordingly, the cross-motion is denied in its entirety.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant Kare's motion to dismiss the complaint is granted only to the extent that the third cause of action for breach of contract and the fourth cause of action for fraudulent inducement against Kare are hereby severed and dismissed; and it is further

ORDERED that Kare's motion is otherwise denied; and it is further

ORDERED that the cross-motion by Creative and the McBride Defendants is hereby denied in its entirety; and it is further

ORDERED that Kare shall answer the complaint within 10 days hereof. Plaintiff's reply, if any, shall be as per the CPLR; and it is further

ORDERED that there be a preliminary conference in this action on July 31, 2008 at Part 10 at 80 Centre Street, Room 122.

The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 2, 2008

So Ordered:


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

