

Hillside Van Lines, Inc. v TMP Directional Mktg.
2008 NY Slip Op 30924(U)
March 12, 2008
Supreme Court, Suffolk County
Docket Number: 0009864/2007
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 46 SUFFOLK COUNTY

PRESENT: Hon. Emily Pines

MOTION DATE: 6-25-07, 6-25-07
SUBMITTED: 8-22-07, 8-22-07
MOTION NO.: 003-Mot D
004-Mot D

HILLSIDE VAN LINES, INC.,

Plaintiff,

-against-

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Attorney for Plaintiff
39 Doyle Court
East Northport, New York 11731

TMP DIRECTIONAL MARKETING, IDEARC MEDIA
CORP., VERIZON DIRECTORIES CORP., and
VERIZON COMMUNICATIONS INC.,

Defendants.

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Upon the following papers numbered 1 to 18 read on these motions to Dismiss; Notice of Motion and supporting papers 1-6; Answering Affidavits and supporting papers 7-9; Replying Affidavits and supporting papers 10; Notice Motion and supporting papers 11-14; Answering Affidavits and supporting papers 15-17; Replying Affidavits and supporting papers 18; it is.

ORDERED that the motion by defendant, Idearc Media Corp. (“Idearc”) to dismiss the complaint against it is granted as to the First, Second and Fourth causes of action and is denied as to the remaining causes of action; and it is further

ORDERED that the motion by defendant, TMP Directional Marketing (“TMP”) to dismiss the complaint is granted as to the First and Second causes of action and is denied as to the remaining causes of action.

This case arises out of a business relationship between the parties. Plaintiff, Hillside Van Lines, Inc. (“Hillside”) contracted with TMP to obtain advertising space in Verizon Yellow pages. TMP acted as an intermediary between Hillside and Verizon.¹ It is alleged in the complaint

¹ Note, Verizon Yellow Pages is the name of the publication, however, the publisher of this book is Idearc.

that although TMP contracted to obtain the best possible price for Hillside's advertising, Hillside was grossly overcharged for a period of seven years. The complaint sets forth four causes of action against the defendants: the First alleging fraudulent misrepresentation, the Second asserting interference with contract negotiations; the Third claiming conspiracy to interfere with contract negotiations and the Fourth for breach of contract. The complaint does not identify the defendants against which each cause of action is brought, but instead, names both defendants.

In its motion to dismiss, Idearc argues that the First cause of action for fraudulent misrepresentation is not specifically plead and is duplicative of the Fourth cause of action for breach of contract. In addition, Idearc argues that the Second and Third causes of action are not adequately plead. Finally, Idearc argues that the Fourth cause of action is based on the written agreement between TMP and Hillside and since Idearc is not a party to any such agreement, this cause of action cannot be maintained against it. TMP in its motion to dismiss raises similar arguments and seeks dismissal of all causes of action against it.

Hillside claims that it relied on TMP's representation that TMP was selling services to Hillside for a discounted rate and that the rates provided by TMP were lower than any price offered to others advertising with Idearc. Hillside asserts that despite this representation, it was being charged far more than other similar companies for similar advertising space. In addition, Hillside claims that it directly contacted a local office of Idearc and was quoted a price significantly less than it was being charged by TMP. Subsequently, Hillside attempted to cancel its contract with TMP and contract directly with the local office of Idearc. However, it is alleged in the complaint that TMP and the national office of Idearc interfered with this contract and prevented Hillside from obtaining advertising at a much lower price.

Hillside's affidavit in opposition further argues that the National office of Idearc and TMP acted together, to prevent the local Idearc sales representatives from selling advertising to Hillside at a much lower cost. Hillside claims that although not specifically alleged in the complaint, the actions of Idearc and TMP set forth a cause of action for an intentional tort which prevented Hillside from obtaining more competitive advertising prices. Frank Pollicano, the advertising director of Hillside makes reference to e-mails and letters allegedly sent pursuant to the directions of Idearc and TMP. These documents purport to terminate Hillside's advertising with Idearc pursuant to the National office procedures and indicates pricing for advertising. Mr. Pollicano contends that after the cancellation notices were sent, TMP and Idearc interfered with the local sales representative preventing Hillside from entering into the contract with the local office. Hillside alleges that as a result, it was denied the benefit of the reduced advertising prices, was prevented fair and free competition and suffered damages.

Hillside contends that the complaint is sufficiently plead and that the fraudulent misrepresentation claim is not duplicative of the breach of contract claim. It argues that the breach of contract specifically claims that TMP failed to procure advertising for Hillside at a discounted rate as required under the contract. Hillside argues that the fraud claim is based on the defendants' attempt to "stymie fair competition". The affidavits in opposition make specific reference to periods of time in which the defendants allegedly conspired to fix prices in the market and allegedly prevented plaintiff from obtaining advertising services directly from Idearc's local office.

Hillside argues that the complaint should not be dismissed against either defendant.

MOTION TO DISMISS

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83, 87-88; *Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634). In assessing a motion under CPLR 3211(a)(7), the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see, Leon v Martinez*, *supra* at 88; *Rovello v Orofino Realty Co.*, *supra* at 635). The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see, Leon v Martinez*, *supra* at 88; *Guggenheimer v Ginzburg*, *supra* at 275; *Rovello v Orofino Realty Co.*, *supra* at 636).

FRAUD

When alleging fraud, a plaintiff must demonstrate: (1) that the defendant made material representations that were false or concealed a material fact which defendant should have disclosed, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations. (*see, Brannigan v. Board of Education of Levittown Union Free School District*, 18 AD3d 787). Moreover, the plaintiffs must state the circumstances constituting the fraud or mistake in detail. **CPLR 3016 [b]**.

In this case, the Court finds that Hillside has failed to adequately plead fraud as to defendant Idearc. The complaint fails to allege reliance by Hillside to any representations made by Idearc and therefore the First cause of action against Idearc must fail. As to defendant, TMP, the Court finds that although Hillside has sufficiently plead a fraudulent misrepresentation claim against TMP, these allegations form the very basis for the breach of contract claim; i.e. that the advertising was being sold at a discounted price. Courts have held that where a fraud claim is based upon the very same facts that give rise to a breach of contract claim, the fraud claim should be dismissed as duplicative (*see, Rivas v Amerimed Usa, Inc.* 34 AD3d 250). Therefore the Court dismisses the First Cause of action in its entirety.

TORTIOUS INTERFERENCE WITH CONTRACT

Although not specifically labeled as such, reading the allegations of the Second cause of action, along with the Affidavit submitted in opposition to the motions to dismiss, Hillside appears to be alleging in its Second cause of action a claim for tortious interference with contract. The tort of interference with contract requires the existence of an actual contract between the Plaintiff and a third party (*see, Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413). In

addition, a party who has allegedly breached the contract involved in the lawsuit cannot be held liable for tortious interference with contract by reason of that particular party's breach (*see, Werner v Katal Country Club*, 234 AD2d 659). This is the law even where the plaintiff alleges that the defendant has conspired with others to cause the breach (*see, Associated Coals Sales Corp. v Hughs*, 64 AD2d 562) Therefore, Hillside's Second cause of action, which, as explained in the Affidavit in opposition to the motions, results from TMP's and Idearc's conspiracy to prevent Hillside from obtaining lower cost advertising services from the local branch of Idearc, must fail. Hillside had no contract with Idearc and TMP was the entity with which Hillside was in contract. The Second cause of action, to the extent that it purports to state a cause of action for tortious interference with contract, is dismissed as against both defendants.

THIRD CAUSE OF ACTION - INTENTIONAL TORT/CONSPIRACY

The Third cause of action appears to allege several theories under which Hillside seeks recovery. The first, tortious interference with business relations, or what is generally a tort of interference with "prospective advantage" has several elements. These elements include 1) the defendant's knowledge of the proposed contract between the plaintiff and the other party; 2) the defendant's intentional interference with the proposed contract; 3) an allegation that the proposed contract would have been entered into absent the defendant's interference; 4) the defendant's interference by wrongful means and 5) the plaintiff's injuries as a result (*see, Guard-Life Corp. v S. Parker Hardware Manufacturing Corp*, 50 NY 2d 183; *Herlihy v Metropolitan Museum of Art* 214 AD2d 250; *Carvel Corp v Noonan*, 3 NY3d 182). Taking Hillside's complaint and the Affidavit in opposition to the dismissal motions together, Hillside does state such a cause of action against TMP for the tort of interference with prospective business advantage to the extent that it alleges that when learning of Hillside's attempt to negotiate a lower price for its advertising with the local office of Idearc, TMP conspired with national Idearc to prevent the contract from coming to fruition, to the financial detriment of Hillside. However, this cannot be alleged against Idearc, as it was the very party with whom Hillside sought the prospective advantage.

The second theory under which Hillside seeks recovery in this cause of action sounds in civil conspiracy. However, in New York there exists no cause of action for the substantive tort of conspiracy (*see, Vogt v Witmeyer* 212 AD2d 1013) To the extent that Hillside, in its affidavit in opposition to the motions, states that the two defendants engaged in a price fixing scheme, such acts are generally prohibited under General Business law §340(1), otherwise known as the Donnelly Act. However, a Donnelly Act violation requires that plaintiff allege injury to competition in the market place in general and not merely an adverse affect upon the plaintiff itself (*see, Benjamin of Forest Hills Realty Inc. v Austin Sheppard Realty, Inc.*, 34 AD3d 91). Based on the above, neither the tort of civil conspiracy nor that of Donnelly Act violations is set forth in what has been presented thus far to the Court.

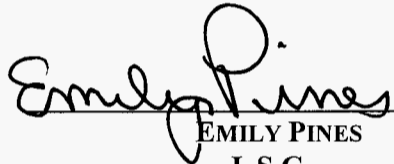
The plaintiff in its affidavit in opposition argues that the defendants are liable for an intentional tort. A prima facie tort has been defined as the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful (*see, Belsky v Lowenthal* 62 AD2d 319).

Taken together, Hillside's allegations do set forth a cause of action against both defendants for prima facie tort as described above. Hillside asserts that Idearc and TMP acted in concert to prevent Hillside from obtaining a lower priced advertising contract, available to other entities, without excuse or justification, by a series of acts which do not fall within any other cognizable tort. At the pleading stage, reading such allegations in a liberal manner, the Court will permit to remain a cause of action against both named defendants in prima facie tort. In sum, based on the above, Hillside, at the pleading stage has set forth a cause of action against TMP for tortious interference with business advantage and against both defendants for prima facie tort.

The Fourth cause of action sounds in breach of contract. The elements of a cause of action for breach of contract are 1) formation of the contract; 2) performance by plaintiff; 3) defendant's failure to perform and 4) resulting damage (see, **Furia v Furia** 116 AD2d 694). At this stage in the litigation, Hillside states such a cause of action against TMP. Hillside claims that in or about January 2000, Hillside and TMP (on behalf of Verizon, now Idearc) entered into a written agreement to provide advertising space in Verizon's Yellow Pages at a discounted price. Hillside alleges to have learned that such was not the case and that it is entitled to damages representing the difference between what it paid and what was promised. However, Hillside has failed to allege a contract with Idearc. Therefore, Hillside cannot maintain this cause of action against Idearc and it is therefore dismissed as to Idearc only.

The defendants shall have thirty days to respond to the complaint in accordance with the terms of this decision. After such time counsel shall appear for a preliminary conference to be scheduled by the Court.

DATED: March 12, 2008


EMILY PINES
J. S.C.