

Culver & Theisen, Inc. v Citysights, LLC

2009 NY Slip Op 31728(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 600406/08

Judge: Eileen Bransten

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

PRESENT: **MON. EILEEN BRANSTEN**

PART 3

Index Number : 600406/2008

CULVER & THEISEN, INC.

vs

CITYSIGHTS, LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. 600406/08
 MOTION DATE 4/28/09
 MOTION SEQ. NO. 01
 MOTION CAL. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 7-16-09

Eileen Bransten
J.S.C.

MON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 3

CULVER & THEISEN, INC,

Plaintiff,

-against-

Index No.: 600406/08

Motion Date: 4/28/09

Motion Seq. No.: 001

CITYSIGHTS, LLC, VECTOR MEDIA, LLC,
VECTOR MEDIA 2, LLC and VECTOR MEDIA
STREET FURNITURE, LLC,

Defendants.

BRANSTEN, J.

In this action for breach of contract, tortious interference with contract, and tortious interference with a business opportunity, defendant Vector Media, LLC (“Vector”), moves, and defendant Citysights, LLC (“Citysights”), cross-moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

Citysights is a bus operator, which entered into two contracts for advertising space on its buses. The first contract was with plaintiff Culver & Theisen, Inc. (“Culver”), an outdoor advertising agency, and the second one was with Vector, Culver’s competitor. Pursuant to their respective contracts, Culver received exclusive advertising rights on some Citysights double-decker buses and non-exclusive rights on other double-decker buses and vehicles, whereas Vector received exclusive rights on apparently all of Citysights double-decker buses.

BACKGROUND

In February 2007, Culver entered into a written agreement with Citysights, granting Culver exclusive advertising rights on five Citysights double-decker buses in their entirety, as well as non-exclusive advertising rights on five other double-decker buses, twenty New York Airport Service vehicles, and forty AirLink vans (Schneck Aff., exhibit C, Culver Contract, exhibit A). The Culver Contract provided that it would commence on March 1, 2007 and end on February 29, 2008. The contract also provided that Citysights would “honor any advertising contracts signed by Culver in 2007 ... for the duration of their term even if said term goes beyond” February 29, 2008 (Culver Contract, ¶ 3).

In May 2007, Citysights and Vector entered into a contract (the “Vector Contract”), for the period from June 1, 2007 through May 31, 2017, which granted Vector exclusive rights to advertise on Citysights’s 20 double-decker buses, except that five of them were expressly stated to be unavailable until March 1, 2008 (Goldberg Aff., exhibit C, Vector Contract, § 1, Exhibit A, § A). In its complaint (Complaint), Culver alleges that it entered into an advertising contract with Mediavest to place advertising on five Citysights double-decker buses in 2007, from March until May and from September until November.

In October 2007, Citysights allegedly informed Culver that advertising space on all of its buses was sold out until the end of the year. In December 2007, Culver was negotiating

another contract with Mediavest for advertising on five or six Citysights double-decker buses from January 1, 2008 until December 31, 2008. Mediavest informed Culver of Vector's representation that Culver did not have the right to sell the proposed advertising, but that Vector did. In response, Culver provided a letter and a copy of the Culver Contract to confirm that it had exclusive right to sell such advertising. Culver also demanded that Vector cease and desist from tortiously interfering with its contract with Citysights. Mediavest informed Culver that it awarded its contract to Vector, and Citysights allegedly honored it.

In December 2007, Citysights informed Culver that it had no double-decker or other buses available for Culver commencing January 2008. Culver alleges that Citysights entered into the Vector Contract, granting Vector rights which were contrary to Culver's rights under the Culver Contract.

Upon these facts, Culver pleads three causes of action: (1) breach of the Culver Contract by Citysights, and seeks monetary damages; (2) tortious interference by Vector with the Culver Contract, based on Vector's intentional encouragement of Citysights to repudiate the Culver Contract, and seeks monetary and punitive damages; (3) tortious interference by Vector with Culver's prospective economic advantage, based on Vector's alleged interference with the prospective contract between Culver and Mediavest, and seeks monetary and punitive damages.

In its answer, Citysights interposed three counterclaims against Culver, alleging that it breached the Culver Contract (1) by failing to make at least nine monthly payments of \$25,000 each to Citysights, and seeks monetary damages, (2) by failing to hire a contractor to repair and replace the damaged blue vinyl wrap on the buses, damaged as a result of advertisement installation, and seeks monetary damages, and that (3) Culver was unjustly enriched by virtue of using Citysights buses without making the required payments, and seeks monetary damages.

By stipulation dated April 11, 2008, Culver discontinued this action without prejudice as against defendants Vector Media 2, LLC, and Vector Media Street Furniture, LLC. Vector now moves, and Citysights cross-moves, to dismiss the Complaint.

ANALYSIS

On a motion to dismiss, pursuant to CPLR 3211, the court must construe the pleading liberally, assume the facts alleged as true, and give claimant “every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also* CPLR 3026). The court must “determine only whether the facts as alleged fit within any cognizable legal theory” (*see Leon*, 84 NY2d at 87-88; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]).

A motion to dismiss, pursuant to CPLR 3211 (a) (1), “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “In assessing a motion under CPLR 3211 (a) (7), ... the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon*, 84 NY2d at 88 [citations and internal quotation marks omitted]).

Citysights’s Cross Motion

A pleading alleging a breach of contract should specify “the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant” (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *see also Sebros Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]).

Citysights does not dispute the existence of the Culver Contract and its binding effect on both parties. Culver claims, and Citysights does not dispute, that it paid Citysights the requisite fees until Citysights breached the contract. Pursuant to the Culver Contract, Citysights was obligated to reserve five buses for Culver’s exclusive use, from March 1, 2007 until February 29, 2008 (Culver Contract, ¶¶ 2, 3). Contrary to Citysights’s contention, Culver alleges, and offers an affidavit of Paul Theisen with attached copies of e-mails, that

show that on December 18, 2007, Citysights breached the Culver Contract by refusing to provide any buses to Culver starting January 2008 (Complaint, ¶ 21; Theisen Aff., ¶¶ 22, 26, exhibit J). Additionally, Culver alleges that on December 19, 2007, Citysights informed it that it wanted to get out of the Culver Contract (Complaint, ¶ 22), which is an allegation of repudiation of the contract before its termination (*see e.g. MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992]).

Under the Culver Contract, Citysights was obligated to provide to Culver, on non-exclusive basis, five double-decker buses and other vehicles (*see* Culver Contract, exhibit A). Citysights also agreed “to honor any advertising contracts signed by Culver in 2007 ...” even if their terms went beyond February 29, 2008 (*id.*, ¶ 3). The Vector Contract, on the other hand, provided that for 10 years, starting from June 1, 2007, Citysights had to make available to Vector 20 double-decker buses on an exclusive basis, as follows: 10 double decker buses in their entirety, except that five of them were not available until March 1, 2008, and 10 other double decker buses were available for advertising only on the driver’s side and the rear (Goldberg Aff., exhibit C, Vector Contract, § 1, Exhibit A, § A).

It appears that when Citysights entered into both contracts, it had 20 double-decker buses in total. In the Culver Contract, Citysights represented that it “ha[d] space available on [the] buses for advertising purposes” (Culver Contract, at 1). The term “non-exclusive right”

(*id.* at 2) in the Culver Contract appears to be ambiguous. A contractual term is ambiguous if it can have two or more possible meanings (*see e.g. F & K Supply v Willowbrook Dev. Co.*, 288 AD2d 713, 715-716 [3d Dept 2001]). “[W]here a written agreement is ambiguous, extrinsic and parol evidence may be considered to determine its purpose and intent” (*First Dev. Corp. v Delco Plainview Realty Assoc.*, 194 AD2d 711, 712 [2d Dept 1993]). The Culver Contract does not explain how, practically, Culver could exercise its non-exclusive rights, and whether Citysights had a right to enter into exclusive contract with other agencies for the same buses. Therefore, extrinsic evidence is required to explain the meaning of Culver’s “non-exclusive right” (*see First Dev. Corp.*, 194 AD2d at 712).

At this juncture, however, Culver’s interpretation – that by virtue of giving Vector exclusive rights to all of its double-decker buses, save five, Citysights may have deprived Culver of its non-exclusive rights to five double-decker buses – appears to be reasonable. Additionally, on December 18, 2007, Culver requested, among other things, six double-decker buses, five to which it had non-exclusive rights and one to which it had no contractual rights, for one month, beginning January 15, 2008 (Theisen Aff., exhibit J). Citysights responded that it had no buses available (*id.*). If the buses were not available because of Vector’s exclusive rights to them, then Culver’s non-exclusive rights might have been violated.

Additionally, by granting Vector exclusive rights to all of the double-decker buses, commencing March 1, 2008, Citysights extinguished Culver's contractual right to secure a contract with a third party that extended beyond the term of the Culver Contract. As a result, Culver alleges that it was unable to secure its third contract with Mediavest for the entire year of 2008 and suffered the loss of at least \$600,000 "in guaranteed income" (Theisen Aff., ¶ 36; Complaint ¶ 30).

Citysights contends that the allegations in the Complaint are conclusory and insufficient to sustain a cause of action for breach of contract. However, the Complaint sets forth the nature of both Citysights's contractual obligation (Complaint, ¶ 10) and its breach of the Culver Contract (*id.*, ¶¶ 21, 25) (*see Sebro Packaging Corp.*, 93 AD2d at 785). Additionally, the Culver and Vector Contracts, copies of which are included in the moving papers, amplify the nature of Citysights's respective contractual obligations and how the terms of the Vector Contract might have clashed with the terms of the Culver Contract (*see Culver Contract*, ¶¶ 2-3, exhibit A; *Vector Contract*, § 1, exhibit A). Therefore, this cause of action survives.

Vector's Motion

Tortious Interference With Contract

“The tort of ... interference with contractual relations[] consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff”

(*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; see also *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). “[T]he plaintiff must allege that the contract would not have been breached ‘but for’ the defendant’s conduct” (*Washington Ave. Assoc. v Euclid Equip.*, 229 AD2d 486, 487 [2d Dept 1996]). At the same time, “[a] defendant who is simply plaintiff’s competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract” (*White Plains Coat & Apron Co., Inc.*, 8 NY3d at 426).

Vector does not dispute that the Culver Contract was valid and that Vector knew about it (see e.g. 09/25/08 Goldberg Aff., at 6). Vector argues that the Culver Contract provided that Culver had exclusive rights only to five buses and non-exclusive right to other enumerated vehicles. Accordingly, Vector contends that Citysights had a right to enter into the Vector Contract, which granted Vector exclusive rights to all of Citysights’s double-decker buses, save the five buses reserved for Culver, which were not available for Vector

until March 1, 2008, or after the expiration of the Culver Contract. Because the Vector Contract specifically took into account the Culver Contract, Vector posits that it could not have intentionally induced Citysights to breach the Culver Contract.

However, as Culver contends, the Vector Contract did not fully allow for Citysights to honor the Culver Contract, because it granted Vector (i) exclusive rights to the five double-decker buses to which Culver had non-exclusive rights, thereby possibly extinguishing Culver's non-exclusive rights, and (ii) exclusive rights to all of the double-decker buses as of March 1, 2008, when Culver had the right, with respect to at least five buses, to negotiate contracts that extended beyond February 29, 2008, which Citysights was obligated to honor (*see e.g. White Plains Coat & Apron Co., Inc.*, 8 NY3d at 427). As Culver alleges, the actual breach of the Culver Contract occurred when Citysights refused to provide any buses starting from January 2008, which was before the expiration of the Culver Contract. It appears that but for Vector's entering into the Vector Contract, Citysights would have provided the requested buses to Culver.

Vector argues that the non-exclusive part of the Culver Contract allowed Citysights to give either exclusive or non-exclusive rights to other parties. As previously indicated, the Culver Contract is ambiguous in this regard and parole evidence is required to clarify the precise nature of Culver's non-exclusive rights (*see First Dev. Corp.*, 194 AD2d at 712).

Finally, contrary to Vector's argument, Culver's allegations in the Complaint are not conclusory and are supported by material facts. Accordingly, this cause of action survives as well.

Tortious Interference With Prospective Economic Advantage

Culver alleges that Vector interfered with its prospective business relationship with Mediavest by offering Mediavest a contract to advertise on Citysights buses, and telling Mediavest that Culver did not have the right to sell the proposed advertising.

“Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct” (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). Plaintiff must allege that defendant acted solely out of malice or employed “wrongful means” (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 418 [1st Dept 1998]). “‘Wrongful means’ include ... fraud or misrepresentation ... and some degrees of economic pressure ...” (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]).

Vector contends that the Complaint does not allege that there was a non-compete agreement restricting Vector from doing business with Mediavest. Vector argues that it did not employ any wrongful means, such as fraud or economic pressure and that it was merely

competing with Culver for a contract with Mediavest. Vector maintains that it had a contractual and legal right to offer to Mediavest the balance of Citysights's double-decker buses prior to February 29, 2008 and all of the buses afterwards.

Culver argues that Vector was aware of the terms of the Culver Contract, specifically that Culver had an exclusive right to five buses through February 2008 and a right to enter into a contract extending beyond that date. Contrary to Vector's argument, Culver's alleged representation to Mediavest – that it had contractual rights from Citysights to five buses for the entire year of 2008 – was correct (*see* Culver Contract, ¶ 3). Vector was aware that Culver was negotiating its third contract with Mediavest for five buses for one year in 2008 (*id.*, ¶ 35). Knowing these facts, Vector nonetheless allegedly told Mediavest “that it had the exclusive rights ... [to] all [of] ... Citysights' buses for the year 2008” (Theisen Aff., ¶¶ 13, 34, 35). This alleged misrepresentation, if proved, would suffice to support the element of wrongful means. Culver alleges that Mediavest would have entered into a third contract with Culver but for Vector's interference, and that it sustained ascertainable damages. Accordingly, Culver has adequately pleaded a cause of action for tortious interference with prospective economic advantage, and this cause of action survives as well.

Accordingly, it is


ORDERED that the motion of defendant Vector Media, LLC, and the cross motion of defendant Citysights, LLC, to dismiss the complaint, are both denied; and it is further

ORDERED that defendant Vector Media, LLC, is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: July 16, 2009

ENTER:



Hon. Eileen Bransten

FILED
AUG 04 2009
COUNTY CLERK'S OFFICE
NEW YORK