

Rochem Intl., Inc. v Xingli Qiu

2010 NY Slip Op 31789(U)

June 29, 2010

Supreme Court, Queens County

Docket Number: 700075/10

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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ROCHEM INTERNATIONAL, INC.,
a New York corporation,
Plaintiff,

Index No.: 700075/10
Motion Date: 6/23/10
Motion Cal. No.: 44

-against-

XINGLI QIU aka MICHAEL QIU, an individual
and H&M USA, Inc., a New York corporation,
Defendants.

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The following papers numbered 1 to 7 read on this motion by plaintiff for an order pursuant to CPLR 3211 (a) (1), (2), (3) and (7) dismissing the counterclaims and granting sanctions against defendants.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-3
Affirmation in Opposition-Exhibits.....	4-5
Reply Affirmation.....	6-7

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR 3211 (a) (1), (2), (3) and (7) dismissing the counterclaims and granting sanctions against defendants is decided as follows:

According to the complaint, this action stems from defendant Xingli Qiu’s employment with plaintiff and his violation of his Confidentiality Agreement with plaintiff. This Agreement is set forth in the complaint. Plaintiff is involved with importing chemicals, nutritional and pharmaceutical raw materials from China for distribution in Europe and the United States. The Agreement had a non-competition provision and Qiu took proprietary and confidential information and trade secrets he obtained during his employment with plaintiff and set up a competing business, co-defendant H&M USA. Thereafter, plaintiff brought the instant action which contains nine causes of action. In an Order of this Court, dated, April 26, 2010, this Court denied defendants motion for an order pursuant to CPLR 3211 (a) (1) and (a) (7).

On or about May 10, 2010, defendants served and filed an Answer with four Counterclaims. The first seeks damages caused by plaintiff’s abuse of process along with attorneys’ fees, costs and disbursements in defending this frivolous lawsuit along with an

award of punitive damages. The second seeks an order preventing plaintiff from using or disclosing any confidential information of the defendants and returning any information or documents received pursuant to said subpoenas, including any reproduction thereof, to the defendants. The third seeks costs incurred by defendants' customers caused by plaintiff's fraudulent acts so that defendants' reputation could be made whole when defendants' clients are compensated for their costs. The fourth seeks injunctive relief prohibiting plaintiff from interfering with defendants' business. Plaintiff now moves to dismiss these counterclaims and defendant opposes this motion.

The branch of the motion seeking to dismiss the first counterclaim is denied. Plaintiff claims that defendants' first counterclaim for abuse of process should be dismissed under CPLR 3211(a)(7) because defendants have failed to allege the elements of the claim. The first counterclaim reads as follows:

Plaintiff took a forged document which it alleged is a Confidentiality Agreement signed by defendant Michael Qiu and made it into the basis of its complaint to abuse the legal process and perpetrate a fraud upon the Court. This forgery is fully set forth above in the first affirmative defense.

Upon filing its unverified complaint, plaintiff by its attorneys Miller Canfield further abused the legal process by their improper issuance of judicial subpoenas to defendants' customers, bank and other non-party entities in violation of the CPLR with the intention to harm defendants' reputation and business by burdening defendants' customers with costs of responding to the subpoenas.

In addition, the information and documents compelled by plaintiff's judicial subpoenas were made returnable to offices of plaintiff's counsel and no copies of said judicial subpoenas were provided to defendants' counsel pursuant to the CPLR. Plaintiff's intention in the unethical issuance of the judicial subpoenas was to disparage defendants' reputation by burdening defendants' customers with the costs of responding to the subpoenas so that they view this burden as a cost exacted upon them by doing business with the defendants causing them to cease doing business with defendants.

That plaintiff's unethical issuance of improper judicial subpoenas upon the bank accounts of defendant Xingli Qiu and his wife Ying Zhao to gain access to their personal and confidential information violated Xingli Qiu and Ying Zhao's privacy rights.

That defendants were caused to sustained damage to their reputation and business and said damages were sustained by reason of plaintiff's fraudulent and unethical acts. In addition, the public - nonparties to this action who were

improperly and unethically subpoenaed by the plaintiff were harmed by plaintiff's fraudulent and unethical acts. By reason of the foregoing acts, defendants is entitled to recover such damage caused by plaintiff's abuse of process along with attorneys' fees, costs and disbursements in defending this frivolous lawsuit.

In addition, that plaintiff's actions and conduct are so morally reprehensible especially in commencing this action with a forged document of such wanton dishonesty to imply a criminal act, punitive damages are warranted against the plaintiff in addition to actual damages and an award for defendants' attorneys' fees, cost of litigation and disbursements in defending this frivolous lawsuit.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

An abuse of process claim has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (Board of Educ. v Farmingdale Classroom Teachers Assn., 38 NY2d 397 [1975]). Here, defendant has alleged plaintiff's issuance of subpoenas was improper due to plaintiffs' intent to bring harm to defendant's reputation and economic interests. This sufficiently claims the gist of the action for abuse of process, which is the improper use of process after it is issued. Contrary to plaintiff's claim, the issuance of a subpoena that is alleged to be improper is not a matter that need be

handled solely as a discovery matter. Accordingly, the branch of the motion seeking dismissal of the first counterclaim is denied. *See, Ginsberg v Ginsberg*, 84 A.D.2d 573 (2d Dep't 1981.) *See also, Board of Educ. v Farmingdale Classroom Teachers Assn, supra.* (This case involved the use of a subpoena that was alleged to be an abuse of process. There, a bitter dispute had erupted between a school district and a teacher's association. The association and its attorney were accused of abusing legal process by issuing subpoenas, with the intent to harass and injure, to 87 teachers and refusing to stagger their appearances, thus compelling the school district to hire substitutes to avert a total shutdown of the schools. The Court found that these allegations were sufficient to support and inference that the use of lawfully issued process was being perverted to inflict economic harm on the school district and denied the motion to dismiss the abuse of process claim.)

The branch of the motion seeking to dismiss the second counterclaim is granted. Plaintiff claims that the Second Counterclaim should be dismissed pursuant to CPLR 3211(a)(1) because this Court has previously decided issues concerning this counterclaim in the So-Ordered Stipulation, dated May 12, 2010. The parties have stipulated that no documents had been received as a result of the subpoenas, that Rochem would withdraw the subpoenas without prejudice, and that Rochem would inform the subpoenaed entities that the subpoenas were withdrawn and that no disclosure should be made pursuant to those subpoenas. The second counterclaim, in pertinent part, reads as follows:

That plaintiff commenced this frivolous lawsuit in an effort to take away defendants' business by gaining access to defendants' confidential information and business practices through its unethical issuance of improper judicial subpoenas on defendants' clients and bank.

Whether plaintiff came into possession of defendants' confidential information and business practices from its unethical issuance of improper judicial subpoenas is unknown to defendants as plaintiff's counsel failed to provide defendants' counsel with copies of the subpoenas pursuant to the CPLR.

Accordingly, injunctive relief directing the plaintiff to comply with the CPLR is warranted along with an order preventing plaintiff from using or disclosing any confidential information of the defendants and returning any information or documents received pursuant to said subpoenas, including any reproduction thereof, to the defendants.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence" In order to prevail on a

CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . ." Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 (2d Dept 2003), *quoting* Trade Source v Westchester Wood Works, 290 AD2d 437 (2d Dept 2002).

Initially, defendants have not submitted in support of their motion a copy of the May 12, 2010 So-Ordered stipulation. However, this stipulation has been filed with the Court and is part of the record of this electronically filed action and has been reviewed by this Court in deciding this motion. Significantly, defendant does not dispute the accuracy of the references to this stipulation made by plaintiff, nor does this Court. Accordingly, the So-Ordered Stipulation is documentary evidence for purposes of this motion. See, La Cara Mia Bar Lounge, Inc. v. Great Locations, Inc., 2009 NY Slip Op 50064U (N.Y. Sup. Ct. 2009) A review of the stipulation shows that defendants agreed to the fact that plaintiff had not received any documents pursuant to the issued subpoenas. As such, it is clear that the claims in the counterclaim regarding defendant not knowing if any information was received by plaintiff are resolved by the stipulation's terms. Accordingly, defendant's motion to dismiss the second counterclaim pursuant to CPLR 3211 (a) (1) is granted.

The branch of the motion seeking to dismiss the third counterclaim is granted. Plaintiff claims that The third Counterclaim should be dismissed pursuant to CPLR 3211(a)(2) and (3) because defendants lack standing to assert a claim on behalf of unnamed clients. Plaintiff also claims the third counterclaim should be dismissed pursuant to CPLR 3211(a)(7) because defendants have failed to state a claim that satisfies CPLR 3016(b). The third Counterclaim, in pertinent part, reads as follows:

That plaintiff committed a fraud upon defendants' clients by its unethical issuance of subpoenas which it misrepresented as judicial subpoenas that threaten defendants' clients to comply under penalties of contempt of court.

That the foregoing acts by plaintiff caused defendants' clients to incur costs, including attorneys' fees, in responding to the subpoenas. Defendants' clients view this as a cost exacted upon them in doing business with the defendants and therefore impacting and damaging defendants' reputation and business.

Therefore, defendants are entitled to recover the costs incurred by defendants' customers caused by plaintiff's fraudulent acts so that defendants' reputation could be made whole when defendants' clients are compensated for their costs.

This counterclaim fails to allege the essential elements of a fraud cause of action and

does not set forth in detail the circumstances constituting the alleged fraud. In order to state a cause of action for fraud, a plaintiff must allege a misrepresentation or material omission of fact which was false and known to be false by the defendant and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury. Lama Holding Co. v Smith Barney, 88 N.Y.2d 413 (1996.)

Here, defendants have failed to allege in the third counterclaim that defendants were subjected to plaintiff's fraudulent action and the manner in which such induced defendants reliance. CPLR 3016(b) states, that "where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." This means that Defendants must include "specific dates and items." Moore v. Liberty Power Corp., LLC, 72 A.D. 3d 660 (2 Dept. 2010). Defendant has failed to allege the elements necessary to state a claim for fraud in the detail required by CPLR 3016(b), and the Third Counterclaim should be dismissed. Here, defendants have failed to even identify the individual companies who were the subject of plaintiff's alleged fraud. Moreover, it is clear from the counterclaim that defendants do not allege that they were subjected to plaintiff's alleged fraud regarding the subpoenas. Rather, the counterclaim involves a fraud involving subpoenas issued to defendants' clients. As such, defendants do not have standing to bring a fraud claim that involves claims for third parties and not themselves. Accordingly, the branch of the motion seeking to dismiss the third counterclaim is granted.

The branch of the motion seeking to dismiss the fourth counterclaim, pursuant to CPLR 3211 (a) (7) for failing to state a cause of action is granted. The fourth counterclaim, in pertinent part, reads as follows:

Plaintiff also seeks to prevent unwanted competition by commencing this frivolous lawsuit to interfere with defendants' business and to gain access to defendants' confidential information and business practices which constitute unfair competition.

To sustain this claim for unfair competition, the defendants must show that the plaintiff misappropriated the defendants' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so. Abe's Rooms, Inc. v. Space Hunters, Inc., 38 AD3d 690 (2d Dep't 2007.) Since the defendants did not allege that the plaintiff misappropriated their labors, skills, expenditures, or good will or otherwise attempted to capitalize on the plaintiff's name or reputation in the distribution business, the fourth counterclaim should be dismissed. *Id.* Accordingly, the branch of the motion seeking to dismiss the fourth counterclaim is granted.

The branch of the motion seeking the granting of sanctions of defendants is denied. At this time, the Court does not find defendants' actions to be such that sanctions are warranted.

In sum, the branch of the motion seeking to dismiss the first counterclaim is denied. The branches of the motion seeking to dismiss the second, third, and fourth counterclaim are granted.

Dated: June 29, 2010

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ORIN R. KITZES, J.S.C.