

Mazzara v Effron

2011 NY Slip Op 33347(U)

July 6, 2011

Supreme Court, Richmond County

Docket Number: 150251/10

Judge: John A. Fusco

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

FRANK J. MAZZARA and AMERIGO E.
 DEDILECTIS

Plaintiff(s),

-against-

CRAIG W. EFFRON, CURTIS SCHENKER,
 ANDREW EFFRON, CRAIG EFFRON and COMPANY
 SCOGGIN CAPITAL MANAGEMENT, LLC (formerly
 SCOGGIN CAPITAL MANAGEMENT II, LLC
 (formerly SCOGGIN CAPITAL MANAGEMENT II,
 LLP), SCOGGIN, INC., SCOGGIN LLC, and S&E
 PARTNERS, L.P. and DOES 1 through 10,

Defendant(s).

DCM PART 4
 HON. JOHN A. FUSCO

DECISION AND ORDER

Index No. 150251/10

Motion No. 4049 - 001

The following papers were fully submitted on the 1st day of April, 2011.

Notice of Motion to Dismiss by Defendants
 with Supporting Papers, Exhibits
 and Memorandum of Law (dated December 17, 2010)

Papers
 Numbered

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Upon the foregoing papers, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failing to state a cause of action is granted to the extent that the third, fifth, sixth and seventh causes of action are dismissed, as are the second and fourth causes of action against individual defendants CURTIS SCHENKER and ANDREW EFFRON, with leave to replead as hereinafter provided. The balance of the motion is denied.

Plaintiffs commenced this action alleging breach of contract, misappropriation of trade secrets, common-law fraud, unjust enrichment, unfair competition, and promissory and equitable

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estoppel against defendants (or some of them) arising out of their alleged oral agreement with defendant CRAIG W. EFFRON (hereinafter EFFRON), wherein plaintiffs agreed to use the unique trading strategies developed by them for the benefit of defendants' hedge fund operations. In exchange, plaintiffs were promised sizable compensation, office space and equipment, accounts to trade on, and other employment opportunities. Plaintiffs allege that they began performing trade operations for defendants' benefit pursuant to said agreement in or about March 2009, that defendants profited therefrom, but that EFFRON failed to fully compensate them for their performance. Eventually, it is alleged that defendants reneged on the entire agreement.

More particularly, the complaint alleges that following a series of exploratory discussions and, *e.g.*, several successful demonstrations of the result of their alleged proprietary trading strategies during January and February 2009, defendant EFFRON gave them a "thank you" payment of \$5,000 and offered plaintiffs office space, trading support and equipment at the hedge fund. Plaintiffs relocated to these premises on or about February 22, 2009, and began using their proprietary system on defendants' behalf on or about March 6, 2009. It is further alleged that after demonstrating its success to EFFRON's apparent satisfaction, a meeting was held on March 31, 2009, at which EFFRON agreed to pay plaintiffs the sum of \$125,000 quarterly for the year ending on December 31, 2009 as a consulting fee, together with a 30% share of defendants' profits based on the implementation of plaintiffs' trading strategy and access to other purported opportunities for profit.

In moving to dismiss the complaint based on plaintiffs' failure to state a cause of action for, *inter alia*, breach of contract (*see* CPLR 3211[a][7]), defendants contend that plaintiffs have failed

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to allege sufficient facts to establish the existence of a binding oral contract between the parties. In particular, defendants contend that there are no factual allegations sufficient to show a manifestation of their assent to the purported agreement by words or deeds, and that the so-called March 31, 2009 agreement was based on past consideration. In addition, defendants contend that plaintiffs never demanded any additional payments after receipt of an initial payment of \$125,000 between March 24, and April 1, 2009, yet they continued to operate from the office space provided by EFFRON for most of 2009. It is defendants' contention that plaintiffs' silence in the face of this alleged breach confirms that there was never any meeting of the minds underlying the alleged March 31, 2009 oral contract.

In addition, defendants contend that plaintiffs have failed to plead performance of their contractual obligations under said "contract". In this regard, defendants assert that while the complaint is rife with vague and conclusory allegations of plaintiffs' contribution of "knowledge, skill, loyalty, time and effort" to defendants' enterprise, they have failed to recite a single fact that is probative on the matter of their having provided defendants with any "trading strategies, trading models, formulas, patterns, devices, information compilations, or services" after March 31, 2009. Having failed to adequately plead their own performance, plaintiffs are alleged to be incapable of recovering compensation under the purported contract.

Defendants also contend that there are no facts sufficient to support plaintiffs' breach of contract claims against individual defendant CURTIS SCHENKER. While plaintiffs allege that SCHENKER was a managing member of defendant SCOGGIN, LLC, and that there were several dinner meetings between plaintiffs and EFFRON, there are no allegations that SCHENKER attended

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any of those meetings or had any other conversations with plaintiffs. Therefore, the claimed breach of contract by SCHENKER, individually, cannot survive.

With regard to plaintiffs' second cause of action, defendants contend that in order to state a viable cause of action for misappropriation of trade secrets, plaintiffs must plead the existence of facts showing that plaintiffs possessed a valuable trade secret that was wrongfully taken either through abuse of a relationship of trust or through theft. In such a case, the key consideration is whether the information in question has economic value, whether it was known to others than those claiming it to be secret, and whether the owners have taken reasonable steps to maintain its confidentiality.

Here, plaintiffs' purported trade secret is a proprietary trading strategy, yet defendants contend that the complaint is devoid of any facts establishing that this trading strategy was unique or special, *i.e.*, a secret formula, pattern, device or compilation of data. In addition, defendants note that the complaint alleges that MAZZARA gave EFFRON trading advice on a nearly daily basis prior to March 31, 2009 without any request for confidentiality. Accordingly, even if they were deemed to constitute trade secrets, plaintiffs must be seen as having freely-disclosed this information to EFFRON without any assurance of confidentiality. Also, plaintiffs purportedly failed to plead the existence of facts demonstrating that there was any legal relationship of trust existing between themselves and defendants.¹ Hence, their conclusory claims of misappropriation are legally insufficient. Furthermore, it is claimed that no facts have been alleged with regard to individual

¹ Insofar as it appears, plaintiff MAZZARA has known defendant EFFRON since they worked as floor traders or brokers on both the Commodity Exchange (COMEX) and the New York Merchantile Exchange (NYMEX).

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defendants SCHENKER and ANDREW EFFRON to establish that they either knew of the alleged trading strategy, or wrongfully obtained it.

With regard to plaintiffs' third cause of action alleging common-law fraud, defendants contend that this claim is duplicative of their breach of contract claim. According to defendants, plaintiffs' fraud allegations use the identical language pleaded in support of their claim for breach of contract, with the sole addition of language claiming that defendants never intended to perform their promises. According to defendants, a cause of action for fraud does not arise where the only "fraud" alleged is a party's secret intention to breach a contractual obligation. Stated otherwise, it is claimed that the mere addition of the allegation that one of the contracting parties never intended to honor its contractual obligations is insufficient to convert a breach of contract claim into a fraud claim.

Additionally, defendants maintain that the fraud cause of action is not pleaded with the specificity required in CPLR 3016(b) insofar as it relates to their purported misrepresentation of a material fact that was known to be false; plaintiffs' justifiable reliance on the allegedly false representation; and damages resulting therefrom. In fact, they contend that there is no allegation of a false representation anywhere in the complaint. Instead, plaintiffs rely on vague and conclusory allegations of the promise of substantial compensation and other unparticularized opportunities for profit that would mutually benefit the parties. Neither, according to defendants, does the complaint allege the existence of an oral contract containing unfulfilled promises.

As for the elements of justifiable reliance and injury, defendants claim that the facts alleged by plaintiffs do not establish that they disclosed their alleged proprietary trading system to EFFRON

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in reliance on any representations which have not been honored. To the contrary, defendants contend that the only act of reliance that can be gleaned from the complaint is the claim (1) by plaintiff DEDILECTIS, that he quit his job after EFFRON agreed to allow MAZZARA to retain him as an on-site consultant at \$1,000 per week, and (2) by MAZZARA, that he paid off his creditors in reliance on unfulfilled promises of compensation by EFFRON. However, as there are no allegations that DEDILECTIS was not paid prior to his termination, his allegation of false statements is fatally flawed. So, too, is MAZZARA's claim of reliance upon the statements made by EFFRON or any of the other defendants in support of his decision to re-pay his own pre-existing debts.

Finally, with regard to any claims against CRAIG EFFRON & COMPANY, SCOGGIN CAPITAL MANAGEMENT, LLC, SCOGGIN CAPITAL MANAGEMENT II LLC, SCOGGIN, INC., SCOGGIN LLC and S&E PARTNERS LP, defendants contend that there are no factual allegations of any false statements made by or on behalf of any of them. The same is claimed to be true as to individual defendants CURTIS SCHENKER and ANDREW EFFRON. In fact, defendants allege that SCHENKER and his attorneys explicitly rejected the prospect of any representation or promise being made on his behalf to plaintiffs. In short, the facts alleged by plaintiffs are stated to be insufficient to make out a cause of action for fraud against any defendant, and must be dismissed.

With regard to the fourth cause of action, *i.e.*, unjust enrichment, defendants contend that no facts have been pleaded establishing that they received any services from plaintiffs which benefitted them unjustly. Rather, it is alleged that plaintiffs are seeking to obtain compensation for trading strategies and advice allegedly given without reservation in exchange for, *e.g.*, free office space and equipment which they received before the date of the alleged oral agreement on March

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31, 2009. In addition, there are no allegations of facts establishing privity with any defendant other than EFFRON. Thus, an essential element of the cause of action is lacking.

As for plaintiffs' claim of unfair competition, defendants contend that this fifth cause of action is devoid of, *inter alia*, any allegation of the improper taking of plaintiffs' property, or that defendants used plaintiffs' property to compete against them. Instead, the complaint alleges, in sum and substance, that defendants used plaintiffs' trading system without adequate compensation in breach of their oral agreement.

As to plaintiffs' sixth cause of action for promissory estoppel, defendants maintain that no promise of any kind was made to plaintiffs on which they relied to their detriment. Nor are there any allegations that defendants were made aware of plaintiffs' reliance.

Finally, defendants maintain that plaintiffs' seventh cause of action for equitable estoppel is merely a restatement of their fraud claim and, as such, should also be dismissed. In any event, defendants again claim, *e.g.*, that plaintiffs have failed to set forth any facts establishing justifiable reliance on the words or deeds of any defendant.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the allegations in the complaint must be accepted as true (*see* Leon v. Martinez, 84 NY2d 83, 87-88) and the motion granted only where plaintiff has failed to establish a cause of action upon the most favorable view of the case (*see* Cayuga Partners v. 150 Grand, 305 AD2d 527). The court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v. Martinez, 84 NY2d at 87-88). However, when the moving party

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offers evidentiary material in support of its motion, the court is required to determine whether the proponent of the pleading has a cause of action, not whether one has been stated (*see* Asgahar v. Tringali Realty, Inc., 18 AD3d 408).

With regard to plaintiff's first cause of action for breach of contract, it is well settled that a court cannot enforce a contractual obligation if the alleged agreement is not reasonably certain in its material terms (*see* Cobble Hill Nursing Home v. Henry & Warren Corp., 74 NY2d 475, 482). Here, it is the opinion of this Court that the facts as alleged by plaintiffs in the complaint are sufficient to establish prima facie that the parties' actions were to be governed by the terms of an oral contract arrived at in some detail over dinners, at meetings, and in telephone conversations, and as reflected in the parties' conduct, such as EFFRON's first "quarterly" payment of the sum required by the alleged contract. On a motion to dismiss, if the court can determine that the plaintiff is entitled to relief on any view of the facts stated, the inquiry is complete and the complaint must be declared legally sufficient (*see* Campaign for Fiscal Equity v. State of New York, 86 NY2d 307, 318).

The same is true of plaintiffs' second cause of action for misappropriation of trade secrets. A plaintiff claiming misappropriation of a trade secret must, in the first instance, prove its possession of an actual trade secret. Although ill-defined in the law, it is well settled that a trade secret includes "any formula, pattern, device or compilation of information which is used in one's business, and which gives him [or her] an opportunity to obtain an advantage over competitors who do not know or use it" (Ashland Mgt. v. Janien, 82 NY2d 395, 407 [internal quotation marks omitted]). Alternatively, the Restatement (Third) of Unfair Competition (§39) defines a trade secret as "any

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information that can be used in the operation of a business or other enterprise that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” Whether the information in question is truly “secret” is generally regarded as one of fact (*see* Ashland Mgt. v. Janien, 82 NY2d at 407), which has been said to depend on the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and other involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others (*see* Restatement of Torts, §757, comment *b*). In addition, a plaintiff must be able to prove that defendant is using the purported trade secret in breach of any agreement, confidence or duty, or as a result of discovery by any improper means (*see* Integrated Cash Mgt. Servs., Inc. v. Digital Transactions, Inc., 920 F2d 171, 173 [2d Cir NY 1990]).

Here, it is the opinion of this Court that plaintiffs have alleged sufficiently detailed facts to state a cause of action for misappropriation of a trade secret. In particular, plaintiffs allege that they acquired and refined a very unique, complex and proprietary algorithmic discretionary trading system that can be used to run a time and price model to project an upcoming potential low in the stock and equities markets, as well as their related indices. The facts alleged in the complaint further provide that this program constituted a valuable trade secret which was theirs exclusively, and provided plaintiffs with a strategic advantage over their competitors. As alleged in the complaint, this complex program was explained to EFFRON over a period of several weeks during which

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plaintiffs communicated with him almost daily, and which provided EFFRON with valuable information regarding certain stocks, indices, equities and futures that resulted in his execution of a series of profitable trades. In addition, it is alleged that EFFRON was sufficiently impressed by the results to enter an oral agreement with plaintiffs to “set up shop” and use their trading system on his behalf. As a result, so much of the motion as seeks the dismissal of plaintiffs’ cause of action for misappropriation of a trade secret is denied.

Nevertheless, plaintiffs’ third cause of action for common-law fraud must be dismissed. In order to properly plead a legally sufficient claim for common-law fraud, a plaintiff must allege the misrepresentation of a material fact, the falsity of that misrepresentation, scienter, reasonable reliance on the false misrepresentation, and injury resulting from such reliance (*see* Small Lorillard Tobacco Co., 94 NY2d 43, 57). In addition, New York law requires that a cause of action for fraud be pled with greater specificity than other causes of action, *i.e.*, that “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016[b]). Here, it appears that the misrepresentations relied upon by plaintiffs were oral promises made by EFFRON regarding promised payouts and collaborative business opportunities, but the facts alleged in support of same are insufficient insofar as they are meant to establish that plaintiffs’ justifiably relied on any of these promises. Accordingly, plaintiffs’ claim for common-law fraud is legally deficient. However, since defendants moved pre-answer to dismiss the complaint pursuant to CPLR 3211(a)(7), this act “extended the defendant[s’] time to answer (*see* CPLR 3211[f]), and thus extended the time in which ... [plaintiffs] could amend [their] complaint as of right” (STS Mgmt. Dev. v. New York State Dept of Taxation & Fin., 254

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AD2d 409; *see* Roni LLC v. Arfa, 74 AD3d 442). Accordingly, plaintiffs are entitled to serve an amended complaint as hereinafter provided.

The same is true as to plaintiffs' sixth and seventh causes of action for promissory and/or equitable estoppel, both of which require similar allegations of justifiable reliance and defendants' knowledge thereof. Hence, these causes of action are likewise dismissed with leave to re-plead.

With regard to plaintiff's fourth cause of action for unjust enrichment, this Court cannot ascribe to defendants' contention that plaintiffs are precluded from asserting a claim for recovery under a quasi-contract theory merely because they have also asserted claims arising out of an alleged oral contract between the parties (*see* Apfel v. Prudential-Bache Sec., 183 AD2d 439, 440, *mod. on other grounds* 81 NY2d 470). To the contrary, where, as here, there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed alternatively upon a quasi-contractual theory (*see* Hochman v. LaRea, 14 AD3d 653, 654-655).

However, plaintiffs' fifth cause of action for unfair competition must be dismissed. It is well settled that a cause of action for unfair competition is premised upon the bad faith misappropriation of a commercial advantage belonging to another which results in fraud or deception or confusion of the public amounting to fraud and resulting in injury to plaintiffs (*see* Allied Maintenance Corp. v. Allied Mech. Trades, 42 NY2d 538, 542-543; Ball v. United Artists Corp., 13 AD3d 133, 139). However, in recognition of the precedents holding that a cause of action for unfair competition is actually grounded in fraud (*see e.g.*, Ball v. United Artists Corp., 13 AD2d at 137), it follows that plaintiffs' fifth cause of action can rise no higher than their cause of action for common-law fraud. Accordingly, it must likewise be dismissed.

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Finally, insofar as the complaint purports to assert causes of action against defendants CURTIS SCHENKER and ANDREW EFFRON, individually, it is devoid of any allegations of conduct on the part of either defendant which would be sufficient to sustain any cause of action. As a result, all such causes of action against either of them must also be dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent that the third, fifth, sixth and seventh causes of action of the complaint are dismissed, and it is further

ORDERED that the complaint as against individual defendants CURTIS SCHENKER and ANDREW EFFRON is dismissed in its entirety; and it is further

ORDERED that the above dismissals are without prejudice to plaintiffs' right to replead these causes of action in an amended pleading to be interposed within 10 days after the service upon them of a copy of this order with notice of entry, or within 20 days after defendants serve their answer (*see* CPLR 3025[a], CPLR 3211[f]); and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

Dated: July 6, 2011

Hon. John A. Fusco, J.S.C.