

<b>Tax Club, Inc. v Precision Corporate Servs.</b>
2012 NY Slip Op 31711(U)
June 15, 2012
Supreme Court, New York County
Docket Number: 114278/2010
Judge: Joan A. Madden
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden  
Justice

PART 0

Index Number : 114278/2010  
TAX CLUB  
vs.  
PRECISION CORPORATE SERVICES  
SEQUENCE NUMBER : 005  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with  
the awarded Memorandum Decision + order.

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

# FILED

JUN 29 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: June 15, 2012

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
THE TAX CLUB, INC. and MANHATTAN  
PROFESSIONAL GROUP, INC.,

Plaintiffs,

INDEX NO.: 114278/2010

-against-

PRECISION CORPORATE SERVICES,  
GARY ADAM CARROLL, ZACH OLSON,  
and KALE GOODMAN,

Defendants.

-----X  
JOAN A. MADDEN, J.:

**FILED**

**JUN 29 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Manhattan Professional Group, Inc. ("MPG") moves pursuant to CPLR 3211(a)(7) to dismiss the counterclaims of defendant Precision Corporate Services ("Precision") for failure to state a cause of action. Precision opposes the motion, which is granted for the reasons below.

This action involves a dispute between competitors in the business of providing tax services to small-sized and newly formed businesses. The complaint alleges, *inter alia*, that Precision sent an email to plaintiffs' existing clients containing allegedly defamatory statements. The email states as follows:

It has come to our attention that another company by the name of "Tax Club-My Essential Planning-Manhattan Professional Group-MCP-ICM-Premier Wealth" is aggressively soliciting unneeded services to some of our clients. In some circumstances [sic] they are falsely stating that Precision Corporate Services has referred them, is associated with or is endorsing their services. **To clarify, we Precision Corporate Services do not support or endorse the activity or services of "Tax Club-My Essential Planning-Manhattan Professional Group-MCP-ICM-Premier Wealth."**

We do not conduct any business with them. If you are contacted by this company simply do not accept the call and if you do, please beware of the aggressive false tactics they employ. Am Comp. ¶ 23, (emphasis in the original).

Precision counters the above email was sent in response to complaints by numerous clients that representatives of Tax Club, using various alias, including MPG, were contacting its clients and offering the same services that the clients had already purchased from Precision.

By decision and order dated October 14, 2011, this court dismissed and severed the claims of plaintiff the Tax Club, Inc. ("Tax Club") on the ground that Tax Club, a foreign corporation, lacked capacity to sue in New York based on its violation of Business Corporation Law § 1312. The court also dismissed the plaintiffs' claims against the individual defendants, the second cause of action for interference with prospective business relations for failure to state a cause of action, and dismissed that part of the first cause of action, for libel *per se*, for lack of personal jurisdiction to the extent it sought relief in connection with the email sent to individuals or entities who were not New York residents. Accordingly, the only remaining claim is by MPG against Precision for libel *per se* in connection with the email sent to New York residents/entities.

MPG now moves to dismiss Precision's counterclaims for interference with economic relations and unfair competition on the ground that the allegations in these counterclaims are based on conduct of Tax Club, which is no longer a plaintiff in this action. Specifically, MPG notes that the counterclaims allege that "Luke Kennedy representing Tax Club, contacted [Jason] Verga (a client of Precision) to purchase Tax Club products and services in addition to what Mr. Verga already received from Precision," and that "the Tax Club contacted Marsha Bianco, a Utah resident, and a client of Precision...and [t]he Tax Club falsely stated that had been referred to Ms. Bianco by

[\* 4]

Precision” (Answer and Counterclaims, ¶’s 10, 12, and 13 ).

In opposition, Precision contends that as Tax Club and MPG are “sister corporations” and that MPG has not sufficiently distinguished itself from Tax Club, and that Tax Club employees acted as agents of MPG. In support of its position, Precision submits evidence that Tax Club and MPG share the same offices and have common executive officers. Precision thus asserts that the allegations against Tax Club are sufficient to infer that Tax Club and MPG acted in concert or that Tax Club acted at the direction of MPG.

In reply, MPG argues that in the event that the counterclaims, which concern clients who are not residents have New York, are not dismissed, Precision has waived its objections to personal jurisdiction.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause if action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference.” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dep’t 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dep’t 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheim v. Ginzburg, 43 NY2d at 275.

The first counterclaim is for interference with economic relations, a tort which “applies to those situations where the third party would have entered into or extended a contractual relationship

with plaintiff but for the intentional and wrongful acts of the defendant.” WFB Telecommunications, Inc. v. NYNEX Corp., 188 AD2d 257, 257 (1<sup>st</sup> Dept 1992)(citation omitted).

The counterclaim for tortious interference with economic relations is based on allegations that Tax Club contacted Mr. Verga and Ms. Bianco and that “Tax Club and MPG also contacted other clients of Precision in 2010, making materially false statements with the intent of deceiving the clients in order to solicit them to purchase Tax Club products and services,” and that certain Precision clients, but not Mr. Verga and Ms. Bianco, “cancelled their subscription to Precision services and terminated business relations with Precision as a direct result of Tax Club’s and MPG’s actions.” (Answer and Counterclaims, ¶ 15, 17). It is further alleged that “MPG intentionally interfered with Precision’s existing or potential economic relations by falsely stating that MPG was affiliated with Precision and thereby deceiving Precision’s customers” (Id., ¶ 19).

These allegations are insufficient to state a claim for tortious interference with economic relations, as the only specific allegations of wrongdoing are against Tax Club which is no longer a party to this action. Moreover, contrary to Precision’s position, as there is no dispute that MPG and Tax Club are distinct and separate corporate entities, there is no basis for holding MPG liable for the actions of Tax Club or as agents of Tax Club as it is well established that “in the absence of a clear indication of domination and control<sup>1</sup>, parent, subsidiary or affiliated corporations are treated separately and independently for the purposes of assigning responsibility.” Meschel v. Resorts Intern. of New York, Inc., 160 AD2d 211, 213 (1<sup>st</sup> Dept 1990). In addition, the counterclaim does not allege

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<sup>1</sup>Here, Precision does not argue that such domination and control exists, nor does evidence that Tax Club and MPG share office space and an executive officer provide a ground to for finding that the corporations are alter egos. See Fantazia Intern. Corp. v. CPLR Furs New York, Inc., 67 AD3d 511 (1<sup>st</sup> Dept 2009).

that either Mr. Verga or Ms. Bianco terminated their business relations with Precision as a result of the statements by representatives of Tax Club, and therefore that Precision was damaged as a result of such statements. Furthermore, conclusory allegations that MPG contacted unspecified clients in 2010 does not provide a basis for a cause of action for tortious interference with business relations.

Next, in order to recover for interference with existing economic relations “a defendant's conduct must amount to a crime or an independent tort.... A sole exception to this general rule has been recognized where a defendant has engaged in conduct for the sole purpose of inflicting intentional harm on [the other party].” Lawrence v. Union of Orthodox Jewish Congregations of America, 32 AD3d 304, 304 (1st Dept. 2006). As the parties here are competitors, the conduct at issue must amount to a crime or an independent tort since the existence of competition “provides an obvious motive for [a party’s] interference.” See Carvel v. Noonan, 3 NY3d 182, 190 (2004). In this case, there is no crime involved, and Precision has not adequately pleaded cause of action for fraud or other independent tort. Accordingly, the counterclaim for interference with economic relations must be dismissed on this ground as well.

The second counterclaim for unfair competition<sup>2</sup> based on allegations that “MPG misappropriated Precision’s skills, expenditures and good will... by attempting to capitalize on Precision’s name and reputation” (Answer and Counterclaims, ¶ 22) is similarly without merit, as counterclaim’s only specific allegation relates to clients contacted by Tax Club, which is no longer a party to this action. Moreover, the counterclaim is devoid of allegations that Ms. Bianco or Mr.

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<sup>2</sup>A claim of unfair competition sounding in misappropriation usually concerns the taking and use of [a party’s] property to compete against the [party’s] own use of the same property. See ITC Ltd. v. Punchgini, Inc., 9 NY3d 467, 468 (2007). A misappropriation claim may also concern the taking and use of the [a party’s] commercial advantage to compete against [that party]. Id. at 476.

Verga, the only clients specifically alleged to have been contacted, decided to end their relationship with Precision as a result of any misappropriation of Precision's commercial advantage in the form of its name or goodwill. Accordingly, the second counterclaim must be dismissed.

In view of the above, it is

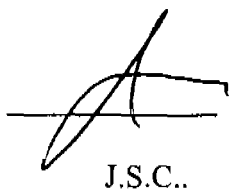
ORDERED that the motion by plaintiff Manhattan Professional Group to dismiss the first and second counterclaims is granted; and it is further

ORDERED the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 31, 2012 at 9:30

am in Part 11, room 351.

Dated June 15, 2012

  
J.S.C..

**FILED**

**JUN 29 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**