

MPG Assoc., Inc. v Randone

2012 NY Slip Op 33684(U)

March 9, 2012

Supreme Court, Nassau County

Docket Number: 0080547-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**MPG ASSOCIATES, INC., d/b/a THE
KTI GROUP,**

Plaintiff,

- against -

BRIAN RANDONE,

Defendant.
-----X

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 008057-10
Motion Seq. Nos. 4 and 6
Submission Date: 2/14/12**

The following papers have been read on these motions:

**Notice of Second Motion, Affirmation in Support and Exhibits.....X
Plaintiff's Memorandum of Law in Support.....X
Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibit.....X
Affirmation in Opposition to Defendant's Motion to Dismiss and Exhibits.....X
Affidavit in Opposition and Exhibits.....X
Plaintiff's Memorandum of Law in Opposition.....X
Reply Affirmation in Further Support.....X
Supplemental Affirmation in Support and Exhibit.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff MPG Associates, Inc., d/b/a The KTI Group ("KTI" or "Plaintiff") on July 14, 2011, and 2) the motion filed by Defendant Brian Randone ("Randone" or "Defendant") on January 24, 2012, both of which were submitted on February 14, 2012. For the reasons set forth below, the Court denies Plaintiff's motion and Defendant's motion. The stay of the action previously imposed is hereby lifted.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3215, for an Order granting a default judgment in favor of Plaintiff and scheduling an inquest on damages. This is Plaintiff's second motion for a default judgment. The Court denied Plaintiff's prior motion for a default judgment.

Defendant moves, pursuant to CPLR §§ 3211(7) and (8), to dismiss the Complaint.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated October 26, 2010 ("2010 Decision") in which the Court denied Plaintiff's prior motion for a default judgment. The Court incorporates the 2010 Decision by reference as if set forth in full herein. As noted in the 2010 Decision, and other decisions of the Court in this action,¹ the progress of this matter was delayed by Defendant's incarceration in the Los Angeles County Jail awaiting a jury trial for the crimes of murder and torture ("Criminal Action"). Defendant was recently acquitted of those criminal charges and is now at liberty.

As noted in the 2010 Decision, Plaintiff seeks injunctive relief and special, general and punitive damages arising from Defendant's tortious conduct injuring KTI's business reputation by 1) publishing false, defamatory and misleading statements about KTI regarding its lack of trustworthiness and failure to pay sums due to subagents; and 2) encouraging KTI's subagents to terminate their contractual and other business relationships with KTI. The Complaint alleges that Defendant engaged in this conduct following KTI's termination of Defendant for cause, following Defendant's arrest and incarceration for murder and torture charges. The Complaint contains three (3) causes of action. The first and second causes of action are for trade libel and tortious interference with business, for which Plaintiff seeks compensatory damages and punitive damages. The third cause of action is for *prima facie* tort, for which Plaintiff seeks an injunction permanently restraining Randone from engaging in any of the conduct alleged in the Complaint.

¹ The Court also issued decisions 1) on May 2, 2011, in which the Court denied Plaintiff's motion to reargue the 2010 Decision, and 2) on April 18, 2011, in which the Court denied Plaintiff's Order to Show Cause seeking injunctive relief.

[* 3]

In support of Plaintiff's instant motion, Plaintiff's counsel affirms that on June 16, 2011, an attorney purporting to represent Defendant appeared at a conference in the above-captioned action ("Instant Action") and advised the Court that his appearance was limited to negotiating the terms of a pre-trial scheduling order. Upon being advised by the Court that he could not enter his appearance for this limited purpose, this attorney advised the Court that he would not be representing Defendant. Plaintiff's counsel also affirms that the prosecutor handling the Criminal Action advised Plaintiff's counsel that the trial of the Criminal Action was further delayed at the request of counsel for Defendant in the Criminal Action.

Plaintiff's counsel also provides a copy of a complaint in a related action pending in the United States District Court for the Eastern District of Court titled *Optimus Communications v. MPG Associates, Inc.*, Docket Number CV11-2468 ("Related Action") (Ex. C to Klein Aff. in Supp.). In the Related Action, the plaintiff alleges that defendant breached a commission agreement entered into by the parties in connection with Verizon sales to clients consummated by plaintiff. Plaintiff's counsel affirms that, upon information and belief, the plaintiff in the Related Action is owned or controlled by Avi Ainev ("Ainev") and is represented by the same attorney who contacted Plaintiff's counsel in May of 2010 to request an extension of Defendant's time to respond to the Complaint in the Instant Action.

Plaintiff's counsel submits that the gravamen of the complaint in the Related Action ("Related Complaint") is that KTI circumvented its 2005 agreement with Optimus Communications ("Optimus") by dealing directly with Optimus' sales agents, including Randone, thus depriving Optimus of sales commissions of approximately \$250,000. Plaintiff's counsel notes that this is the precise sum that Randone claims is owed to him by KTI. Plaintiff's counsel submits that the Related Complaint is defective on its face because the underlying agreement at issue contains an arbitration clause. KTI intends to move to dismiss the Related Action, and to move for sanctions on the grounds that the Related Action lacks merit in light of the arbitration clause in the underlying agreement.

Plaintiff's counsel affirms, further, that KTI filed a separate action against James Roeske ("Roeske") for his involvement in Randone's allegedly improper conduct with respect to KTI. The Court (Marber, J.) awarded KTI a default judgment against Roeske in the sum of \$34,358.76, with interest. Plaintiff provides a copy of the transcript reflecting Justice Marber's

award (Ex. E to Klein Aff. in Supp.).

In opposition to Plaintiff's motion, Randone affirms that he is the president of KTI West Inc. ("KTI West"), a California corporation engaged in the sale of telecommunication services. In or about 2007, KTI West entered into an oral agreement with Plaintiff pursuant to which KTI West agreed to solicit customers to purchase telecommunications services from Verizon. On making a sale, KTI West would send the sales information to Plaintiff in New York and Plaintiff would process the sale with Verizon. KTI West was paid a sales commission from Plaintiff on each new Verizon customer it obtained.

Randone avers that KTI West operated solely in California and Texas, and 90% of the sales were secured were in California and the remaining 10% were secured in Texas. Randone affirms that he 1) never entered New York for any business purposes related to KTI West's business dealings with Plaintiff; and 2) never transacted business within New York. KTI West sent sales contracts executed in California and Texas to the Plaintiff in New York for processing through Verizon.

Randone avers further that the persons named in the Complaint, to whom Randone allegedly made defamatory comments, are all residents of California. He never communicated any statements regarding Plaintiff to any person in New York, never telephoned anyone in New York about Plaintiff and never traveled to New York to speak with anyone in person about Plaintiff. Moreover, at the time that Defendant allegedly made the defamatory statements, he was incarcerated in California on the Criminal Action, and was not involved in any business activity due to that incarceration. Randone affirms that he was acquitted of all charges in the Criminal Action.

In opposition to Defendant's motion, Ginamarie Pigott ("Pigott"), an officer and principal of KTI, disputes Defendant's assertion that he derived no business from interstate commerce and did no business in New York. Pigott affirms that KTI is a national sales company with customers, sales representatives, subagents and independent contractors located throughout the country. Its sales representatives are permitted to sell authorized products and services anywhere in the United States, and do so.

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Pigott affirms, further, that KTI's business relationship with Randone was based on a business model pursuant to which KTI sold him the business name "KTI West" for \$500. As an independent contractor, Randone operated KTI West by using sales representatives who were acting exclusively on behalf of KTI. Those sales representatives completed sales throughout the country of Verizon products and services offered by KTI in its capacity as an authorized Verizon agent. In exchange for Randone's sales, KTI paid him a commission of 80% and he, in turn, paid commissions to his sales team. Randone also had the authority to recruit new sales representatives throughout the country. Pigott affirms that KTI's purpose in entering into its arrangement with Randone was "to have a physical presence on the West Coast without itself having to incur the expenses of maintaining an office there" (Pigott Aff. in Opp. at ¶ 3).

Pigott explains the "Verizon Ca\$h System" (Pigott Aff. in Opp. at ¶ 4) which is Verizon's computer program for calculating sales commissions. The Verizon Ca\$h System ("VCS") electronically generates a document called a CCF when orders are issued by Verizon. The CCF is maintained in the ordinary course of KTI's business. Pigott further explains how it enters information into the VCS, which information includes the sales team's applicable code number, the year sold and the last name of the sales agent. Pigott provides a spreadsheet ("Spreadsheet") (Ex. A to Pigott Aff. in Supp.) which reflects that, from 2007 to 2009, Randone's KTI West team sold Verizon products and services to 195 customers in states other than California, from which Randone received commissions. In addition, the Spreadsheet reflects that Randone's team made sales to 25 customers in New York, from which Randone received commissions.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment in light of Defendant's failure to actively participate in the Instant Action, and contends that Defendant has used his incarceration in the Prior Action "as a pretext for delaying the [I]nstant [A]ction" (P's Memo. of Law at p. 2). Plaintiff outlines Defendant's delays, including but not limited to 1) the request in May of 2010 by an attorney named Rosalyn Maldonado for an extension of time for Randone to answer the Complaint, and Ms. Maldonado's failure to enter an appearance for Defendant following that request, 2) Defendant's claim that he is not subject to jurisdiction in New York notwithstanding his having availed himself of New York's court system by filing an

[* 6]

action in New York County in 2006, 3) Defendant's failure to appear at a conference before the Court in February of 2011 due to his incarceration on the Criminal Action, 4) the delay of the trial of the Criminal Action by Randone's criminal defense attorney, and 5) the Defendant's claimed inability to participate in the Instant Action even though the Related Action, which is proceeding, is being pursued by Ainev who, at Randone's behest, allegedly recruited KTI's subagents to leave KTI. Plaintiff argues that, under all the circumstances, the Court should conclude that Defendant's failure to proceed has been intentional and/or in bad faith and enter a default judgment in favor of Plaintiff and against Defendant.

Defendant moves to dismiss the Complaint, first on the grounds that the court lacks personal jurisdiction over Defendant. Defendant argues that he could not have reasonably expected his purportedly tortious statements, which were made outside of New York, to have consequences within New York in light of the fact that 1) his purported statements were made in California to persons in California; and 2) as a result of Defendant's alleged statements, the persons hearing the statements allegedly ceased doing business with Plaintiff in California, and possibly Texas. Defendant also argues that the exercise of jurisdiction over Defendant in New York is impermissible because Defendant did not derive substantial revenue from interstate or international commerce, in light of the fact that Defendant was incarcerated at the time of the allegedly defamatory statements. Defendant also argues that, for the purposes of the Instant Action, Defendant's business dealings with Plaintiff through KTI West are irrelevant. Plaintiff's claims arise out of statements allegedly uttered by Defendant after the termination of Defendant's business dealings with Plaintiff.

Defendant also argues that the Complaint does not state a proper cause of action in light of the fact that 1) with respect to the cause of action for trade libel, Plaintiff has failed to plead special damages and specifically set forth the actual losses that form the basis for the damages; and 2) Plaintiff's claim for "tortious interference with business," whether intended to refer to tortious interference with contractual relations or tortious interference with business relations, is insufficient, *inter alia*, in light of Plaintiff's failure to allege that Defendant procured a breach of a specific contractual obligation.

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Plaintiff opposes Defendant's motion to dismiss, submitting that 1) Defendant waived any jurisdictional defense in light of his failure to raise a jurisdictional objection in his answer, or in a pre-answer motion to dismiss; 2) Defendant filed a purported motion to dismiss for failure to state a cause of action (Ex. E to Klein Aff. in Opp.), consisting of a lengthy handwritten application to the Court, which makes no reference to a jurisdictional objection; 3) Randone's Affidavit, which contains only "conclusory, unsupported and self-serving statements" regarding his transaction of business (P's Memo. of Law in Opp. at p. 15), is insufficient to support his motion to dismiss; 4) even assuming *arguendo* that the Court were to consider the merits of Defendant's motion, Plaintiff is entitled to discovery of Randone on the jurisdictional issue pursuant to CPLR § 3211(d); 5) the Court has personal jurisdiction over Randone pursuant to CPLR §§ 302(a)(1), 302(a)(3)(i) and 302(a)(3)(ii); and 5) the Court should deny Defendant's motion to dismiss for failure to state a cause of action as the allegations in the Complaint state causes of action for trade libel, tortious interference and *prima facie* tort.

In reply, Defendant submits that 1) the Court should excuse Defendant's failure to assert his personal jurisdiction objection in his answer or in a pre-answer motion; 2) Plaintiff has improperly framed the personal jurisdictional analysis based on the business relationship of Plaintiff and non-party KTI West, rather than on the claims in the Complaint which relate to statements and actions occurring after Defendant ceased doing business with Plaintiff through KTI West; and 3) in opposition to Defendant's motion to dismiss for failure to state a cause of action, Plaintiff has offered "nothing other than a recapitulation of its pleadings" (Brown Reply Aff. at ¶ 8).

RULING OF THE COURT

A. Default Judgment

Pursuant to CPLR § 3215(a), when a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. In *Key Bank v. Lammers*, 191 A.D.2d 615 (2d Dept. 1993), the Second Department reversed the trial court's order entering a default judgment, based solely on the defendant's failure to attend the initial pretrial conference, where the record suggested that the *pro se* defendant intended to participate in the proceedings and that her default was not intentional or the result of bad faith. *Id.*

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B. Dismissal Standard for Failure to State a Cause of Action

It is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

C. Defense of Lack of Personal Jurisdiction

A defendant who fails to move to dismiss on the ground of lack of personal jurisdiction within sixty (60) days after serving its answer waives that defense. *Dimond v. Verdon*, 5 A.D.3d 718, 719 (2d Dept. 2004); CPLR § 3211(e).

D. Relevant Causes of Action

The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment. *Banco Popular North America v. Lieberman*, 75 A.D.3d 460, 462 (1st Dept. 2010), citing *Waste Distillation Tech. v. Blasland & Bouck Engrs., P.C.*, 136 A.D.2d 633 (2d Dept. 1988). In addition, the facts so published must cause special damages, in the form of actual lost dealings. *Id.*, citing *SRW Assoc. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 331 (2d Dept. 1987).

On a motion to dismiss a claim for libel on the ground that the offending statement is not defamatory, the court must determine whether the contested statements are reasonably susceptible of a defamatory connotation. *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 412-413 (1st Dept. 2009), quoting *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 380 (1995) and citing *James v. Gannett Co.*, 40 N.Y.2d 415, 419 (1976). In determining whether the statement is reasonably susceptible of a defamatory meaning, the court must examine not only the particular words claimed by the plaintiff to be defamatory but the entire communication in which those

words appeared. *Id.* at 413, citing *James, supra*, at 419-420.

To state a cause of action to recover damages for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct that interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 82 A.D.3d 915, 918 (2d Dept. 2011), citing *Smith v. Meridian Techs., Inc.*, 52 A.D.3d 685 (2d Dept. 2008). As a general rule, such culpable conduct must amount to a crime or an independent tort, and may include wrongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. Mere knowing persuasion would be insufficient. *Id.*, quoting *Lyons v. Menoudakos & Menoudakos, P.C.*, 63 A.D.3d 801, 802 (2d Dept. 2009) (internal citations omitted).

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat & Apron v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007).

To state a claim for prima facie tort, plaintiff must plead 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts that would otherwise be lawful. *Posner v. Lewis*, 80 A.D.3d 308, 312 (1st Dept. 2010), quoting *Freithofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985).

E. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion for a default judgment based on the Court's conclusion that the record suggests that the Defendant, who was incarcerated in California as outlined in the 2010 Decision, intends (and has always intended) to participate in these proceedings and that his failure to appear at a prior conference before the Court was not intentional or the result of bad faith. Moreover, in his putative motion (Ex. E to Klein Aff. in Supp.), Defendant articulates potential defenses to this action by denying all of Plaintiff's allegations and asserting, *inter alia*, that 1) Plaintiff has instituted this action in an effort to conceal its improper conduct with respect to paying commissions; and 2) Defendant's statements about Plaintiff were truthful and, therefore, not defamatory. Under all the circumstances, the Court concludes that the imposition of a default judgment would be inappropriate and the Court denies that application.

The Court denies Defendant's motion to dismiss this action for lack of personal jurisdiction based on the Court's conclusion that Defendant has waived that defense by failing to assert it in his answer or pre-answer motion.

The Court denies Defendant's motion to dismiss the Complaint for failure to state a cause of action. As outlined in the 2010 Decision, the Complaint alleges that Defendant 1) published false, defamatory and misleading statements about KTI regarding its lack of trustworthiness and failure to pay sums due to subagents; and 2) encouraged KTI's subagents to terminate their contractual and other business relationships with KTI. Plaintiff alleges that, following KTI's termination of Defendant, due to Defendant's arrest for the Criminal Action and other breaches of his agreement with KTI which included Defendant's accessing customers' personal and confidential account information without their prior approval, Defendant "embarked on a campaign to injure KTI's business reputation in the industry by falsely and maliciously claiming that KTI fails and refuses to pay its agents and subagents sums contractually due them for services rendered" (Comp. at ¶ 15). Plaintiff alleges that Randone arranged, through another subagent, a series of three-way telephone conversations from his jail cell with other KTI subagents as well as a KTI employee in Texas. During these conversations, Randone allegedly 1) falsely claimed that KTI owes him \$25,000, which it is unjustifiably refusing to pay; 2) impugned KTI's character and integrity by falsely alleging, *inter alia*, that KTI "pretends to be nice to its subagents while it stabs them in their backs" (Compl. at ¶ 17(b)); and 3) urged subagents to break their contractual arrangements with KTI and to work, instead, with KTI's competitors. Plaintiff alleges that, as a result of Randone's conduct, Roeske left KTI to work for a competitor called Pipe One; and 2) Roeske and Avi Einav, Pipe One's principal, are actively recruiting KTI's subagents to leave KTI and join Pipe One. Plaintiff has obtained a judgment against Roeske.

At this nascent stage of the litigation, accepting the facts alleged as true and according to the Plaintiff every favorable inference which may be drawn therefrom, the Court concludes that the factual allegations in the Complaint state causes of action for trade libel, tortious interference with business and *prima facie* tort. Accordingly, the Court denies Plaintiff's motion to dismiss the Complaint for failure to state a cause of action.

In light of the foregoing, the Court denies Plaintiff's motion and Defendant's motion.

All matters not decided herein are hereby denied.


This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on April 18, 2012 at 9:30 a.m. The stay previously imposed is hereby lifted.

ENTER

DATED: Mineola, NY

March 9, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 14 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**