Resource Finance Co. & RFC I, LLC v Cynergy Data, LLC
2013 NY Slip Op 32944(U)
November 19, 2013
Supreme Court, New York County
Docket Number: 650142/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

RESOURCE FINANCE COMPANY and RFC I, LLC,

Plaintiffs,

-against-

CYNERGY DATA, LLC *et al.*,

Defendants.

INDEX NO. 650142/2011

MOTION DATE Oct. 2, 2013

MOTION SEQ. NO. 013

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the motion of third-party defendants Richard Weissman, Sherry Weissman and Pamela Weissman for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the third and fourth causes of action in the third-party complaint and cross claim defendant Seymour Weissman's motion for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the fourth, fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims asserted by Merchant Processing Services, LLC are decided in accordance with the accompanying decision and order.

Dated: November 19, 2013

O. PETER SHERWOOD, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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RESOURCE FINANCE COMPANY AND RFC I, LLC,

Plaintiffs,

-against-

CYNERGY DATA, LLC, MERCHANT PROCESSING SERVICES, LLC, CARD PAYMENT SYSTEMS OF NEW YORK, LLC, MERCHANT PROCESSING SERVICES CORP., VLADIMIR SADOVSKY, ALEXANDER PARSOL, OLEG FIRER, CARD PAYMENT SERVICES, LLC AND SEYMOUR WEISSMAN,

Defendants.

----------X

SEYMOUR WEISSMAN,

Cross-Claim Plaintiff,

-against-

MERCHANT PROCESSING SERVICES, LLC,

Cross-Claim Defendant.

----------X

MERCHANT PROCESSING SERVICES, LLC,

Cross-Claim Plaintiff,

-against-

SEYMOUR WEISSMAN,

Cross-Claim Defendant.

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DECISION AND ORDER

Index No. 650142/2011

Mot. Seq. No. 013

----------X

MERCHANT PROCESSING SERVICES, LLC,

Third Party Plaintiff,

-against-

RICHARD WEISSMAN, SHERRY WEISSMAN and PAMELA WEISSMAN,

Third Party Defendants.

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SHERWOOD, J.S.C.:

Third-party defendants Richard Weissman (Richard), Sherry Weissman (Sherry) and Pamela Weissman (Pamela) move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the third and fourth causes of action in the third party complaint. Cross claim defendant, Seymour Weissman (Sy) moves, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the fourth, fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims asserted by Merchant Processing Services, LLC (MPS LLC).

This lawsuit arises out of a contentious dispute between former business partners. In 2006, Sy and Richard entered into a series of agreements to sell their interest in Card Payment Systems of New York, Inc. (Old CPS), a credit card processing business, to MPS LLC, a company that is run by defendant Vladimir Sadovsky (Sadovsky). Sadovsky agreed to pay Sy and Richard $2 million and to establish a new company, Card Payment Systems of New York, LLC, that would be a wholly owned subsidiary of MPS LLC, and which would be owned 70 % by MPS LLC and 30 % by Sy (Sheppe affirmation, exhibit A [hereinafter Answer] ¶¶ 69, 72). Pursuant to the stock purchase agreement (SPA) which governed the sale of Old CPS, Sadovsky agreed to immediately pay $150,000 to Sy and $300,000 to Richard. The remainder of the purchase price was financed through: 1) a $850,000 promissory note to Sy which was to be repaid in eight equal monthly installments on a quarterly basis, and 2) a $700,000 promissory note in Richard's favor which was to be repaid, first, in nine equal monthly installments of $11,111.11, and a tenth installment of $600,000 which was due on the ten-month anniversary of the note. The SPA also contained a noncompete clause which,

inter alia, prohibited Sy and Richard from contacting and/or transacting business with current customers of Old CPS (Answer, ¶¶ 78-85).

In addition to the SPA, Sy and MPS LLC entered into two other agreements: 1) an employment agreement wherein Sy agreed to maintain the confidentiality of customer and vendor lists (Answer ¶¶ 87-91); and 2) a shareholders agreement naming Sy as president and as a director of New CPS and tasking him with responsibility for the day-to-day operation of that company. The shareholders' agreement contained a non-solicitation clause which prohibited any shareholder from interfering with the relationship between the company and its employees and/or from engaging in any business with a customer of the company or any other shareholder (Answer, ¶¶ 95-102).

It is undisputed that MPS LLC, initially, borrowed $750,000 from plaintiffs Resource Finance Company, LLC and RFC I, LLC (collectively RFC) to help finance the purchase of Old CPS. Pursuant to the loan agreement, MPS LLC granted RFC a security interest and assignment of all of MPS LLC's assets, including its contracts and tort claims (Sheppe affirmation, exhibit B [hereinafter Weissman aff], ¶ 6). One of MPS LLC's payment processors, defendant Cynergy Data LLC (Cynergy), acknowledged the $750,000 loan by agreeing to make twelve monthly payments of $10,466.75 to RFC from money it collected on New CPS's behalf (the residuals) with a lump sum payment of the remaining debt due at the end of twelve months (Weissman aff, ¶ 6). Throughout 2008 and 2009, RFC loaned additional money to MPS LLC and Sadovsky. Eventually, the monthly amount that was necessary to pay back the loans exceeded New CPS's residuals and MPS and Sadovsky allegedly defaulted in their repayment obligations to RFC (Weissman aff, ¶ 9).

Sy alleges that MPS LLC and Sadovsky's loans from RFC put New CPS in a precarious financial position; that the RFC loans did not benefit New CPS, but rather benefitted Sadovsky and the companies he owned; that Sadovsky and MPS LLC breached the SPA and the parties' other agreements, and that, because of Sadovsky and MPS LLC's alleged breaches and refusal to operate New CPS in the best interest of its owners, in 2010, he was compelled to leave New CPS and form another company known as Card Payment Services, LLC (Weissman CPS) (Weissman aff, ¶¶ 14-19).

In January 2011, RFC commenced an action against Cynergy, MPS LLC, Old CPS, New CPS, MPS Corp., Sadovsky, Sy, Alexander Parsol, Oleg Firer and Weissman CPS[1] to recover $1.5 million alleged to be due on the loans made to MPS LLC, Old CPS and New CPS[2]. Sy and Weissman CPS answered RFC's complaint and, in addition to their counterclaims against RFC, the answer stated a cross claim against MPS LLC for contractual indemnification. MPS LLC served its answer to the cross claim, and interposed 16 direct and/or derivative cross claims against Sy and four third-party claims against Richard, Sherry and Pamela

The cross complaint/third-party complaint alleges that, in violation of the agreements between Sy and MPS LLC, Sy formed Weissman CPS in 2009 while he was still employed by New CPS and that: 1) he solicited New and Old CPS's customers and encouraged them to move their business to Weissman CPS; 2) he enlisted Richard, Sherry and Pamela to act as agents for Weissman CPS and convince customers to transfer their business to that entity; and 3) Richard, Pamela and Sherry were aware that Sy was the president and director of New CPS when they solicited customers on behalf of Weissman CPS.

By this motion, Sy, Richard, Sherry and Pamela seek dismissal of: a) the third, third-party claim which states a cause of action against Richard, Sherry and Pamela for aiding and abetting Sy's alleged breach of fiduciary duty; b) the fourth cross claim and third-party claim alleging slander; c) the fifth cross claim against Sy for breach of the employment agreement; d) the sixth cross claim against Sy for breach of the shareholders' agreement; e) the eighth cross claim against Sy for breach of fiduciary duty; f) the ninth cross claim against Sy for breach of the duty of loyalty; g) the twelfth cross claim against Sy for statutory and common law trademark infringement; and h) the thirteenth

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[1] Although the caption in this matter has not been amended, the action has been discontinued with prejudice as against defendants Cynergy, Oleg Firer, Sadovsky and Alexander Parsol. Moreover, by order dated June 11, 2011, the court (Kapnick, J.) granted RFC's motion for a default judgment against Old CPS and New CPS.

[2]The complaint states 14 separate causes of action. The procedural history regarding RFC's complaint will not be recited herein as it is not relevant to the motion currently before the court.

cross claim against Sy for unfair competition.[3]

PARTIES' CONTENTIONS

In support of dismissal of the third, third-party claim, the movants argue that MPS LLC has failed to state a cause of action because the complaint fails to allege that they had actual knowledge that Sy was breaching his fiduciary duty and/or that they provided substantial assistance to Sy, as the primary violator. Richard, Sherry and Pamela contend that the slander cause of action is time-barred, as to them, and all of the movants argue that MPS LLC has failed to plead slander with sufficient particularity. It is Sy's position that the trademark infringement cross claim must be dismissed because the statute upon which MPS LLC relies is only applicable to registered trademarks, and the common-law trademark infringement claim is insufficient because there is no allegation that the name at issue has acquired a secondary meaning or is inherently distinctive. Movants also argue that the third, forth, fifth, sixth, eighth, ninth, twelfth and thirteenth causes of action must be dismissed because those causes of action improperly intermingle MPS LLC's individual claims with the derivative claims belonging to New CPS.

In opposition to dismissal, MPS LLC contends that the slander claim is sufficiently pleaded; that the aiding and abetting claim states all the elements necessary to plead that cause of action including that Richard, Sherry and Pamela were aware that Sy was the president of New CPS and that they knowingly participated in Sy's breaches of his fiduciary duties. MPS LLC states that it erroneously stated its trademark cause of action under 15 USC § 1114 and requests leave to amend its pleading to state a claim under the Lanham Act and the common law. It is MPS LLC's position that the use of the Weissman CPS name is likely to cause confusion in that it is confusingly similar to Old CPS and New CPS and that it could lead to the belief that Sy's new company is affiliated with Old and/or New CPS. Finally, MPS LLC argues that it has properly asserted derivative claims on behalf of New CPS and, if it has not, it requests leave to amend its cross claims and third-party claims to add New CPS as an additional plaintiff.

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[3] The cross claims and counterclaims are stated directly or, in the alternative, derivatively on behalf of New CPS.

DISCUSSION

On a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977])). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, where the motion to dismiss is based on documentary evidence (CPLR 3211 [a] [1]), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88; *see also 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

1. **Aiding and Abetting Breach of a Fiduciary Duty**

"[A] claim for aiding and abetting breach of a fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808-809 [2d Dept 2011] [internal quotation marks and citations omitted]). "A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator" (*id. at 809,;* citing *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]). Moreover, knowledge of the breach of duty must be actual, not merely constructive (*Kaufman v Cohen* 307 AD2d at 125).

As a corporate officer, Sy owed a fiduciary duty to MPS LLC (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). However, in this case, there is a question of fact about whether customers and merchants moved to Weissman CPS before Sy left New CPS or after he left, when he allegedly no longer owed a fiduciary duty to New CPS. As to the movants knowledge of Sy's duty, the third-party complaint contains only a conclusory statement that Richard,

Sherry and Pamela were aware that Sy was director of New CPS. The pleading does not claim that the movants had actual knowledge of Sy's duties under the SPA, the shareholders' agreement and/or the employment agreement or that they were aware that, by soliciting merchants and customers, they were providing substantial assistance to Sy in the alleged violation of his fiduciary duties. The third cause of action in the third-party complaint does not adequately state a cause of action for aiding and abetting a breach of fiduciary duty. Accordingly, that cause of action is dismissed.

2. **Slander**

"The elements of a cause of action [to recover damages] for defamation[4] are a false statement, published [or stated aloud] without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" *(Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009] [internal quotation marks and citations omitted]). In New York, CPLR 3016 (a) requires that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." Moreover, New York courts require dismissal of a defamation claim where the persons to whom the defamatory remarks were allegedly made and where the dates, times and places of the defamation are left unspecified (*Bell v Alden Owners*, 299 AD2d 207, 208-209 [1st Dept 2002]; *Hawley v Merchant Ivory Productions (USA) Inc.*, 2008 NY Slip Op 31694 [U]; 2008 WL 2556260, 2008 NY Misc LEXIS 9497 [Sup Ct, NY County 2008]; *see also Gill v Pathmark Stores*, 237 AD2d 563, 564 [2d Dept 1997]). Moreover, CPLR 215 (3) requires that a cause of action to recover damages for slander be commenced within one year of the date of publication (*Casa de Meadows, Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 920 [1st Dept 2010]). The cause of action accrues, and the statute begins to run, on the date the statements at issue were made, not when plaintiff learns of them (*id.*)

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[4] The term defamation encompasses both libel and slander (*Henriques v Linville*, 30 Misc 3d 1215 (A), 2011 NY Slip Op 50074 [U] *7 [Sup Ct, New York County 2011]). Libel is the publication of a statement about an individual that is both false and defamatory (*Brian v Richardson*, 87 NY2d 46, 51 [1995]) and slander is a defamatory statement said aloud (*see Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 428 [1st Dept 1968] *affd* 25 NY2d 943 [1969]).

In this case, the third-party claim alleging slander against Richard, Sherry and Pamela is barred by the one-year statute of limitations. Although not specific, the third party complaint alleges that sometime in 2009 and in March 2010, or during the six months prior to March 2010, Sy enlisted the help of Richard, Sherry, and Pamela to solicit merchants and customers on behalf of Weissman CPS. It is during that time period that the slander allegedly occurred. The third- party complaint was filed in October 2012, more than two years after the third-party defendants allegedly made the slanderous statements about Old CPS, New CPS and MPS LLC. Accordingly, the slander claim is time barred as against Richard, Sherry, and Pamela.

The slander cross claim against Sy is timely. However, that cross claim, as against Sy, is dismissed, with leave to replead, because it fails to set forth the allegedly slanderous words that were uttered and it fails to identify the persons to whom the slanderous remarks were allegedly made. In addition, the dates, time and place of the slander have not been specified.

3. **The Fifth, Sixth, Eighth, Ninth, Twelfth and Thirteenth Cross Claims**

> "For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation. Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged. But allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed, though leave to replead may be granted in an appropriate case."

(*Abrams v Donati*, 66 NY2d 951, 953 [1985] [internal citations omitted]; *see Yudell v Gilbert*, 99 AD3d 108, 115 [1st Dept 2012]; *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2d Dept 2009]; *Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002]; *see also Tzolis v Wolff*, 10 NY3d 100, 109 [2008] [members of LLC's may sue derivatively]).

The fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims intermingle MPS LLC's direct claims as a stockholder with the derivative claims of New CPS. New CPS is not named as

a cross-claim plaintiff. In addition, the causes of action are a confusing mixture of allegations which should be specifically identified as either direct or derivative. Accordingly, the fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims are dismissed, with leave to replead.

CONCLUSION

Accordingly, it is

ORDERED that the motion of third-party defendants Richard Weissman, Sherry Weissman and Pamela Weissman to dismiss the third and fourth causes of action in the third party complaint is **GRANTED** and the third and fourth causes of action in the third-party complaint are **DISMISSED**; and it is further

ORDERED that third-party defendants are directed to serve an answer to the third party complaint within 20 days after service of a copy of this order with notice of entry; and it is further

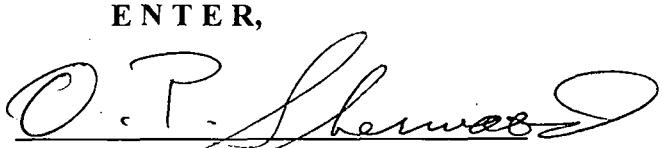
ORDERED that cross claim defendant Seymour Weissman's motion to dismiss the third, fourth, fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims asserted by Merchant Processing Services, LLC is **GRANTED** and such cross claims are **DISMISSED**; and it is further

ORDERED that cross claim plaintiff Merchant Processing Services, LLC is **GRANTED** leave to serve an amended answer so as to replead the fourth, fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that cross claim plaintiff fails to serve and file an amended answer in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the fourth, fifth, sixth, eighth, ninth, twelfth and thirteenth cross claims with prejudice.

Dated: November 19, 2013

E N T E R,



O. PETER SHERWOOD
J. S. C.