# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** MELVIN L. SCHWEITZER **PART** 45
*Justice*

Index Number : 651599/2012
EPIC SPORTS INTERNATIONAL,
vs.
FROST, SEAN
SEQUENCE NUMBER : 003
____ DISMISS ACTION

**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** by defendants Front and Eyeball Productions, LLC to dismiss all causes of action as against them is GRANTED.

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

**Dated:** February 21, 2013

Melvin L. Schweitzer J.S.C.
MELVIN L. SCHWEITZER

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 45

| | | |
|---|---|---|
| EPIC SPORTS INTERNATIONAL, INC., f/k/a KLIP AMERICA, INC., AND AMINCOR, INC., | : | |
| Plaintiffs, | : | Index No.: 651599/2012 |
| -against- | : | DECISION AND ORDER |
| SEAN FROST, EYEBALL PRODUCTIONS, LLC., SAMSUNG C&T AMERICA, MARKER VÖLKL (INTERNATIONAL) GMBH, COMETECH ENTERPRISE CO., and MARSHAL INDUSTRIAL CORP., | : | Sequence No. 003 |
| Defendants. | : | |

**MELVIN L. SCHWEITZER, J.:**

Plaintiffs Epic Sports International, INC f/k/a Klip America, Inc. (ESI), and Amincor, Inc. (Amincor) bring this action against defendants Sean Frost (Mr. Frost), Eyeball Productions, LLC. (Eyeball), Samsung C&T America, Inc. (SCTA), Marker Völkl International GMBH (MV), Cometech Enterprise Co. (Cometech), and Marshall Industrial Corp. (Marshall), alleging violation of ESI's intellectual property rights as well as various breach of contract and tort claims. Mr. Frost and defendant Eyeball move to dismiss all claims involving Mr. Frost and Eyeball pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and pursuant to CPRL 3211 (a) (1) on the ground that Mr. Frost's and Eyeball's defenses are founded upon documentary evidence.

**Background**

The following facts are taken from the plaintiffs' complaint. ESI, formerly known as Klip America, Inc., is a Nevada corporation with its principal place of business in New York. In September 2008, ESI was heavily indebted to Capstone Business Credit, LLC and Capstone

Capital Group I, LLC, New York entities with whom ESI was doing business. Mr. Frost, a principal and president of ESI, had executed a personal guarantee for the debt.

In September 2008, ESI went through a reorganization in which it restructured its outstanding debt. It entered into a Subscription Agreement (Agreement) with Universal Management Corp. (Universal), an entity formed in connection with the reorganization. Mr. Frost executed the Agreement as president of ESI, and individually with regard to certain provisions. Pursuant to the Agreement, Universal received 80% of ESI's stock, Mr. Frost received 20%, and ESI retained exclusive ownership of all properties, personal and real and all intellectual property rights previously owned by it. In addition, on September 19, 2008, Mr. Frost entered into an employment agreement with ESI. Also, as part of the reorganization, Mr. Frost's personal guarantees of debt of ESI to Capstone Business Credit, LLC and Capstone Capital Group I, LLC were released.

On October 1, 2008, ESI entered into a License Agreement (MV License Agreement) with MV, under which ESI received a license to sell and distribute Völkl and Boris Becker merchandise. Pursuant to the terms of the MV License Agreement, ESI developed molds (including Organix and Power Bridge Series molds) and other technology (including Power Arm, BoiSensor, Optispot and DNX technologies) for the purpose of manufacturing Völkl tennis racquets. The complaint alleges that these molds and technologies constitute ESI's intellectual property.

On October 14, 2010, in an attempt to facilitate the worldwide growth of Völkl sales, ESI signed a Strategic Alliance Agreement (SCTA Alliance Agreement) with SCTA. ESI and SCTA also signed a Limited Sublicense Agreement (MV Sublicense Agreement) setting out the

terms of MV product distribution. MV had knowledge of and consented to ESI and SCTA entering into these agreements.

In May 2011, MV notified ESI of material breaches of the MV License Agreement. On July 20, 2011, MV's President visited ESI's office in New York to review the status of the worldwide distribution of Völkl products. In September 2011, upon completion of the review, MV terminated the MV License Agreement with ESI. This resulted in an automatic termination of the MV Sublicense Agreement between ESI and SCTA. Upon termination, ESI was to liquidate the existing inventory of Völkl products, and SCTA was to liquidate all the inventories of Völkl and Boris Bekker products.

Allegedly, during his visit to New York, MV's President separately met with Mr. Frost and SCTA. The complaint alleges that at this time these parties opened discussions regarding the sale of inventory held by SCTA. Plaintiffs allege that beginning in September 2011, when the Agreements were terminated, Mr. Frost no longer made his daily activities known to ESI representatives. Allegedly, SCTA made payments directly to Mr. Frost in connection with the sale of Völkl and Boris Bekker products. In addition, Mr. Frost created a new entity called Eyeball Production, LLC, for purpose of selling and marketing Völkl and Boris Bekker tennis equipment.

Plaintiffs allege that despite SCTA's obligation to stop sales and liquidate inventory, SCTA and Mr. Frost cooperated and continued to sell and distribute Völkl and Boris Bekker products that were designed and manufactured on the basis of ESI's molds and technologies. Plaintiffs further allege that despite their demand, Mr. Frost has refused to account for the sale and manufacture of Völkl and Boris Bekker products. Plaintiffs assert that this constitutes a

direct violation of ESI's intellectual property rights and a breach of fiduciary duty owed to them by Mr. Frost.

**Standard of Review**

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court's task is to determine whether "from the [complaint's] four corners[,] factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, "a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. "Documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

**Discussion**

First, Second, Third, Fourth, Eleventh, Thirteenth and Fourteenth Causes of Action: Violation of ESI's Property Rights

Plaintiffs' first, second, third, fourth, eleventh, thirteenth and fourteenth causes of action involve allegations predicated on the existence of ESI's protected property rights. Under New York law, protected intellectual property rights are limited to trademarks, copyrights, patents and trade secrets. *People v Colon*, 8 Misc 3d 569, 574 (Sup Ct, NY Co 2005). It is undisputed that ESI never obtained any trademark, copyright or patent to protect the newly developed molds and technologies. At issue is whether plaintiffs' complaint pleads the existence of a trade secret owned by ESI, and, if so, whether the misappropriation of a trade secret claim is properly pleaded.

In order to state a cause of action for misappropriation of trade secrets, a plaintiff must plead that: "(1) it possessed a trade secret; and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means. *Integrated Cash Mgmt. Serv. v Digital Transactions, Inc.*, 920 F2d 171 (2d Cir 1990); *Sylmark Holdings Ltd v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 297 (2004). The New York Court of Appeals has adopted the definition of trade secret set forth in the Restatement of Torts as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know how to use it." *Ashland Mgmt., Inc. v Janien*, 82 NY2d 395, 407 (1993) (citing Restatement of Torts, § 757, comment b); *see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285, 297 (2004).

Plaintiffs' complaint alleges that the molds and technologies, developed in connection with the manufacturing of the Völkl tennis racquets, were ESI's intellectual property. However,

the pleading fails to identify what information, property and/or technology comprise the trade secrets in this case. In addition, plaintiffs do not allege that any particular intellectual property was confidential, or that any effort was spent to guard the secrecy of any alleged technology. Moreover, the complaint fails to allege the value of the information to its business or that it gives ESI an advantage over competitors.

Therefore, even interpreted in a light most favorable to the plaintiffs, the facts in the complaint fail to plead the existence of a trade secret. *See Plasmanet, Inc. v Apax Partners, Inc.*, 6 Misc 3d 1011(A), 2044 WL 3115160, at *4 (Sup Ct, NY Co, Nov. 22, 2004) (failure to support conclusory allegations that plaintiff's trade secrets gave it a significant competitive advantage, among other things, results in dismissal of complaint); *Thayil v Fox Corp.*, 2012 WL 364034, at *5 (SDNY Feb. 2, 2012) (trade secret claim dismissed where plaintiff failed to plead that he protected the confidentiality of that alleged trade secret); *Watts v Jackson Hewitt Tax Serv., Inc.*, 675 F Supp 2d 274, 279-80 (EDNY 2009) (counterclaim dismissed where defendants failed to allege that information constituted a trade secret or that information gave them a competitive advantage over their competitors).

Plaintiffs' complaint fails to plead the existence of a trademark, copyright, patent, or trade secret. Thus, the complaint fails to plead the existence of protected property rights. Accordingly, the first, second, third, fourth, eleventh, thirteenth and fourteenth causes of action with regard to the violation of ESI's property rights are dismissed.

First, Second, and Fifteenth Causes of Action: Breach of Contract

Plaintiffs' first, second, and fifteenth causes of action allege that Mr. Frost breached various contractual agreements between Mr. Frost and ESI. In New York, to plead a cause of action for breach of contract, plaintiff's complaint must assert the existence of a contract, plaintiff's performance under the contract, the breach of the contract by the defendant; and damages resulting from the breach. *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Plaintiff also must "allege, in nonconclusory language as required, the essential terms of the parties' contract, including the specific provisions of the contract upon which liability is predicated." *In re Sud v Sud*, 211 A.D.2d 423, 423 (1st Dept 1995).

In the first cause of action, plaintiffs plead that under the Subscription Agreement between ESI, Universal, and Mr. Frost, the latter had "no right to use [ESI's] property rights except for the furtherance of the business of ESI" and that "the further development of ESI's property rights by the defendants . . . is in direct violation of their respective agreements with plaintiffs." However, plaintiffs' contract causes of action are dismissed as a necessary corollary to the failure by plaintiffs to demonstrate their ownership of the property rights *(see* discussion, *supra*). In addition, plaintiffs fail to indicate any "specific provision" of the Agreement that Mr. Frost allegedly breached.

In the second cause of action, plaintiffs plead that "[d]efendant Frost has breached his Employment Agreement with ESI in misappropriating properties belonging to ESI, including tangible, personal, and intellectual property and property rights belonging to ESI." Plaintiffs' complaint fails to specify any specific provisions that give rise to this liability. Additionally, plaintiffs do not allege that plaintiffs performed the contract. Plaintiffs also fail to specify the

time frame of the alleged misappropriation as well as the property that was allegedly misappropriated by Mr. Frost.

Under the fifteenth cause of action, plaintiffs plead that "Frost retained one or more Epic employees, solicited customers and vendors, and used proprietary information to violate the term of the [Employment] Agreement." The complaint does not specify the time frame within which the events giving rise to the cause of action occurred. Similarly, plaintiffs fail to plead in nonconclusory fashion the terms and provisions of the Employment Agreement that were allegedly breached by Mr. Frost. Defendants also cannot be held liable to plaintiffs for communicating information regarding technologies that belong to someone other than plaintiffs. The complaint does not provide a sufficient factual basis upon which a cause of action for breach of the Employment Agreement may be stated.

Plaintiffs' vague and conclusory allegations under the first, second, and fifteenth causes of action are insufficient to satisfy the minimal pleading standards for breach of contract. Accordingly, the first, second, and fifteenth causes of action with regard to the breach of contract are dismissed pursuant to CPLR 3211 (a) (7).

Third and Fifteenth Causes of Action: Breach of Fiduciary Duty

Under the third cause of action plaintiffs plead that Mr. Frost breached his fiduciary duty to plaintiffs by disclosing ESI's trade secrets; by using ESI's property rights; by diverting ESI's assets to Eyeball; by receiving money directly from SCTA; and by using technologies developed by ESI. Since plaintiffs' property rights claims fail (*see* discussion, *supra*), there can be no valid breach of fiduciary duty claim with respect to property rights plaintiffs do not possess. Additionally, plaintiffs fail to allege with any specificity the nature of assets allegedly diverted, or the sums of money allegedly received by Mr. Frost. The complaint also lacks the time frame

within which these actions allegedly took place. Plaintiffs' allegations regarding asset diversion and receipt of money from SCTA are wholly conclusory and fail to state any cognizable cause of action.

Under the fifteenth cause of action, plaintiffs plead that "[u]pon information and belief, discussions and/or negotiations between Eyeball, Frost, and Samsung C&T, took place on or before the termination of Samsung C&T's agreements with the Plaintiff" and "commenced during a period of time that Frost owed a fiduciary duty to Plaintiff." Nothing in any of the agreements between ESI and Mr. Frost prohibited Mr. Frost from entering into discussions with third parties. Conclusory allegations of mere discussions between defendants will not suffice to state a cause of action for breach of fiduciary duty, or any other cognizable cause of action.

Fifteenth Cause of Action: Breach of Covenant of Good Faith and Fair Dealing

Under the fifteenth cause of action, plaintiffs plead that "[u]pon information and belief, discussions and/or negotiations between Eyeball, Frost, and Samsung C&T, took place on or before the termination of Samsung C&T's agreements with the Plaintiff" and "commenced during a period of time that Frost owed a duty of good faith and fair dealing to Plaintiff." To plead breach of good faith and fair dealing, plaintiff must allege facts showing that "defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Aventine Inv. Mgmt, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 (2d Dept 1999).

In New York, the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract. *Phoenix Capital Invs., LLC v Ellington Mgmt. Grp., LLC*, 51 AD3d 549, 550 (1st Dept 2008). As stated above, nothing in any of the agreements created between ESI and Mr. Frost prohibited Mr. Frost from entering into

discussions with third parties. In addition, no provision limits Mr. Frost's ability to contract with third parties upon the termination of the agreement with ESI. To allow plaintiffs' conclusory claim to stand "would unjustifiably frustrate the expectations of the parties as made explicit in the contract." *Phoenix Capital Investments LLC,* 51 AD3d at 550. "The stark inconsistency between the claim and the negotiated terms of the contract requires that the claim be dismissed." *Id.*

Eleventh Cause of Action: Tortious Interference with Contract

Plaintiffs' eleventh cause of action alleges tortious interference with contract on the part of Mr. Frost and other defendants. In New York, to plead tortious interference with contract plaintiff must allege the existence of a valid contract between the plaintiff and a third party; defendant's knowledge of the contract and the specific terms of the contract; defendant's intentional and improper procuring of a breach of that contract; and plaintiff's resulting damages. *Burrowes v Combs*, 25 AD3d 370, 373 (1st Dept 2006). Plaintiff must plead that "but for" defendant's conduct, the contract would not have been breached. *Id.* at 370.

Plaintiffs' complaint asserts that, upon information and belief, Mr. Frost and other defendants were engaged in ongoing business negotiations prior to termination of MV License Agreement. Plaintiffs contend that Mr. Frost and other defendants engaged in undefined business practices subsequent to termination of MV's and SCTA's agreements with ESI. The complaint fails to plead any specific term of any specific contract that was breached as a result of defendants' negotiations. Nor does it plead that defendants' negotiations amount to "intentional and improper procuring of the breach" of the unidentified contracts or that, "but for" defendant's conduct, the contract would not have been breached. The complaint simply concludes that "such negotiations and agreements constitute tortious interference with ESI's contracts with Frost,

Universal, SCTA and MV." This conclusory allegation does not cure plaintiffs' failure to plead the essential elements of a tortious interference with contract cause of claim.

In addition, plaintiffs base their tortious interference with contract cause of action on their allegation that the defendants tortiously interfered with ESI's intellectual property or property rights. In the absence of a proper pleading of such intellectual property or property rights, the claim for interference fails. The failure of a claim to intellectual property or trade secret rights also results in a failure of the related claim for interference with such rights (discussion, *supra*).

Accordingly, the eleventh claim is dismissed for failure to state a cause of action.

Thirteenth Cause of Action: Tortious Interference with Prospective Economic Advantage

Plaintiffs allege tortious interference with prospective economic advantage as a part of the thirteenth cause of action. To plead this cause of action in New York, plaintiff must allege that plaintiff had a business relationship with a third party; that defendant interfered with that relationship; that defendant acted for a wrongful purpose or used dishonest, unfair, or improper means directed at the third party; and that defendant's acts injured the relationship. *Friedman v Coldwater Creek, Inc.*, 2009 WL 932546, at *1 (2d Cir, 2009); *see also 10 Ellicott Square Court Corp. v Violet Realty, Inc.*, 81 AD3d 1366 (4th Dept 2011). Unfair and improper means may include physical violence, economic pressure, fraud or misrepresentation; persuasion alone is not enough. *Id.* at 1367, *citing Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980).

Plaintiffs make the sole allegation that Mr. Frost and other defendants "have knowingly engaged in conduct designed to diminish and interfere with ESI's rights to economic advantage." Plaintiffs' complaint fails to allege that Mr. Frost acted for a wrongful or dishonest purpose or

that he employed improper means directed at third parties. Plaintiffs' complaint fails to plead the claim with required particularity. Accordingly, the thirteenth cause of action with regard to the tortious interference with prospective economic advantage is dismissed.

Thirteenth Cause of Action: Aiding and Abetting Breach of Fiduciary Duty

Under the thirteenth cause of action plaintiffs plead that Eyeball and other defendants "have knowingly assisted Frost in breaching his fiduciary duties to ESI." To plead a claim for aiding and abetting breach of fiduciary duty, a plaintiff must allege the existence of a breach by the primary wrongdoer; knowledge of the violation by the defendant; that defendant knowingly induced or participated in the breach; and damages to the plaintiff as a result of the breach. *See Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 (1st Dept 2007). Plaintiffs fail to plead a breach of fiduciary duty by a primary wrongdoer, and fail to plead that defendants had knowledge of any breach of fiduciary duty by a party or how defendants provided substantial assistance to such party in breaching his fiduciary duties.

The pleading standard established by CPLR 3016 (b) requires that such a claim be plead with particularity and that plaintiff state the circumstances of the alleged wrong in detail. CPLR 3016 (b); *Marine Midland Bank v Grant Thornton LLP*, 260 AD2d 318, 319 (1st Dept 1999). Mere conclusory allegations of defendant's wrongdoing will not satisfy the heightened standard established by CPLR 3016 (b). *Id.*

Here, plaintiffs merely allege that Eyeball and other defendants "have knowingly assisted Frost in breaching his fiduciary duty to ESI." Plaintiffs do not plead any detail of the alleged wrongdoing by Eyeball. Plaintiffs' conclusory statement is insufficient to plead the adding and abetting breach of fiduciary duty cause of action. Accordingly, the claim is dismissed.

Sixteenth Cause of Action: Breach of Fiduciary Duty and Breach of Implied Covenant of Good Faith and Fair Dealing

Under the sixteenth cause of action, plaintiffs plead that "the Defendants, and each of them, engaged in a course of conduct which was designed to breach their obligations to the Plaintiff." The sixteenth claim fails to allege any cognizable cause of action against Mr. Frost or Eyeball while alleging breach of fiduciary duty and breach of implied covenant of good faith and fair dealing on the part of other defendants. This cause of action has to be pled with particularity. CPLR 3016 (b). Also, when a cause of action is pled against multiple defendants, the plaintiff must make factual allegations as to the time frame and particular acts attributable to each defendant. Since the complaint fails to satisfy the established heightened standard, the sixteenth cause of action is dismissed.

Seventeenth and Eighteenth Causes of Action: Equitable Relief and Unjust Enrichment

Under the seventeenth cause of action, the plaintiffs plead that based on Mr. Frost's conduct, this court should equitably rescind the restructuring agreement of ESI; reinstate the debt of ESI to Capstone Business Credit, LLC; reinstate Mr. Frost's personal guarantees of the debt; and make Mr. Frost and Eyeball responsible for both the Capstone Business Credit Loans and the additional investments in ESI. Pleading of a claim for equitable relief in this case requires at a minimum proper pleading of the underlying causes of action against Mr. Frost. It follows that the failure to properly plead the other causes of action against Mr. Frost means a failure of the related claim for equitable relief. The seventeenth cause of action is dismissed.

The eighteenth cause of action alleges that Mr. Frost and Eyeball were unjustly enriched "in the amount of the investment of the Plaintiff, Amincor, and Capstone Business Credit, to

ESI." Similar to the seventeenth cause of action, the eighteenth cause of action fails against Mr. Frost and Eyeball. It is dismissed.

**Conclusion**

Plaintiffs' complaint fails to state sufficient facts so as to plead the first, second, third, fourth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth causes of action against Mr. Frost and Eyeball.

Accordingly, it is

ORDERED that defendant Sean Frost's and defendant Eyeball's motion to dismiss all causes of action against them is granted.

Dated: February 21, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER