

Karastathis v FXDirectDealer, LLC (FXDD)
2014 NY Slip Op 30608(U)
March 3, 2014
Supreme Court, New York County
Docket Number: 112956/11
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

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KHRIS KARASTATHIS,

Plaintiff,

- against -

FXDIRECTDEALER, LLC (FXDD), VALENTIN
PEYTCHINOV, DON KETTELER, ROSEMARY
BOVA, JOE RUNSDORF, JACK NAUS, and BURT
STILLMAN,

Defendants.

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DECISION and ORDER
Index No. 112956/11
Motion Seq. Nos. 001, 002
Submission Date: 10/18/12

HON. SALIANN SCARPULLA, J.:

Defendant FXDirectDealer, LLC (“FXDD”)(motion sequence no. 001) moves pursuant to CPLR 2201, 3016(b), 3211(a)(1), 3211(a)(4) and 3211(a)(7) to dismiss the Verified Complaint or, in the alternative, for an order staying this action pending the outcome of a related class action pending in the Southern District of New York.¹

Defendant Don Ketteler (“Ketteler”)(motion sequence no. 002) also moves to dismiss the Verified Complaint as asserted against him for failure to state a cause of action pursuant to CPLR 3211(a)(7) and for costs, disbursements and attorneys’ fees pursuant to CPLR 8101, 8201, 8202 and 8303-a.

¹ At oral argument, FXDD withdrew that portion of its motion seeking to stay this action, given that a decision had already been issued in the federal class action. (Tr. 5:11-14.)

Background

This action involves plaintiff's use of FXDD's foreign exchange trading platform that was promoted as "seamless," but was allegedly slow, erratic, difficult to use, and designed to enable FXDD to profit from the losses of its customers.

FXDD is a global online provider of off-exchange foreign exchange trading and related services to retail, institutional and individual customers worldwide. Defendant Valentin Peytchinov was a managing partner at Whisper 1, LLC ("Whisper 1"), an investment firm created in 2005 and dissolved in 2009 which referred customers to FXDD. Defendants Ketteler, Rosemary Bova ("Bova"), Joe Runsdorf ("Runsdorf"), Jack Naus ("Naus") and Burt Stillman ("Stillman") were partners at Whisper 1.²

Plaintiff alleges that FXDD markets itself and its products through television, internet, direct mail, seminars, webinars and other media in order to attract customers to trade foreign currencies using its electronic trading platforms. As a part of its sales and marketing campaign, FXDD offers the use of a Demo Account through which potential customers can try out FXDD's trading platforms. FXDD purportedly represents that the Demo Account will mirror actual trading conditions and functions as a training tool simulating real-world trading

² Defendant Valentin Peytchinov ("Peytchinov") has filed an Answer, and his counsel appeared at oral argument on these motions, but has not moved with respect to the claim asserted against him. In addition, at the time of oral argument, none of the remaining defendants had been served. (Tr. 3:9-4:2.)

conditions. For instance, to trade on FXDD's platform, a customer must acknowledge in a written customer agreement that he or she

has conducted simulated trading using the [FXDD] Demo Trading Platforms or such other platform as FXDD shall make available for a period that has allowed the Customer to develop a full understanding of the FXDD Internet Trading Platforms or such other platforms as FXDD shall make available for online trading of Spot Foreign Exchange real-time trading.

Plaintiff further alleges that FXDD advertised on its website that “[t]he demo accounts are a great way to get a feel for live trading. We want customers to feel comfortable in our platform before placing real money in an account.” Also, “[t]he demo accounts for both platforms **mirror exactly** what you will see if you sign-up for a live account, and [t]he pricing and spreads are the same in demo and live accounts.” (emphasis added). However, plaintiff points out that after a class action was filed against FXDD in federal district court in New York,³ it removed this language from the FAQ section of its website. Now, under the heading “How Does the Demo Account Compare to a Live Account,” FXDD states “[t]he pricing on the demo platforms, while indicative of live pricing, is **not a mirror image** of what you will see if you sign up for a live account. (emphasis added).

³ At the time FXDD brought this motion to dismiss, a class action was pending in the Southern District of New York under the caption *Hugo Cruz, on behalf of himself and all others similarly situated v. FXDirectDealer, LCC (FXDD)*, Civil Action No.: 11-cv-1008 (PAC). Shortly after FXDD brought this motion, the Southern District granted FXDD's motion to dismiss the class action in its entirety. *Cruz v. FXDirectDealer, LLC*, 855 F.Supp.2d 89 (S.D.N.Y. 2013). On appeal, the Second Circuit partially vacated and remanded the district court's order.

FXDD has also allegedly represented to customers that it provides a straight through process (“STP”) model of trading for its customers, stating “[t]hrough our proprietary Straight Through Processing (STP) dealing engine, we **seamlessly** take interbank liquidity and pass it on to our clients. By applying this business philosophy it allows us to focus on facilitating our customers’ trading orders, not on depleting our customers’ trading accounts by trading against them.” (emphasis added). In addition, FXDD promotes itself as offering “[t]ransparent and consistent interbank pricing and liquidity,” and “transparent pricing that allows [individual traders] to maximize [their] trading profits,” with “real-time margin monitoring capability in [its] unique, easy-to-read format...[because it]...believe[s]...[its]...[customers] need to know exactly where they stand in real time so that educated trading decisions can be made.” Moreover, FXDD allegedly represents that its trading platform technology “is a fully redundant and secure application...which...was built with the latest technology to insure that you can enjoy uninterrupted service 24 hours a day.”

Another component of FXDD’s sales and marketing campaign is the use of a large network of “Introducing Brokers” which FXDD uses to refer customers to it for a fee or commission. Defendants Peytchinov and Ketteler were Introducing Brokers. In 2005, Peytchinov and Ketteler hosted a series of meetings (the “Meetings”) at Ketteler’s employer’s apartment in New York, the purpose of which was to entice individuals to invest with Peytchinov and Ketteler’s firm, Whisper 1, and to draw individuals to FXDD’s trading platform.

In 2005, plaintiff began attending the Meetings. He alleges that during one such Meeting, Peytchinov urged him to open an account with FXDD and showed him a Demo Account of an FXDD trading platform. Peytchinov purportedly told plaintiff that if he opened a trading account with FXDD, Peytchinov would control the account and the account would have large gains. Plaintiff further alleges that Peytchinov assured him that the trading platform was designed to prevent losses of more than \$25,000; a loss of \$25,000 would trigger an automatic stop that would effectively prevent Peytchinov's clients from losing more than \$25,000.

In purported reliance on these representations, plaintiff opened an account with FXDD (the "Account"), control of which he gave to Peytchinov and Whisper 1. When plaintiff opened the Account, he entered into a Customer Agreement with FXDD (the "Customer Agreement"), which provides that "due to market conditions or other circumstances, **FXDD may be unable to execute the Order at the Market or specified level and the Customer agrees that FXDD will bear no liability for failure to execute such orders.**" (emphasis in original.) The Customer Agreement further provides that "all Market Order and non-Market Orders...are accepted by FXDD and undertaken on a *'best-efforts basis.'*" (italics in original.)

Plaintiff claims that after Peytchinov took control of the Account, Peytchinov lost a substantial amount of his money. Specifically, plaintiff deposited \$750,000 in the Account in January 2006. That same month, the Account realized losses of \$14,176.74. The following month, the Account realized losses of \$575,854.71. Peytchinov blamed the losses on the FXDD trading platform, explaining that he and his partners were unable to close positions of five lots or more without excessive keystrokes for each lot. Further, Peytchinov and his partners were unable to place stops at the same price for all positions in the same currency pair, which he claimed is the most basic of all defensive trading strategies. In essence, Peytchinov claimed that adding or exiting positions on the FXDD software was needlessly complex, requiring several steps when there should have been few. As a result, Peytchinov was unable to make “smooth single click transactions.”

Plaintiff alleges that Peytchinov’s experience with the FXDD platform was not atypical and that other customers have complained of the following:

- (a) Slow Server Command: when a customer is engaged in profitable trading activity, FXDD routes the customer’s account to a slow server, causing the trade execution to be slowed down, giving FXDD the time to appropriate any potential profit in the trade by buying and selling in between the customer’s order and the real market;
- (b) False Error Messages: FXDD’s administrative back-end console prevents

customers from closing out a profitable trade and instead causes the trading platform to generate one of a series of “error” messages to the customer, effectively blocking the customer’s efforts to finalize what would have been a profitable trade; and

- (c) “Slow Fill” and “No Fill” Commands: FXDD often fails to execute valid and profitable trade orders entered by the customer and instead causes the trading system to generate a “slow fill” or “no fill” message to the customer as the customer attempts to close out a profitable trade, preventing the customer from making a profit while generating profits for FXDD.

Plaintiff filed a Summons and Verified Complaint dated March 14, 2012 asserting causes of action for (1) fraud against FXDD; (2) breach of contract against FXDD; (3) violation of General Business Law (“GBL”) 349(h) against FXDD; (4) violation of GBL 350 against FXDD; and (5) civil conspiracy against FXDD, Peytchinov, Ketteler, Bova, Runsdorf, Naus and Stillman.

Discussion

It is well settled that

[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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. Under

CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994)(internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, “are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009)(citing *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 233-34 (1st Dep’t 1994)).

The Fraud Claim

“In order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim.” *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dep’t 2011)(internal citation omitted). Moreover, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).

Here, plaintiff alleges that FXDD actively concealed facts and knowingly made certain misrepresentations in its promotional materials, including that the STP system was seamless and facilitated customers' trading orders, that FXDD would not seek to deplete customers' trading accounts by trading against them, and that customers' experiences on FXDD trading platforms would mirror that on the Demo Account. (Ver. Compl. ¶¶ 28A-D.) Plaintiff further alleges that at the time such misrepresentations were made, FXDD knew they were false or made them recklessly without regard to whether or not they were true, and made them with the intent to defraud plaintiff. (*Id.* at ¶ 29). Finally, plaintiff alleges that it reasonably and justifiably relied on FXDD's misrepresentations, resulting in his financial losses in the sum of at least \$590,701.64.

FXDD argues that plaintiff has failed to plead its fraud claim with the requisite specificity under CPLR 3016(b). Specifically, FXDD asserts that plaintiff fails to specify which advertisements or representations he relied upon, why the substance of any such advertisement was materially false, or when and where the purportedly false advertisement was made. (Memo in Support, p. 9.)

Plaintiff has not alleged in the Complaint that he saw or read any of FXDD's website, advertisements, or marketing materials prior to opening his account. Thus, to the extent his fraud claim relates to those marketing materials, he has failed to state a cause of action. Plaintiff has further failed to state a fraud cause of action against FXDD based on the

Customer Agreement because an allegation that FXDD entered into the Customer Agreement with the intent not to perform is insufficient to support a fraud claim. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dep't 2011)(internal citation omitted). As such, FXDD's motion to dismiss plaintiff's fraud claim is granted.

Breach of Contract

In its second cause of action plaintiff alleges that FXDD breached the Customer Agreement. To sufficiently plead a breach of contract cause of action, plaintiff must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." *See U.S. Bank Natl. Assoc. v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep't 2012)(citing *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (2d Dep't 2010)).

Plaintiff alleges that through FXDD's allegedly deceptive and intentionally manipulative trading practices, it breached the Customer Agreement by: failing to use its "best efforts" in accepting and undertaking orders; failing to ensure that prices, bid/ask spreads and liquidity reflected the prevailing interbank market liquidity; and by violating a prohibition in the parties' agreement against the use any device, software, or other artifice to manipulate or attempt to manipulate the functioning of any electronic system, data feed, software, connection speed or other interface, device or software made available by FXDD in connection with trading on its platforms.

FXDD argues that plaintiff's claim is barred by the plain language of the Customer Agreement which disclaims FXDD's liability where "due to market conditions or other circumstances, FXDD may be unable to execute the Order at the Market or specified level." FXDD also points to those provisions of the Customer Agreement which provide that "execution may not be immediate or at the price dictated by the opening level due to imbalances in Orders, market conditions, market liquidity or other circumstances," and that "FXDD shall have no responsibility for delays in the transmission or Orders due to disruption, market conditions, failure or malfunction of communications facilities and shall not be liable for any claims, losses, damages, costs or expenses, including attorneys' fees, to any person or entity as a result of its negligence." Yet, it is clear that even under these circumstances, FXDD is obligated to use its best efforts to execute plaintiff's orders and it is this very obligation that plaintiff alleges FXDD breached. Thus, plaintiff has sufficiently pled a breach of contract cause of action.

FXDD further argues that plaintiff's cause of action is undermined by the language in the Customer Agreement which provides that "FXDD makes no warranty expressed or implied that Bid and Ask Prices shown represent prevailing bid and ask prices in the interbank market." However, plaintiff alleges intentional manipulation on the part of FXDD, thus this language, in and of itself, does not warrant dismissal of the breach of contract cause of action.⁴

⁴ The Court notes that the Second Circuit similarly held that plaintiff had sufficiently alleged that FXDD breached the parties' agreement by failing to use its "best efforts" to execute

GBL Claims

Plaintiff asserts against FXDD claims for violation of GBL 349 and 350. GBL 349 prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” (GBL 349(a)), and affords a right of action to “any person who has been injured by reason of any violation of this section” (GBL 349(h)). To obtain relief under GBL 349, a party must prove that the conduct in question is “consumer oriented” and deceptive or misleading in a material way, and that plaintiff has been injured by reason thereof. *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 (1999). The statute “contemplates actionable conduct that does not necessarily rise to the level of fraud. In contrast to common-law fraud, General Business Law Section 349 is a creature of statute based on broad consumer-protection concerns.” *Id.* at 343. It is “not necessary under the statute that a plaintiff establish the defendant’s intent to defraud or mislead.” *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). GBL 350 prohibits “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” In order to assert a claim under GBL 350, a plaintiff must allege that “the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury.” *Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 (2d Dep’t 2002). A plaintiff need not establish justifiable reliance under either GBL 349 or 350. *See Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941-942 (2012).

trade orders in the way that FXDD stated it would. *See Cruz v. FXDirectDealer, LCC*, 720 F.3d 115, 124 (2d Cir. 2013).

FXDD argues that plaintiff's GBL claims must be dismissed as time-barred. Claims under GBL 349 and 350 are subject to a three-year statute of limitations. See *Gaidon v. Guardian Life Ins. Co. of America*, 96 N.Y.2d 201, 210 (2001); *Gristede's Foods, Inc. v. Unkechaug Nation*, 532 F.Supp.2d 439, 453 (E.D.N.Y. 2007). The accrual of GBL claims begins to run at the time of plaintiff's injury, that is, "when all factual circumstances necessary to establish a right of action have occurred, so that plaintiff would be entitled to relief." See *id.* (quoting *Gaidon*, 96 N.Y.2d at 210). FXDD contends that plaintiff's GBL claims accrued, at the latest, in February, 2006, when his account had lost approximately 80% of its initial investment value, but that plaintiff did not assert his claims until nearly six years later. Plaintiff argues in opposition that his claims are not time-barred because they are tolled by the doctrine of fraudulent concealment. The cases cited by plaintiff⁵ involve claims under either GBL 349 or 350. However, plaintiff does not attempt to identify any concealed information that has since been revealed to him which would justify tolling the applicable statute of limitation here. Thus, plaintiff's GBL claims are dismissed as time-barred.

Civil Conspiracy

Finally, plaintiff asserts against all of the defendants a cause of action for "civil conspiracy" based on an alleged conspiracy formed between FXDD and Whisper 1 to "engage in conduct that violated Plaintiff's common law, contractual, and statutory rights." "[C]ivil conspiracy is not recognized as an independent tort in this State." *Shared*

⁵ Plaintiff relies on *People v. Liberty Mutual Ins. Co.*, 52 A.D.3d 378 (1st Dep't 2008); *N.Y. v. Hendrickson Bros., Inc.*, 849 F.2d 1065 (2d. Cir. 1988).

Communications Services of ESR, Inc. v. Goldman Sachs & Co., 23 A.D.3d 162, 163 (1st Dep't 2005). To prevail on a claim for civil conspiracy, plaintiff must first plead specific wrongful acts which might constitute an independent tort. See, e.g., *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep't 2011); *Satin v. Satin*, 69 A.D.2d 761 (1st Dep't 1979). For the reasons discussed above, plaintiff has failed to successfully allege a fraud claim against FXDD and, therefore, its civil conspiracy claim against that defendant must also fall. In addition, plaintiff's civil conspiracy claim as asserted against defendant Ketteler is insufficiently pled because plaintiff has not asserted an underlying tort against him. Moreover, even if plaintiff had sufficiently asserted an underlying tort claim against Ketteler, plaintiff only alleges that FXDD entered into a conspiracy with Whisper 1, not with Ketteler in his individual capacity. As such, this cause of action is dismissed as against defendants FXDD and Ketteler.

In accordance with the foregoing, it is

ORDERED that defendant FXDD's motion to dismiss the complaint pursuant to CPLR 3016(b), 3211(a)(1), 3211(a)(4) and 3211(a)(7) is granted only to the extent of dismissing plaintiff's fraud, GBL 349, GBL 350 and civil conspiracy causes of action, and is otherwise denied as to plaintiff's breach of contract cause of action; and it is further

ORDERED that defendant Ketteler's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted only to the extent of dismissing the civil conspiracy cause of action asserted against him, and is denied with respect to his request for costs, disbursements and attorneys' fees pursuant to CPLR 8101, 8201, 8202 and 8303-a; and it is further


ORDERED that counsel for the parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on April 16, 2014 at 2:15.

This constitutes the decision and order of this Court.

Date: New York, New York

March 3, 2014

ENTER:


Saliann Scarpulla, J.S.C.