

**Reachout Wireless, Inc. v In Touch Wireless
Concepts, Inc.**

2014 NY Slip Op 30787(U)

March 27, 2014

Supreme Court, New York County

Docket Number: 652587/11

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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REACHOUT WIRELESS, INC., a New York
Corporation, and AMERICAN CANDY, INC.,
a New York Corporation, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

Index No.
652587/11

-against-

IN TOUCH WIRELESS CONCEPTS, INC., a New
York Corporation d/b/a ZCOM, and IMINDER
"VIKAS" DHALL, Individually,

Defendants,

-against-

SHELLY BHUMITRA, POONAM SAWNHEY a/k/a
POONAM SETHI, and AJAY BHUMITRA,

Additional Defendants
pursuant to CPLR 3019(d).

-----x
Hon. Charles E. Ramos, J.S.C.:

Motion sequences 007 and 008 are hereby consolidated for
disposition.

In motion sequence 007, the counterclaim defendant Ajay
Bhumitra (Ajay) moves pursuant to CPLR 3014 and 3211(a)(7) to
dismiss the defendants In Touch Wireless Concepts, Inc. d/b/a
ZCOM (ITC) and Iminder "Vikas" Dhall's (Dhall, collectively, the
Counterclaim Plaintiffs) third and fifth amended counterclaims in
the first amended counterclaims.¹

¹ Berg Aff., Ex. B

In motion sequence 008, the counterclaim defendants Shelly Bhumitra (Shelly) and Poonam Sawney a/k/a Poonam Sethi (Poonam), and plaintiffs Reachout Wireless Inc. (RWI) and American Candy, Inc. (ACI, collectively, the Sub-Agents, together with Ajay, the Counterclaim Defendants) move pursuant to CPLR 3014, 3016(b), and 3211(a)(7) to dismiss ITC and Dhall's amended third, fifth, and seventh through ninth counterclaims in the Amended Counterclaims.

Background

The plaintiffs initially commenced this action by filing a class action complaint. However, the instant motions relate only to the third party/counterclaim action commenced by the Counterclaim Plaintiffs against the Counterclaim Defendants.

The Counterclaim Plaintiffs allege in their answer, that at all relevant times, pursuant to a contractual agreement, ITC, was a master agent to Verizon Wireless (VZW), authorized to exclusively market and sell VZW branded wireless products and services to customers (Complaint, ¶ 1, 2).

Furthermore, ITC's agreement with VZW permitted ITC to engage its own sub-agents at its own store locations to exclusively market and sell VZW telecommunications services. VZW had final approval over the sub-agents and the store locations (*id.* at ¶ 3). Dhall is allegedly the principal of ITC.

Dhall and Ajay have known each other as professional colleagues in the telecommunications sales industry for many

years (*id.* at ¶ 58).

Ajay, Shelly's brother, is involved in the wireless communications industry and maintains a large portfolio of Sprint Nextel and AT&T agency store locations that are in direct competition with ITC (*id.* at ¶ 38, 40). Ajay was not authorized to market or sell VZW telecommunications services.

In 2005, as a courtesy to Ajay, ITC requested and obtained VZW approval for Shelly and Poonam's various entities, including RWI and ACI, to become ITC sub-agents (*id.* at ¶ 43).

Ajay allegedly personally participated in the management and operation of store locations owned by RWI and ACI (*id.* at ¶ 46). As a result, Ajay was aware of the terms and conditions of the sub-agent agreements of RWI and ACI (*id.* at ¶ 47).

ITC alleges that Ajay's request for sub-agent approval for RWI and ACI was actually the first step in a scheme to destroy ITC from within in order to acquire ITC's customers and store locations as additions to Ajay's existing portfolio (*id.* at ¶ 51). The scheme involved Shelly and Poonam acting unethically and inconsistent with their sub-agency obligations, in order to cause VZW to terminate ITC as its master agent.

In February 2006, ITC alleges that Shelly used Dhall's credit card without his knowledge, to purchase airfare for Tom Verghese (Verghese), a VZW District Manager, for travel to a wireless trade show in Europe that Shelly and Dhall were also

attending. Thereafter, Shelly reported to a VZW investigator that Dhall improperly purchased Verghese's airfare (*id.* at ¶ 83).

Verghese had final approval over the opening of new store locations. ITC alleges upon information and belief that the Counterclaim Defendants bribed Verghese so that he would decline ITC's requests to open new store locations to prevent ITC from expanding in aid of the scheme (*id.* at ¶ 63-4).

Furthermore, ITC alleges that Shelly bribed an ITC employee, Raymond Patterson, to steal proprietary information from ITC for Shelly (*id.* at ¶ 74).

Moreover, ITC alleges that the Sub-Agents, acting on behalf of Ajay and themselves, and along with Verghese, activated a significant number of prepaid wireless phones for non-existing customers (*id.* at ¶ 54). Activating wireless accounts with false subscriber information is a breach of ITC's master agent agreement with VZW (*id.* at ¶ 55).

Shelly reported to VZW that the activations were at the direction of ITC (*id.* at ¶ 56). ITC alleges that VZW self-orchestrated the prepaid activations in an effort to increase their new activations to impress investors (*id.* at ¶ 57).

ITC alleges that these actions were all a part of a "Trojan Horse" scheme to destroy ITC from within by the Counterclaim Defendants.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "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" (*id.*).

Motion Sequence 007

The amended third counterclaim for tortious interference against Ajay alleges that Ajay was aware of the agreements that RWI and ACI both had with ITC, that Ajay induced Shelly and RWI to breach their contract with ITC by putting Shelly in a position to sell and market non VZW products. As a result of the breach, VZW terminated its contract with ITC and causing ITC to suffer a loss of commissions and business opportunities in the amount of \$450,000,000.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

The third counterclaim is dismissed because it is identical

to ITC's original fifth counterclaim for tortious interference, which was previously dismissed with prejudice (*compare* Berg Aff., Ex. A, 46:26-47:5 and Ex. C, p. 118).

The amended fifth counterclaim for misappropriation of proprietary information against the Counterclaim Defendants alleges upon information and belief that Shelly directed Raymond Patterson to steal proprietary information from ITC and used it to divert business.

The amended fifth counterclaim must be dismissed in its entirety because allegations are vague and conclusory. Furthermore, the allegations are asserted primarily upon information and belief.

The amended seventh counterclaim for fraudulent inducement against the Sub-Agents alleges that they entered into the sub-agent agreements with ITC with the intention of competing against ITC.

"To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]).

The amended seventh counterclaim alleges "nothing more than defendants' entry into a contract they purportedly did not intend to honor", which fails to state a cause of action for fraud

(*Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295 [2004]). "It is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation" (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]). Consequently, this amended counterclaim must be dismissed.

The amended eighth counterclaim seeks a permanent injunction preventing the Sub-Agents from disseminating the confidential information. It alleges that an injunction is required to determine all the parties that have had access to ITC's confidential information and prevent them from using the information to obtain a competitive advantage.

The amended ninth counterclaim seeks a permanent injunction against Shelly and RWI to enjoin them from competing against ITC. It alleges that an injunction is required to prevent Shelly from operating another wireless business other than for ITC.

The amended eighth and ninth counterclaims must be dismissed because the Counterclaim Plaintiffs fail to allege that the failure to impose an injunction will result in irreparable harm (*518 E. 80th St. Co., LLC v Smith*, 251 AD2d 215, 216 [1st Dept 1998]) or that there is no adequate remedy at law (*Gaynor v Rockefeller*, 15 NY2d 120, 132 [1965]).

Accordingly it is,

ORDERED that the counterclaim defendant Ajay Bhumitra's

motion to dismiss the amended third and fifth counterclaims (MS 007) is hereby granted in its entirety, and it is further

ORDERED that the amended counterclaim defendants Shelly Bhumitra and Poonam Sawney a/k/a Poonam Sethi, and plaintiffs Reachout Wireless Inc. and American Candy, Inc.'s motion to dismiss the third, fifth, and seventh through ninth counterclaims (MS 008) is hereby granted in its entirety, and it is further

ORDERED that the parties shall contact the Clerk of Part 53 and schedule a status conference within forty-five (45) days of the date of this decision.

This constitutes the decision and order of the Court.

Date: March 27, 2014

ENTER:



J.S.C.

HON. CHARLES E. RAMOS