

Age Group, Ltd. v Martha Stewart Living Omnimedia, Inc.

2014 NY Slip Op 30981(U)

April 14, 2014

Sup Ct, New York County

Docket Number: 653408/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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AGE GROUP, LTD.,

Index No.: 653408/2013

Plaintiff,

DECISION & ORDER

-against-

MARTHA STEWART LIVING OMNIMEDIA, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Martha Stewart Living Omnimedia, Inc. (MSLO) moves to dismiss the Complaint pursuant to CPLR 3211. Defendant's motion is granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the Complaint.

MSLO is a media and merchandising company that controls and licenses the rights to Martha Stewart brand products. Complaint ¶¶ 17-18. Plaintiff Age Group, Ltd. (Age Group) manufactures and licenses products for distribution online and in department stores. ¶ 15. On July 9, 2009, Age Group and MSLO entered into a 4 year Licensing Agreement (the MSLO Agreement), under which MSLO granted Age Group an exclusive license to market, manufacture, and sell Martha Stewart brand pet products (the Pet Products) to pre-approved distributors, who would then sell the products to the public. ¶¶ 19-22. The MSLO Agreement is governed by New York law and expired on December 31, 2013. ¶¶ 19, 26.

On October 16, 2009, Age Group entered into a contract (the PetSmart Contract) with non-party PetSmart, Inc. (PetSmart), under which PetSmart agreed to purchase a certain amount of Pet Products over a four year period, coinciding with the four year term of the MSLO Agreement. ¶ 31. The court will not discuss the financial details of the PetSmart Contract because they are irrelevant to this motion and subject to a confidentiality order. *See* Dkt. 7. In short, the PetSmart Contract obligated PetSmart to make annual minimum Pet Product purchases. ¶¶ 32-33. The more Pet Products purchased by PetSmart, the more money Age Group and MSLO would make. It is undisputed that if MSLO chose not to extend Age Group's license at the end of 2013, Age Group would no longer be able to sell Pet Products to PetSmart or other distributors.

Age Group alleges that shortly after it contracted with PetSmart, MSLO realized that it grossly undervalued the profit potential of its Pet Products. ¶ 7. The Complaint alleges that, as a result, MSLO interfered with Age Group's ability to timely produce Pet Products so that PetSmart would grow frustrated with Age Group and ultimately wish to contract directly with MSLO when the PetSmart Contract terminated. ¶ 8. This, according to Age Group, defeated the purpose of the MSLO Agreement -- maximizing revenue in the first four years and developing a long term profitable relationship. Specifically, Age Group alleges that MSLO unreasonably withheld approval of Pet Products, disparaged Age Group's performance by lying to PetSmart, and generally engaged in an interference campaign, detailed in the Complaint, leading to the breakdown of Age Group's relationship with PetSmart.

MSLO denies these allegations. MSLO contends that Age Group was putting out unacceptable product and that MSLO's refusal to approve designs was based on the need to protect the Martha Stewart brand. Age Group avers that MSLO's objections were unreasonable.

Section 6(a) of the MSLO Agreement provides:

MSLO agrees to exercise its rights of approval reasonably and promptly ... in a spirit of cooperation, it being acknowledged that any decision made by MSLO based on concerns about the MSLO Brand shall not be deemed unreasonable if made in good faith. [Age Group] further acknowledges that MSLO's approval decisions regarding the [Pet Products] may be base solely on MSLO's subjective standards, including its aesthetic judgment regarding design, marketing, advertising and exploitation of the MSLO Brand ... In the event of any objection ... MSLO shall strive to reasonably describe the objection or reason for disapproval, provided that [Age Group] acknowledges that MSLO may not be able to express with specificity such objection and/or the reason.

Dkt. 20 at 8 (emphasis in original).

In addition to refusing to approve the Pet Products designed by Age Group, MSLO also allegedly interjected itself into Age Group's creative process, thereby complicating and interfering with Age Group's ability to do its job. ¶¶ 37, 46. For instance, Age Group alleges, MSLO insisted on having an active role in designing and pricing Pet Products, when such matters were supposed to be delegated to Age Group. ¶ 38. This micromanaging, according to Age Group, was intended to frustrate Age Group's performance. ¶ 41. MSLO intentionally designed overpriced, inferior products and then blamed Age Group. ¶ 45. MSLO did this to make it appear that Age Group lacked the capacity to deliver quality, low price Pet Products, using this outcome to convince PetSmart that it should cut Age Group out of the process before the expiration of the MSLO Agreement. ¶ 44. This led to MSLO's ultimate goal of ridding itself of Age Group and making more money on its Pet Products.

Moreover, Age Group contends that throughout this process, MSLO sent PetSmart numerous disparaging emails about Age Group's supposed failings, claiming that "Age Group [is] not following up, sending [] inferior samples, not hitting target prices and letting things slip through the cracks." ¶ 50. Age Group further alleges that MSLO violated the MSLO Agreement's confidentiality provision by disclosing the terms and duration of the MSLO Agreement to PetSmart. MSLO refused to extend a license to Age Group beyond 2013, and allegedly began working directly with PetSmart months before the MSLO Agreement expired. ¶¶ 68-69.

Age Group's complaint, filed on November 5, 2013, asserts four causes of action: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) tortious interference with prospective economic advantage; and (4) injurious falsehood.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that

are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Breach of Contract and the Duty of Good Faith and Fair Dealing

It is well established that contracts “are construed in accord with the parties’ intent.” *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). “The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Id.* (citations omitted). Moreover, “provisions in a contract are not ambiguous merely because the parties interpret them differently.” *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 362 (1996). “The ultimate aim is to realize the parties’ ‘reasonable expectations’ through a practical interpretation of the contract language.” *Gessin Elec. Contrs., Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 518 (1st Dept 2010), quoting *Sutton v E. River Savings Bank*, 55 NY2d 550, 555 (1982).

The covenant of good faith and fair dealing in the course of performance is implied in every contract. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). “This covenant embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). “While the duties of

good faith and fair dealing do not imply obligations ‘inconsistent with other terms of the contractual relationship,’ they do encompass ‘any promises which a reasonable person in the position of the promisee would be justified in understanding were included.’” *Id.*, quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978). The duty of good faith and fair dealing may be breached “when a party to a contract acts in a manner that, *although not expressly forbidden by any contractual provision*, would deprive the other party of the right to receive the benefits under their agreement.” *Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22-23 (1st Dept 1996) (emphasis added).

Section 6(a) of the MSLO Agreement provides MSLO with substantial discretion to object to Pet Products proposed by Age Group. However, MSLO’s discretion is not unlimited. MSLO is obligated to “exercise its rights of approval reasonably and promptly [and] in a spirit of cooperation.” Nonetheless, MSLO’s rejection of a design “shall not be deemed unreasonable if made in good faith.” Such rejection can be based on “MSLO’s subjective standards, including its aesthetic judgment,” which “MSLO may not be able to express with specificity.” In other words, MSLO can only be held liable if its rejection was made in bad faith, such as when a rejection is made to undermine Age Group, rather than due to a subjective design preference.

MSLO’s exercise of such bad faith is the gravamen of the Complaint. Age Group does not dispute the specifics of the rejected designs. Rather, Age Group alleges a theory of scienter that plausibly explains why MSLO would undermine its own Pet Products at the short run expense of Age Group for the purpose of maximizing the value of its brand in the long run. Indeed, this strategy may well be economically rational for MSLO. However, such a strategy, if actually employed, constitutes bad faith under the MSLO Agreement.

To be sure, Section 6(a) permits MSLO to utilize subjective aesthetic judgments regarding particular Pet Products submitted by Age Group for approval. But, it is commercially unreasonable to interpret MSLO's express good faith discretion under section 6(a) to include long term economic considerations unrelated to particular Pet Products designs. The contract did not provide MSLO with the right to reject Pet Products for any reason. Section 6(a) is narrower and, as written, provides Age Group with protection against MSLO's bad faith. This protection is meaningless if good faith merely encompasses MSLO's own interests.

Questions of fact about MSLO's actual behavior preclude dismissal. Regarding damages, Age Group can only recover lost profits during the four years the MSLO Agreement was in place. Given MSLO's absolute discretion over renewal and because the profits MSLO might or might not have earned depend upon third-party conduct, it is too speculative under a contract or a tort theory, discussed below, to permit Age Group to recover profits it might have earned had MSLO decided to renew.

B. Tortious Interference With Prospective Economic Advantage

"To prevail on a claim for tortious interference with business relations in New York, a party must prove: (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009).

MSLO argues that Age Group cannot recover damages for lost business because: (1) MSLO had the unilateral and unconditional right not to renew the MSLO Agreement; (2) MSLO, at most, committed a breach of contract, not an independent tort; and (3) MSLO is

protected by the economic interest doctrine. As discussed earlier, MSLO is correct that it had the absolute right not to renew the MSLO Agreement, even if doing so was not in its best economic interest.¹ Thus, Age Group is limited to recovering losses during the contract period.

MSLO's contention that Age Group did not plead the commission of an independent tort is simply wrong. Age Group pleads allegedly defamatory statements made by MSLO to PetSmart with particularity. "Defamation is a predicate wrongful act for a tortious interference claim." *Amaranth*, 71 AD3d at 47, citing *Stapleton Studios, LLC v City of New York*, 26 AD3d 236 (1st Dept 2006). Additionally, it is irrelevant that MSLO had an economic interest to compete with Age Group by getting PetSmart to want to contract with it directly. It is well settled that competitors cannot unfairly compete by employing "wrongful means" (i.e. criminal or tortious acts), such as "lur[ing customers] by fraud or misrepresentation." *Carvel Corp. v Noonan*, 3 NY3d 182, 191-92 (2004). Doing so constitutes tortious interference with business relations. *Id.*

Nonetheless, Age Group's tortious interference claim is duplicative of the claim that MSLO breached its express and implied contractual good faith duties. Age Group alleges that it made less money from PetSmart because MSLO's interference decreased total sales and profit margins. Age Group also alleges that MSLO's disruption of the PetSmart relationship hindered Age Group's ability to sell to other retailers. These claims fall under the ambit of MSLO's good faith duty to not interfere with Age Group's ability to exploit the financial benefits of its license, subject only to MSLO's contractual veto rights.

¹ A tortious interference claim for loss of a prospective customer requires a showing that the defendant was the "but for" cause of the loss of that customer." *Parrott v Logos Capital Mgmt., LLC*, 91 AD3d 488, 489 (1st Dept 2012). Since the cause of Age Group losing the PetSmart business was MSLO's decision not to renew – a legal decision – the "but for" causation was legal and lost business opportunities post-contact are not recoverable.

C. Injurious Falsehood

“To establish a claim for injurious falsehood, a plaintiff must demonstrate that a defendant maliciously made false statements with the intent to harm the plaintiff, or recklessly and without regard to their consequences, and that a reasonably prudent person would have or should have anticipated that damage to the plaintiff would result.” *N. State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 20 (2d Dept 2012). “The elements of injurious falsehood are ‘essentially identical to slander of title.’” *Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 922 (1st Dept 2010), quoting *Rosenbaum v City of New York*, 5 AD3d 154 (1st Dept 2004). Pursuant to CPLR 3016(a), “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint.” See *BDCM Fund Adviser, L.L.C. v Zenni*, 98 AD3d 915, 917 (1st Dept 2012).

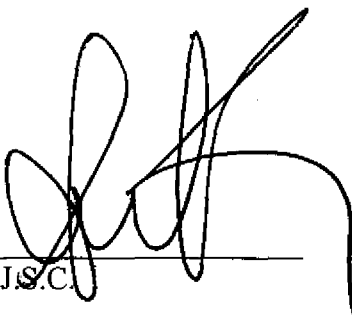
Ordinarily, pursuant to CPLR 215(3), “[t]he statute of limitations applicable to defamation claims is one year [] and generally accrues on the date of the first publication.” *Hoesten v Best*, 34 AD3d 143, 150 (1st Dept 2006). However, “[t]he three-year statute of limitations for tortious interference applies when the gravamen of a complaint is economic injury, rather than merely reputational harm.” *Amaranth*, 71 AD3d at 48. That is because “[i]n applying a Statute of Limitations [...] ‘[w]e look for the reality, and the essence of the action and not its mere name.’” *Id.* at 47, quoting *Morrison v Nat’l Broad. Co.*, 19 NY2d 453, 459 (1967), quoting *Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 (1937).

Since the alleged statements were made in 2011, more than one year prior to the commencement of this action, Age Group cannot recover damages for reputational harm. Although damages for economic injury are recoverable, the breach of contract claims covers these damages. Therefore, injurious falsehood is dismissed as duplicative. Accordingly, it is

ORDERED that the motion by defendant Martha Stewart Living Omnimedia, Inc. to dismiss the Complaint is granted in part as follows: (1) the third (tortious interference with business relations) and fourth (injurious falsehood) causes of action are dismissed as duplicative; (2) damages are limited to lost profits during the period the MSLO Agreement was in effect; and (3) the motion is otherwise denied.

Dated: April 14, 2014

ENTER:



J.S.C.