Grusd v Arccos Golf LLC
2014 NY Slip Op 31471(U)
June 3, 2014
Supreme Court, New York County
Docket Number: 653239/2013
Judge: Shirley Werner Kornreich

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

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CLINTON GRUSD,

Plaintiff,

-against-

ARCCOS GOLF LLC f/k/a GOLFKICK LLC, SALMAN SYED, AMMAD FAISAL, VICTORIA ELENOWITZ, ELON BOMS, and LAUNCH CAPITAL,

Defendants.

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Index No.: 653239/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 & 004 are consolidated for disposition.

Defendants Arccos Golf LLC f/k/a Golfkick LLC (Golfkick),[1] Salman Syed, Ammad Faisal, Victoria Elenowitz, Elon Boms, and Launch Capital (Launch) moved, pursuant to CPLR 3211, to dismiss the Complaint except for the breach of contract and breach of fiduciary duty claims asserted against Syed. Seq. 001. After the motion to dismiss was fully briefed, plaintiff Clinton Grusd served defendants with an Amended Complaint (the AC), which includes facts and evidence from discovery, but no new claims. The parties agreed to apply the motion to dismiss to the AC. Defendants also moved by order to show cause to seal portions of the AC which supposedly are confidential and would compromise defendants' business strategy. Seq. 004. Defendants, however, withdrew their motion to seal. *See* Dkt. 70. For the reasons that follow, defendants' motion to dismiss is granted in part and denied in part.

I. Procedural History & Factual Background

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

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[1] Pursuant to a stipulation dated May 28, 2014 (Dkt. 72), the caption was changed to reflect the fact that Golfkick is now called Arccos. For the sake of clarity, the company is referred to as Golfkick in this decision since that was its name while the underlying events occurred.

In May 2011, while Grusd and Syed were students at the Yale School of Management, they agreed to become "50-50" partners in a tech start-up called Dolphin Golf. Dolphin Golf was intended to be a smartphone app that would serve as a virtual caddie.

To explain, some golfers employ caddies who not only carry the golfer's equipment, but also serve as a coach, recording the golfer's statistics, educating themselves on the course, and providing the golfer with in-game strategic advice. Caddies are expensive, and their services tend only to be utilized by professionals and the very affluent. The idea behind Dolphin Golf was to develop technology that would accumulate a golfer's statistics, swing data, and other pertinent performance information, store and aggregate it on the user's smartphone or other mobile device, and provide the benefits of a caddie for golf enthusiasts.

Grusd and Syed began developing Dolphin Golf in May 2011. Though they never executed a formal written agreement or incorporated, they exchanged numerous text messages that clearly evidence their partnership. They attempted to develop, *inter alia*, technology, business plans, funding sources, and corporate relationships.

On July 27, 2011, Grusd proposed pursing a licensing agreement with Callaway Golf Company (Callaway). Elenowitz, an angel investor who Grusd and Syed knew from Yale, introduced Grusd and Syed to George Fellows, Callaway's CEO. On August 1, 2011, Elenowitz emailed Fellows, thanking him for meeting with Syed "and his partner" (Grusd) about their new golf business. Syed met with Fellows numerous times in an attempt to negotiate a licensing deal with Callaway. At the time, however, Callaway was developing a similar, competing product, so Callaway declined to do business with Dolphin Golf. Grusd and Syed agreed that Syed would continue monitoring Callaway's interest in working with Dolphin Golf and that Syed would also

look into partnering with other sports companies, such as Nike and Titleist. Grusd and Syed continued working on Dolphin Golf through May 2012, when Syed engaged in further negotiations with Callaway's head of research and development, Alan Hocknell.

In the fall of 2012, Syed told Grusd that he needed to find salaried employment and that he could no longer work full-time on Dolphin Golf. Syed asked Grusd to "hold the fort" and said he would soon return to work on Dolphin Golf. Grusd alleges that Syed was lying. Rather than temporarily walking away from developing the golf project to make money doing something else, Grusd claims that Syed was actually moving forward with the golf project on his own, cutting out Grusd and working with the very business partners he and Grusd pursued for Dolphin Golf.

On October 24, 2012, Hocknell emailed Syed about potentially collaborating with Dolphin Golf. Hocknell informed Syed that Callaway decided to discontinue its development of a competing product and that, instead, Callaway was interested in licensing its technology to Dolphin Golf. Syed told Hocknell that he was interested. Syed began working with Faisal, who became Syed's primary business partner. Syed got Elenowitz and Boms' venture capital fund, Launch, to provide financing. He formed a new company, Golfkick, but did not tell Grusd about it, nor did he inform Grusd of Hocknell's offer. Indeed, while Syed was secretly working on Golfkick, Syed lied to Grusd about his purported job search. In fact, Grusd attempted to procure employment for Syed by getting him an interview with his brother's tech company and also offered to lend money to Syed to help pay off his student loans.

Grusd found out about Golfkick in August 2013, when Syed updated his LinkedIn profile, indicating that he had been the "CEO and Co-Founder at Golfkick" since October 2012.

In June 2013, Golfkick had signed a licensing agreement with Callaway. In July 2013, Golfkick had obtained an additional $4 million in financing. Grusd immediately confronted Syed about Golfkick. Syed claimed that Golfkick was different from Dolphin Golf. Syed begged Grusd not to bother him about Golfkick because Syed "really needed this." Grusd maintains he is entitled to 50% of Golfkick, since the parties had agreed that they would be equal partners in Dolphin Golf.

Grusd commenced this action on September 18, 2013. The AC contains 13 causes of action: (1) breach of contract against Syed and Golfkick; (2) breach of fiduciary duty against Syed and Golfkick; (3) aiding and abetting breach of fiduciary duty against all defendants; (4) idea misappropriation against all defendants; (5) fraud against Syed and Golfkick; (6) constructive fraud against Syed and Golfkick; (7) negligent misrepresentation against Syed and Golfkick; (8) tortious interference with contract and/or business relations against all defendants; (9) breach of implied contract against Syed and Golfkick; (10) unfair competition against all defendants; (11) unjust enrichment against all defendants; (12) misappropriation of proprietary information against all defendants; and (13) preliminary and permanent injunctive relief.

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).

It is unclear if New York law applies to some or all of Grusd's claims since the AC does not indicate where all of the relevant events occurred (e.g., Connecticut). The parties assumed that either New York law applies or that any other applicable law does not differ from New York law. For instance, New York and Connecticut law are substantially similar on basic contract law principles. *See Highland HC, LLC v Scott*, 113 AD3d 590, 593-94 (2d Dept 2014) (collecting cases); *see also TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571 (1st Dept 2014) (New York law should be applied where no conflict of law exists). Moreover, Connecticut's fiduciary duty and aiding and abetting standards appear similar to New York's. *See Aetna Life Ins. Co. v. Appalachian Asset Mgmt. Corp.*, 110 AD3d 32, 41-42 (1st Dept 2013); compare *Hi-Ho Tower, Inc. v Com-Tronics, Inc.*, 255 Conn 20, 38 (2000) ("a fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one

of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other"), with *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005) ("a fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation") (citation and quotation marks omitted); compare *Efthimiou v Smith*, 268 Conn 499, 505 (2004) ("[a]iding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation"), with *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003) ("A claim for aiding and abetting a breach of 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").

As discussed below, Grusd's claims arise from Syed's disloyalty to their Dolphin Golf business, which might be characterized as a joint venture or de facto partnership, and which may well be governed by Connecticut law. Connecticut, like New York, recognizes the concept of de facto partnership, which is also called a "partnership at will." *See Forino Barbieri, LLC v Barbieri*, 2008 WL 344680, at *3 (Conn Super 2008); *Brown v Garver*, 2009 WL 943726, at *6-7 (Conn Super 2009) (discussing Connecticut's partnership statutes); *see generally Kidz Cloz, Inc. v Officially For Kids, Inc.*, 320 FSupp2d 164, 171-72 (SDNY 2004) (discussing New York's partnership and joint venture law); *see also Ride, Inc. v APS Technology, Inc.*, 2014 WL 131565,

at *5-11 (D Conn 2014) (analyzing partnership and joint venture claims under New York and Connecticut law).

The AC is dismissed without prejudice and without a stay of the parties' current discovery obligations. Grusd is directed to file a second amended complaint that clearly indicates which law applies to the claims surviving this motion, discussed below.

A. Breach of Contract and Breach of Fiduciary Duty

Defendants do not move to dismiss Grusd's claim that he and Syed entered into an oral agreement to develop a golf business as equal partners. Likewise, defendants do not move to dismiss Grusd's claim that Syed breached his fiduciary duties as a business partner by secretly forming a competing business. Both the breach of contract and fiduciary duty claims are properly pled against Syed. Defendants, however, move to dismiss the causes of action against Golfkick since Grusd does not allege that he ever entered into any agreement with Golfkick. Similarly, they argue that no fiduciary duties could have existed between Grusd and Golfkick since Grusd had no dealings with Golfkick. Grusd does not contest these points.[2] Grusd, instead, makes inapposite successor liability and agency arguments.

It should be noted that since the gravamen of Grusd's lawsuit is that he is the rightful owner of half of Golfkick, his primary damages claim is not against Golfkick. Rather, Grusd seeks either a monetary judgment from Syed for the value of his 50% equity in Golfkick or an actual conveyance of equity in Golfkick. Golfkick, however, has not directly damaged Grusd; it was merely the vehicle used by Syed to allegedly breach his duties to Grusd. To wit, Golfkick, as Grusd maintains, is merely the incorporated version of the Dolphin Golf business. Hence, as

[2] Indeed, the lack of privity precludes a breach of contract claim under any applicable law.

Grusd concedes, Golfkick had no contractual or fiduciary duties to Grusd. For these reasons, the breach of contract and breach of fiduciary duty claims are dismissed as against Golfkick.

B. Aiding and Abetting Breach of Fiduciary Duty

The similar standards for establishing fiduciary duties under New York and Connecticut law are set forth above. *See Hi-Ho Tower*, 255 Conn at 38; *EBC I,* 5 NY3d at 19. Likewise, New York and Connecticut's aiding and abetting standards are similar. *See Efthimiou v Smith*, 268 Conn at 505; *Kaufman*, 307 AD2d at 125.

Under New York law:

> To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damages resulting from the breach. A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty. Furthermore, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.

Global Minerals & Metals Corp. v Holme, 35 AD3d 93, 101-02 (1st Dept 2006) (citations and quotation marks omitted), accord *Kaufman*, 307 AD2d at 125-26. "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the [harm] to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009) (quotation marks omitted).

Grusd asserts aiding and abetting claims against all defendants. The claim is dismissed against Syed because Grusd's breach of fiduciary duty claim against him renders an aiding and abetting claim duplicative.[3]

However, the aiding and abetting claims against Faisal, Elenowitz, Boms, and Launch are properly pled. Grusd alleges these defendants knew about Dolphin Golf and the relationship Grusd and Syed had before Syed secretly started Golfkick. To be sure, as defendants aver, the mere "advancement of funds ... is not ... the type of substantial assistance that subjects a non-primary actor to liability as an aider and abettor." *Weadick v Herlihy*, 16 AD3d 223, 224 (1st Dept 2005). In other words, funding a wrongfully competing company, without more, is not considered to be the sort of "substantial assistance" that gives rise to aiding and abetting liability. Nonetheless, these defendants are alleged to have done far more than simply funding Golfkick. Indeed, the AC contains alleged facts about their level of involvement that belies the notion that they are mere, passive bystanders, who simply funded a company that Syed may have used to breach his fiduciary duties to Grusd. For instance, the AC explains:

> Faisal worked with Syed using the Callaway Opportunity, confidential information, and work product that belonged to Dolphin Golf to obtain the licensing agreement with Callaway and investment from Launch. Elenowitz put together a list of investors, repeatedly met with Syed and Faisal after the Hocknell E-Mail, and affirmatively assisted them in positioning Golfkick to obtain capital, such as by affirmatively helping Syed and Faisal obtain a higher valuation than Syed or Faisal anticipated. Boms and Launch, of course, made an investment in Golfkick, the prospect of which helped Syed and Faisal finalize the deal with Callaway and which investment allowed Golfkick to further pursue the business. Boms and Launch also substantially assisted Syed in the negotiations with Callaway.

AC ¶ 107. The allegations that Faisel and Boms participated in the Callaway negotiations and that Elenowitz took an active role in procuring financing for Golfkick indicate a level of

[3] One cannot aid and abet one's own breach.

involvement that rises beyond mere passive investment. Moreover, their alleged knowledge about Grusd and Dolphin Golf, particularly due to their prior involvement through Yale, raises a reasonable inference that they may be fairly characterized as co-conspirators. Discovery will establish if these allegations are true or if the AC overstates the level of these defendants' involvement with Goflkick. These allegations, plus the plausible inference of motive (i.e. without Grusd, there is more available equity for the investors), is sufficient for the aiding and abetting claim to survive a motion to dismiss.

C. Idea Misappropriation

"New York law recognizes the tort of misappropriation of ideas when a plaintiff's factual assertions establish that the misappropriated ideas were both novel and concrete." *Daou v Huffington*, 2011 WL 11415371, at *4 (Sup Ct, NY County 2011) (Ramos, J.), citing *Lois Pitts Gershon PON/GGK, Inc. v Tri-Honda Advertising Ass'n, Inc.*, 166 AD2d 357 (1st Dept 1990) and *Alexander v Murdoch*, 2011 WL 2802923, at *8 (SDNY 2011); *see generally Lapine v Seinfeld*, 31 Misc3d 736, 743-47 (Sup Ct, NY County 2011) (Friedman, J.) Though "[d]etermining novelty is generally a question [] of fact" [*Daou*, 2011 WL 11415371, at *5, citing *Apfel v Prudential-Bache Secs., Inc.*, 183 AD2d 439 (1st Dept 1992)], "[t]he question of whether an idea is sufficiently novel or original to merit protection under New York law is amenable to summary disposition." *Am. Bus. Training Inc. v Am. Mgmt. Ass'n*, 50 AD3d 219, 223 (1st Dept 2008), quoting *Paul v Haley*, 183 AD2d 44, 53 (2d Dept 1992). Likewise, under Connecticut law, "[a] claim for misappropriation of idea requires that a legal relationship must

exist between parties and that the idea is novel and concrete." *Powerweb Energy, Inc. v Hubbell Lighting, Inc.*, 2014 WL 1784082, at *6 (D Conn 2014).[4]

Defendants submit evidence, such as patents and competing golf products, which suggests the Dolphin Golf/Golfkick product is not unique. Grusd, however, avers that though other virtual caddie products exist, the Dolphin Golf/Golfkick product has certain novel features, and to the extent certain features are not unique, the development of a single product that integrates all of its features has no parallel in the market. This dispute in an inherently factual matter that is not amenable to resolution on a motion to dismiss.

Nevertheless, Grusd's idea misappropriation claim warrants dismissal on another, more fundamental ground. Indeed, the same is true of Grusd's other tort claims. The problem is that the gravamen of this lawsuit is Syed's alleged theft of Grusd's interest in their joint venture/de facto partnership. Specifically, the two of them allegedly each had a 50% interest in a company developing a virtual caddie product, and that, behind Grusd's back, Syed incorporated, got investors, and proceeded to market with the product, effectively stealing Grusd's equity. In other words, Grusd believes that, by virtue of his agreement with Syed and the work they performed on Dolphin Golf, Grusd is rightfully entitled to 50% of Golfkick.

If this is true, then the ideas and trade secrets that Syed allegedly stole really belong to the two of them equally (they belong to the business), not either of them individually. In fact, if Grusd has a right to equity in Golfkick, the ideas and trade secrets belong to Golfkick. Hence, Grusd would have no individual ownership interest in such secrets. Grusd would own equity in

[4] It should be noted that "Connecticut has adopted the Uniform Trade Secrets Act and New York has not," an issue that might "make a difference in the court's analysis." *See Bulldog N.Y. LLC v Pepsico, Inc.*, 2014 WL 1284903, at *6 (D Conn 2014); *see also Victor G. Reiling Assocs. & Design Innovation, Inc. v Fisher-Price, Inc.*, 406 FSupp2d 175, 200-01, n.37 (D Conn 2005), citing *Stewart v World Wrestling Fed'n Entm't, Inc.*, 2005 WL 66890, at *1 (SDNY 2005) (discussing factors relevant to choice of law analysis).

the company, and the company would own the secrets. Indeed, by claiming that Grusd and Syed each had a 50% interest in the ideas and trade secrets they developed in conjunction with Dolphin Golf, Grusd is implicitly conceding that Syed also has a 50% interest in those secrets. Hence, Grusd cannot claim that he can recoup those secrets; he can only claim that he was wrongly divested of his equity in the company that owns such secrets. Grusd's entire case rises and falls on the claim that he has a right to Golfkick and that Syed stole that from him. If Grusd fails to prove this, his other claims necessary fail. To wit, if Grusd cannot prove that he and Syed were still pursing the Dolphin Golf venture when Syed decided to form Golfkick on his own, Grusd could not maintain a trade secrets claim. *See Ashland Mgmt. Inc. v Janien*, 82 NY2d 395, 407 (1993) ("a trade secret must … be secret").

Thus, if Grusd prevails, his other claims are either duplicative or moot. Grusd would be entitled to an equitable remedy, either payable in cash or Golfkick equity, based on the amount the finder of fact believes he is entitled to.[5] Hence, Grusd's remaining claims, such as fraud, are dismissed as duplicative.[6]

In sum, Grusd has pled a claim for an interest in Golfkick[7] and a tort claim for aiding and abetting against the other defendants. However, Grusd must file a new complaint that clearly

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[5] Most likely, damages would be whatever diluted interest Grusd and Syed would each be left with after granting equity to investors.

[6] It should be noted that the cause of action for injunctive relief otherwise merits dismissal since this is a remedy, not an independent claim.

[7] Golfkick shall remain a party to this lawsuit as a nominal defendant because its interests are directly impacted by this action.

sets forth the substantive law that governs his claims, and, presumably, a subsequent motion to dismiss will address the choice of law issue.[8] Accordingly, it is

ORDERED that the motion by defendants Arccos Golf LLC f/k/a Golfkick LLC (Golfkick), Salman Syed, Ammad Faisal, Victoria Elenowitz, Elon Boms, and Launch Capital to dismiss the Amended Complaint is granted in part as follows: (1) the breach of contract and breach of fiduciary duty claims against Golfkick are dismissed with prejudice; (2) the aiding and abetting breach of fiduciary duty claim against Syed is dismissed with prejudice; (3) the claims for idea misappropriation, fraud, constructive fraud, negligent misrepresentation, tortious interference, breach of implied contract, unfair competition, unjust enrichment, misappropriation of proprietary information, and injunctive relief are dismissed as duplicative; (4) the remaining claims in the Amended Complaint are dismissed without prejudice and may be repled in a second amended complaint in accordance with this decision by June 30, 2014; and (5) the motion is otherwise denied; and it is further

ORDERED that defendants' motion to seal is permitted to be withdrawn.

Dated: June 3, 2014

ENTER:

J.S.C.

[8] The court declines to rule on matters of Connecticut law without proper briefing. If the parties believe that only New York law applies (as opposed to New York law not differing from Connecticut law, though it does differ on trade secrets), they should brief the issue explicitly.