

Kalamata Capital LLC v Biz2credit Inc.
2015 NY Slip Op 31556(U)
August 17, 2015
Supreme Court, New York County
Docket Number: 653749/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
KALAMATA CAPITAL LLC,

Plaintiff,

-against-

BIZ2CREDIT INC. and ITRIA VENTURES, LLC,

Defendants.
-----X

DECISION/ORDER
Mot. Seq. 001

Index No.: 653749/2014

O'NEILL LEVY, J.:

The instant action stems from the alleged breach of an October 31, 2013 System Integration Agreement (“the Agreement”) between Kalamata Capital LLC and Biz2Credit Inc. (“B2C”). Kalamata alleges breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing against B2C; and tortious interference with business relations against B2C and Itria Ventures, LLC (“Itria”).¹ Plaintiff further seeks preliminary and permanent injunctive relief against B2C and Itria.

B2C and Itria now move for an Order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint. Plaintiff opposes the motion. After considering the papers and after oral argument, the motion is denied in part and granted in part.

It is undisputed that Plaintiff Kalamata is a financial institution that provides merchant cash advances and other short-term financings to small and medium-sized business through its online platform. Defendant B2C operates an online platform that provides financial services and business tools to potential borrowers and financiers in connection with commercial credits to small and medium-sized business. Kalamata describes B2C as a broker of loans. Defendants state that the Kalamata and B2C are in fact competitors, “with both in the business of making

¹ It is undisputed that no contract exists between Kalamata and Itria.

loans to small businesses,” while Plaintiff denies they are competitors. Defendants argue that Kalamata and B2C came to do business together with B2C referring customers to Kalamata per the terms of the Agreement. Plaintiff alleges that Defendant Itria is a competing lending company with which B2C shares common ownership and control. Defendants offer no statements regarding Itria and its relationship to B2C.

According to the complaint, pursuant to the Agreement, Kalamata and B2C were to “work together to build, improve, and integrate their online platforms, for B2C to steer borrowers and credit clients to Kalamata, and for B2C to service and manage the loans it brokered for Kalamata, in exchange for payment. Kalamata sought B2C’s assistance to originate small business financings, build and manage its online platform, manage and service deals that B2C referred and increase its customer base.” According to Plaintiff, the purpose of the Agreement was to outsource to B2C its front-end origination and referrals of financings and Kalamata’s platform and back-end process of managing and servicing the financing of Plaintiff’s customers from the B2C platform. Under the Agreement, it was agreed that B2C would not refer less than \$6,000,000 in loans to Plaintiff. Plaintiff alleges that Defendants interfered with Plaintiff’s business relationships with clients, used confidential information in violation of the Agreement, and funneled clients to Itria, causing significant damage to Kalamata’s business.

As an initial matter, the court notes that during the course of motion practice, Plaintiff indicated its willingness to withdraw its third and fifth claims, for unjust enrichment and breach of covenant of good faith and fair dealing against B2C, which it had originally pleaded as alternatives to its breach of contract claim, without prejudice.

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the action. CPLR 3211(a)(1) allows a party to move to dismiss a cause of action on the ground that “a defense is

founded upon documentary evidence.” When moving under this subsection, the Defendant has the burden of submitting documentary evidence that, on its own, “resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim.” *Fortis Fin. Svcs, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 (1st Dept 2002)(citing to *Scadura v. Robillard*, 256 A.D.2d 567 (2d Dept 1998)). Dismissal pursuant to CPLR § 3211(a)(1) “may be appropriately granted only where documentary evidence *utterly* refutes plaintiff’s factual allegations, *conclusively* establishing a defense as a matter of law.” *Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002) (emphasis added). Defendants submit a copy of the Agreement in support of their motion to dismiss based on documentary evidence.

Defendants argue that the conduct alleged in the complaint as constituting a contractual breach by B2C is permissible in that the relationship between the parties was non-exclusive and B2C and Kalamata were free to compete. Defendants point to Section 2(b) of the Agreement, which states, in part:

both parties shall be free both during and after the Term (as defined) to enter into other system integration projects, including those similar or identified to some or all of the (A) the B2C [Biz2Credit] Integration, the Private Label Platform and the Custom Platform or (B) the SCM Platform, as applicable, with any third party, including competitors of the other party.

Defendants also look to Section 8(c) which concerns the proprietary nature of subscriber information and outlines the permissible use of the information. Kalamata argues that the complaint provides specific and detailed allegations of B2C’s breach of four sections of the agreement: 13(l) (“Non-Solicitation”), 2(c)(iii) (“Priority on Renewals”), 5(b)(ii)(regarding referral and closing fees which B2C would pay to Kalamata, with the fees paid “after the Closing of any Transaction that originates from the SGM [Kalamata] platform or SGM [Kalamata] directly or indirectly through SGM [Kalamata] partners or affiliates, then is referred to

Biz2Credit at the election of SGM, and is funded by a third party lender or other financial institution...”; and 5(g), which outlines, among other things, B2C’s obligation to provide to Kalamata monthly statements summarizing credit transactions, closing fees, and B2C processing fees.

The court finds that the complaint sufficiently alleges a breach of contract and Defendants’ documentary evidence—the Agreement at issue—does not clearly refute the assertions in the complaint. Moreover, Defendants’ explanation of those provisions would produce an arguably odd result with B2C (through the allegedly later-formed Itria) being permitted to use the confidential customer information provided by Kalamata in connection with the Agreement to harm Kalamata. Accordingly, this branch of the motion is denied. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002).

Defendants also move under CPLR 3211(a)(7) for failure to state a cause of action. To prevail on a motion to dismiss on this ground, it must be shown that no cause of action exists. *Guggenheimer v. Ginzburg*, 401 N.Y.S.2d 182, 185 (1977). The dismissal motion must be denied if, from the pleading’s “four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Id.* *See also Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 960 N.Y.S.2d 404, 406 (1st Dep’t 2013). Factual ambiguity is resolved by affording the pleading a “liberal construction” and the benefit of every possible favorable inference.” *Leon v. Martinez*, 614 N.Y.S.2d 972, 974 (1994). Applying that standard here, the court finds that the allegations in the complaint are sufficient to survive a CPLR § 3211(a)(7) challenge. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002), citing *Leon*, *supra*. While the court may consider affidavits in considering a motion to dismiss, *see Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976), here Defendants submit just an attorney

affirmation with a copy of the Agreement and the summons and complaint in support of their motion.

To make out a cause of action for breach of contract, a plaintiff must show “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010)(internal citation omitted). Here, Plaintiff pleads the existence of a contract with B2C, that Kalamata performed under the contract, and that B2C breached the contract by interfering with Kalamata’s relationship with its customers, failing to give Kalamata the right of first offer to fund any renewal of a prior loan after more than 50% of the funding has been repaid; failing to fulfill its obligation to pay Kalamata a “referral fee” after closing any transaction that originates through Kalamata; and failing to provide Plaintiff with monthly reporting under the contract. Plaintiff further alleges that B2C violated the nondisclosure agreement by sharing Plaintiff’s confidential information with Itria, Kalamata’s competitor, and with Kalamata’s customers. The court thus finds that Plaintiff has asserted all of the requisite elements of a breach of contract claim and the branch of the motion seeking to dismiss that claim is denied. *See Forty Central Park South, Inc. v. Anza*, ---N.Y.S.3d ---, 2015 WL 4112797, at *1 (1st Dep’t July 9, 2015)(citing to *Harris*, *supra*).

The court turns to Plaintiff’s second cause of action, for tortious interference with business relations against B2C and Itria. “To prevail on a claim for tortious interference with business relations..., 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 A.D.3d 40, 47 (1st Dep’t 2009). Here, the court finds that Plaintiff has stated a claim for tortious interference with business relations against B2C and Itria and thus denies that portion of the motion.

Plaintiff has alleged the existence of a business relationship, that B2C was aware of that business relationship and that “[b]y virtue of its relationship with B2C and the common ownership and control between the two companies, Itria was aware of the terms and restrictions of Kalamata’s agreement with B2C as well as Kalamata’s loan terms with its customers. Itria also was aware of Kalamata’s security interest in the assets of Kalamata’s customers and the guarantors on the loans made to its customers.” It can be inferred from these allegations that Itria had an awareness of the Agreement with Kalamata. *See GS Plasticos Limitada v. Bureau Veritas*, 88 A.D.3d 510, 510 (1st Dep’t 2011). Similarly, Plaintiff has met the third pleading requirement in that it alleges, among other things, that “for solely malicious purposes, B2C shared Kalamata’s confidential customer information with Itria, Kalamata’s competitor, violating the [Non-Disclosure Agreement]” and that “Itria assisted B2C in violating its agreements with Kalamata, and assisted and encouraged Kalamata’s customers to violate the terms of their loan agreements.” Finally, Plaintiff pleads that its business has suffered, alleging in its complaint that it has “lost significant business” with a number of its customers.

Finally, Defendants seek dismissal of Plaintiff’s fourth cause of action for preliminary and permanent injunctive relief against B2C and Itria. They correctly assert that injunctive relief is not available where a plaintiff does not have any substantive cause of action. *See Weinreb v. 37 Apts. Corp.*, 97 A.D.3d 54, 58-59 (1 Dep’t 2012). However, in light of the fact that the court has found that Plaintiff has asserted several causes of action here, that branch of the motion is denied.

Accordingly, it is ORDERED that Defendants' motion to dismiss is granted to the extent that Plaintiff's third and fifth causes of action (for unjust enrichment and breach of covenant of good faith and fair dealing) are dismissed as withdrawn; and it is further

ORDERED that Defendants' motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear in Part 19 on September 30, 2015 at 9:30 a.m. for preliminary conference; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

Dated: August 17, 2015
New York, New York



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY.