

Dart Direct, Inc. v Urban Express/NJ LLC

2016 NY Slip Op 30847(U)

April 22, 2016

Supreme Court, New York County

Docket Number: 652838/11

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
DART DIRECT, INC., and JO JO W INC.,

Plaintiffs,

-against-

URBAN EXPRESS/NJ LLC, EARLYBIRD
DELIVERY SYSTEMS, LLC and URBAN
EXPRESS ASSEMBLY LLC, XPO LOGISTICS,
INC., XPO LAST MILE, INC., and XPO
COURIER, LLC,

Defendants.

-----X
URBAN EXPRESS/NJ LLC, EARLYBIRD
DELIVERY SYSTEMS, LLC, and URBAN
EXPRESS ASSEMBLY LLC,

Third- Party Plaintiffs,

-against-

TODD WEISS and GREG WEISS,

Third-Party Defendants.

-----X
HON. ANIL C. SINGH, J.:

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the second amended and supplemental complaint. Plaintiffs oppose the motion.

The genesis of this action is a transaction between plaintiff Dart Direct, Inc. (“Dart Direct”) and Urban Express/NJ LLC (“UX/NJ”). The companies were engaged in a similar line of business – namely, providing home delivery and home assembly

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services of merchandise, such as furniture and sports equipment.

On November 24, 2008, pursuant to a purchase agreement, Dart Direct conveyed, sold and assigned to UX/NJ all of the accounts listed on "Schedule A" attached to the purchase agreement. Schedule "A" listed thirty accounts, which Dart Direct represented it was servicing. The parties intended the purchase agreement to transfer to UX/NJ the right to provide delivery and assembly services to Dart Direct's customers listed on "Schedule A." In consideration for purchasing the accounts, UX/NJ agreed to pay Dart Direct ten percent of all amounts invoiced and collected for services rendered by UX/NJ to the accounts.

On that same date, UX/NJ and Dart Direct entered into a separate commission agreement, pursuant to which UX/NJ agreed to retain Dart Direct as an independent contractor to sell the services of UX/NJ. As consideration for Dart Direct's services, UX/NJ agreed to pay Dart Direct a commission equal to five percent of all amounts invoiced and collected by UX/NJ with respect to customers obtained by Dart Direct.

Plaintiffs commenced the instant action by filing a summons and complaint on October 17, 2011, alleging that defendants UX/NJ, EarlyBird Delivery Systems, LLC, and Urban Express Assembly LLC (collectively, "Urban Express") breached the agreements by failing to make payments due under the agreements. Subsequently, plaintiffs filed a first amended complaint.

In a decision and order dated January 21, 2014, the Court granted defendants'

motion to dismiss causes of action for breach of the implied covenant of good faith and fair dealing, unjust enrichment, and declaratory judgment.

On February 9, 2015, EarlyBird Delivery Systems, LLC (“EarlyBird”) entered into an asset purchase agreement with UX Specialized Logistics, LLC, pursuant to which EarlyBird and its subsidiaries sold substantially all of their assets, but retained the purchase agreement and commission agreement.

In a memorandum opinion dated September 29, 2015, the Court dismissed plaintiffs’ cause of action for fraud, finding that the claim was duplicative of the cause of action for breach of contract.

On October 6, 2015, plaintiffs filed a second amended and supplemental complaint, adding the XPO defendants, alleging additional causes of action against the Urban Express defendants and new causes of action against the XPO defendants.

Defendants’ motion to dismiss the second amended and supplemental complaint is now pending before the Court.

The second amended and supplemental complaint alleges causes of action for breach of contract – breach of purchase agreement (first cause of action); breach of contract – breach of services agreement (second cause of action); breach of the implied covenant of good faith and fair dealing (third cause of action); fraud – failure to disclose (fourth cause of action); tortious interference with business relationships (fifth cause of action); tortious interference with contract (sixth cause of action); unjust

enrichment (seventh cause of action); an accounting (eighth cause of action); and declaratory judgment (ninth cause of action). Plaintiffs seek compensatory and punitive damages.

Discussion

“[D]ismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (Kolchins v. Evolution Markets, Inc., 128 A.D.3d 47, 58 [1st Dept., 2015] (internal quotation marks and citations omitted)). “If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (id.).

Under CPLR 3211(a)(7), the Court’s task is to determine whether the complaint pleads a viable cause of action (Henneberry v. Borstein, 91 A.D.3d 493, 496 [1st Dept., 2012]). The complaint must be construed liberally in favor of plaintiff, accepting the facts alleged as true, to determine whether the facts fit within any cognizable legal theory (Sonne v. Board of Trustees of Village of Suffern, 67 A.D.3d 192 [2d Dept., 2009]). The plaintiff must be given every favorable inference that may be drawn from the facts (Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 [1995]).

If the facts show that the plaintiff may be entitled to relief, the Court’s inquiry is

over, and it must declare the complaint legally sufficient (id.). Ultimately, the test is whether the complaint, as corrected, gives adequate notice to the court and to defendant of the transactions or occurrences intended to be proved (Sargiss v. Magarelli, 12 N.Y.3d 527 [2009]). Any additional facts submitted by plaintiff in its opposing affidavits will be accepted as true, to the extent that they correct any defects in the complaint (Mathurin v. Lost & Found Recovery, LLC, 65 A.D.3d 617 [2d Dept., 2009] (the amended complaint, supplemented by plaintiff's affidavit, stated a cause of action)).

Defendants' first contention is that plaintiffs' claims for breach of contract against all defendants fail to state a cause of action because plaintiffs are not in privity of contract with all defendants. Defendants assert that only one of the defendants – namely, UX/NJ – is a party to the agreements.

In opposition, plaintiffs assert that the corporate law doctrine of de facto merger precludes defendants from prevailing on the basis of lack of privity as to all defendants, including the XPO parties.

The “corporate law doctrine” was originally developed to protect shareholder rights, but it has been applied in products liability, breach of contract and tort actions (Hamilton Equity Group, LLC v. Juan E. Irene, PLLC, 101 A.D.3d 1703, 1704 [1st Dept., 2012]; Abreu v. Barkin & Associates Real Estate, LLC, 136 A.D.3d 600 [1st Dept., 2016]; Matter of New York City Asbestos Litig., 15 A.D.3d 254 [1st Dept.,

2015]; Kretzmer v. Firesafe Prods. Corp., 24 A.D.3d 158 [1st Dept., 2005]).

The First Department explained the doctrine in Fitzgerald v. Fahnstock & Co., 286 A.D.2d 573 [1st Dept., 2001]). There, the Court wrote:

The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation. The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation. Not all of these elements are necessary to find a de facto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name. The concept upon which this doctrine is based is that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased.

(Fitzgerald, 286 A.D.2d at 574-575) (internal quotation marks and citations omitted).

Here, plaintiffs allege that on February 10, 2015, the XPO parties began doing business with all of Urban Express's customers, including Dart Direct's accounts, using the same offices and same office address, phone and fax numbers that Urban Express had used, and with the same 700 Urban Express officers, directors, managers, employees and other personnel (except for Todd Weiss and Greg Weiss) that had worked for Urban Express the day before; Urban Express and XPO conspired together

to circumvent plaintiffs' contractual rights; and the XPO parties are a mere continuation of Urban Express and expressly or impliedly assumed Urban Express's contractual and tort liabilities.

Specifically, plaintiffs allege that Steven Moelk, prior CEO of Urban Express, and most of its officers, directors and shareholders of Urban Express, became on February 9, 2015, officers, directors and shareholders of XPO; XPO continues to employ all or a majority of the 700 former employees of Urban Express; XPO continued the general business operations of Urban Express while Urban Express ceased all ordinary business operations; XPO exploits the name, goodwill, customer lists and software of Urban Express; XPO continued to service the same corporate clients of Urban Express; XPO continued to operate out of the physical office location of Urban Express; XPO continued to use the same telephone and fax numbers of Urban Express; XPO assumed liabilities ordinarily necessary to continue Urban Express's business operations uninterrupted; and XPO represented to the public and in regulatory filings that it provides an unbroken continuation of the original business enterprise of Urban Express (Second Amended Complaint, para. 58, pp. 14-15).

Viewing the allegation in the lights most favorable to plaintiffs, the Court finds that plaintiffs have sufficiently alleged the existence of a de facto merger.

Defendants' second contention is that the third cause of action (breach of the implied covenant of good faith and fair dealing), the fourth cause of action (fraud –

failure to disclose), seventh cause of action (unjust enrichment), and ninth cause of action (declaratory judgment) should be dismissed based on the doctrine of “law of the case.”

In opposition, plaintiffs assert that new facts asserted in the second amended complaint render “law of the case” inapplicable. Plaintiffs point to allegations in the second amended complaint that defendants made efforts to leave the Urban Express parties as empty companies and transfer accounts to a new entity.

The Court of Appeals summarized the law of the case doctrine in People v. Evans, 94 N.Y.2d 499 [2000], writing:

[L]aw of the case rests on a foundation that ... distinguishes it from issue and claim preclusion. Whereas the latter concepts are rigid rules of limitation, law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court’s discretion, but does not restrict its authority.

(Evans, 94 N.Y.2d at 503).

After carefully comparing the second amended complaint to the first amended complaint, the Court in its discretion adheres to its prior determination that the causes of action for breach of the implied covenant of good faith and fair dealing, fraud, unjust enrichment, and declaratory judgment must be dismissed.

Defendants’ third contention is that plaintiffs’ complaint fails to state a cause of action for tortious interference with prospective contractual relations. Defendants

assert that plaintiffs fail to allege that the sole purpose of the XPO defendants for entering into the asset purchase agreement was to harm plaintiffs or that they used wrongful means.

The elements of this tort are “a) the plaintiff had business relations with a third party; b) the defendant interfered with those business relations; c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and d) there was resulting injury to the business relationship” (Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 [1st Dept., 2009]).

An essential element that must be pled by plaintiff is wrongful conduct by the defendant. As the Court of Appeals explained in Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189 [2004]:

[T]he degree of protection available to a plaintiff for a competitor’s tortious interference with contract is defined by the nature of plaintiff’s enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant’s deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.

The interference employed by defendants must be by wrongful means or with malicious intent. “Wrongful means include physical violence, fraud or misrepresentation” (id. at 191). “Extreme and unfair economic pressure” may amount to wrongful means (id. at 192-3).

Here, plaintiffs allege that the XPO transaction was structured to come between Dart Direct and the Urban Express parties, assisting the parties evade their obligations to Dart Direct. Specifically, the second amended complaint asserts that XPO and the Urban Express parties “played a creative corporate shell game by which UX Specialized Logistics sold its business, including Dart [Direct]’s accounts, to UX Specialized Logistics [LLC]” (Second Amended Complaint, p. 16, para. 63).

The Court finds that the second amended complaint fails to allege wrongful conduct by defendants meeting the definition of “malicious intent.” Accordingly, the complaint fails to state an essential element of a cause of action for tortious interference with prospective contractual relations.

Defendants’ fourth contention is that the second amended complaint fails to state a cause of action for tortious interference with contractual relations. Defendants contend that plaintiffs fail to allege that UX Specialized Logistics did not have proper justification for entering into the asset purchase agreement with EarlyBird.

The elements of tortious interference with contract are: 1) the existence of a valid contract; 2) defendant’s knowledge of the contract; 3) defendant’s intentional procurement of the breach; and 4) damages (Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 [1996]; see also Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 [1993]).

It is axiomatic that if there is no valid existing contract, there can be no breach of an existing contract that may give rise to interference with contractual relations (see Jim

Ball Chrysler LLC v. Marong Chrysler-Plymouth, Inc., 19 A.D.3d 1094 [4th Dept., 2005]). Plaintiff must also “allege that the contract would not have been breached ‘but for’ the defendant’s conduct” (Burrowes v. Combs, 25 AD3d 370, 373 [1st Dept. 2006]) (internal citations omitted).

Here, plaintiffs allege that there was a purchase agreement and a commission agreement between Dart Direct and UX/NJ; the XPO parties had knowledge of the agreements; and the XPO parties intentionally induced the Urban Express parties to breach the agreements. Plaintiffs allege further that on February 10, 2015, Urban Express notified Dart Direct that it had entered into the asset purchase and sale agreement with XPO, was no longer doing business with Dart Direct’s accounts, and would not pay any more commissions to Dart Direct.

For two reasons, the Court finds that the complaint fails to state a cause of action for tortious interference with contract.

First, there is a problem with chronology. The initial breach of contract alleged in this case – that is, UX/NJ’s failure to pay the full amounts and percentages of commissions beginning in 2011, and UX/NJ’s unilateral decision to change the terms of the agreements – preceded the transaction between XPO and Urban Express by four years. Because the complaint alleges that UX/NJ breached the agreements in 2011, there is no possibility that XPO procured the breach since XPO did not enter the picture until 2015.

Second, the facts alleged in the complaint support the conclusion that the XPO transaction had a legitimate business purpose. The complaint alleges that the Urban Express parties sold all of their assets, including the Dart Direct accounts, to XPO for a purchase price of \$59,000,000 (Second Am. Complaint, p. 11, para. 42). The complaint alleges further that “Dart, JoJo, EarlyBird and Assembly have been in the business of providing delivery and assembly services for sports and fitness equipment, furniture and similar products and XPO, through its operating subsidiaries and affiliated companies, has also been in the business of providing warehousing and fulfillment services” (Second Am. Complaint, p. 5, para 10).

Viewing these allegation in the light most favorable to plaintiffs, the allegations support the conclusion that the XPO transaction had a lawful commercial purpose. It is well settled that interference with contract must be intentional to be actionable, and there can be no recovery for negligent interference or conduct incidental to some other lawful purpose (Alvord & Swift v. Muller Constr. Co., 46 N.Y.2d 276, 281 [1978]; Harris v. Town of Fort Ann, 35 A.D.3d 928, 929 [3d Dept., 2006]; Reliance Ins. Co. v. Morris Assoc., 200 A.D.2d 728, 730 [2d Dept., 1994]; Omnivest Inc. v. Elders Futures, 157 A.D.2d 528, 530 [1st Dept., 1990]; Montano v. City of Watervliet, 47 A.D.3d 1106, 1108 [3d Dept., 2008]).

Defendants’ fifth contention is that plaintiffs are not entitled to an accounting against EarlyBird, Urban Express Assembly LLC, and the XPO defendants, because no

fiduciary relationship exists between those defendants and plaintiffs.

Plaintiff's cause of action for an accounting is set forth at paragraphs 160 through 166 of the second amended complaint. Plaintiff alleges that Dart Direct's commissions are determined by the volume of business done with the Dart Direct accounts and calculated based on the amount of money derived from that business; Dart Direct does not make these calculations, and does not have the books, records, reports, invoices or other documents upon which they are based; and, in light of the nature of the contracts, the way in which payment to Dart Direct is required to be calculated and paid, and Dart Direct's inferior knowledge, lack of access to the necessary documents and reliance on Urban Express and XPO, a fiduciary relationship exists between plaintiffs and defendants (Second Am. Complaint, pp. 31-32).

“[I]n the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for an accounting” (Saunders v. AOL Time Warner, Inc., 18 A.D.3d 216, 217 [1st Dept., 2005]). “A conventional business relationship, without more, is insufficient to create a fiduciary relationship” (Di Tolla v. Doral Dental IPA of New York, LLC, 100 A.D.3d 586 [1st Dept., 2012]).

In short, the Court finds that the second amended complaint alleges the existence of conventional business relationships among the parties, not fiduciary relationships. Accordingly, the cause of action for an accounting must be dismissed.

Defendants' sixth contention is that plaintiff Dart Direct does not have standing

to bring this action, because it assigned all of its rights under the agreements to Jo Jo W, Inc.

“On a defendant’s motion to dismiss the complaint based upon the plaintiff’s alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law” (New York Community Bank v. McClendon, 2016 WL 1442135 [2d Dept., 2016]). “To defeat a defendant’s motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to standing” (id.) (internal quotation marks omitted).

Defendants’ contention is meritless for two reasons. First, a motion to dismiss for lack of standing must be brought under CPLR 3211(a)(3). Here, defendants’ motion was brought under CPLR 3211(a)(1) and (7). Second, defendants have not met their burden by submitted any sworn affidavits or documentary evidence to make a prima facie showing that Dart Direct lacks standing.

Defendants’ final contention is that plaintiffs are not entitled to punitive damages.

“To sustain a claim for punitive damages, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another” (Don Buchwald & Assoc. v. Rich, 281 A.D.2d 329, 330 [1st Dept.,

2001])).

Here, plaintiffs sought an award of punitive damages in their cause of action for fraud. Because that cause of action is dismissed, the complaint herein cannot satisfy the criteria for punitive damages. Further, in an action for breach of contract, punitive damages are not generally awarded (New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 315-316 [1995]).

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the third, fourth, fifth, sixth, seventh, eighth and ninth causes of action are dismissed.

The foregoing constitutes the decision and order of the court.

Date: April 22, 2016
New York, New York



Anil C. Singh