

<b>Taboola, Inc. v Aitken</b>
2016 NY Slip Op 31340(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 654404/2015
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 63

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TABOOLA, INC.,  
Plaintiff,

Index No.: 654404/2015  
Mot. Date: Mar. 25, 2016  
Motion Seq.: 001

-against-

**DECISION AND ORDER**

BRIAN AITKEN,  
Defendant.

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**ELLEN M. COIN, A.J.S.C.**

Plaintiff Taboola, Inc. (Taboola) brings a motion to dismiss defendant Brian Aitken's counterclaims pursuant to CPLR 3211 (a) (1) and (7), CPLR 3016 (a) and (b), and CPLR § 3013, and for sanctions under CPLR § 8303-a and 22 NYCRR § 130-1.1.

According to the pleadings and the parties' affidavits, in the fall of 2015<sup>1</sup>, Brian Aitken met with at least one representative of Taboola. Plaintiff and defendant disagree about who represented Taboola at that meeting. There, the parties discussed a book on public relations that defendant planned to write. He hoped that the book would include a case study of Taboola's business practices. On October 29, 2015, Taboola's Deputy General Counsel signed a book

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<sup>1</sup> The parties disagree about the date of the meeting and who was in attendance. Plaintiff asserts that defendant met with Benjamin Nichols, a Taboola employee, in mid-October 2015. Defendant claims that the meeting took place on September 30, 2015 and included the CEO of Taboola, Adam Singolda.

contract with Mr. Aitken. Taboola promised to pay defendant \$15,000, granted the limited right to use Taboola's marks and agreed to help market the finished book (Exhibit 3 to plaintiff's motion to dismiss, page 1). In exchange, defendant agreed to specifications about the book's content (*id.* at page 2). The contract's termination clause entitled Taboola to a full refund "if the Case Study is not published in the Book or if Taboola is not given the right to distribute the Case Study independently of the Book and the Author" (*id.*). Taboola also reserved the right to unilaterally withdraw from the book after reading it, in which case Mr. Aitken would retain the \$15,000 sponsorship fee. By signing the contract, defendant represented that he had "all necessary rights and licenses from any third parties who are referenced in the Book" (*id.*) The contract required him to "include in the book a two-page case study highlighting the relationship between Taboola and Hewlett-Packard [HP]" (*id.*).

Shelly Paioff, Deputy General Counsel for Taboola, avers in her affidavit that after the contract was signed, Taboola learned that defendant was not permitted to publish what he had learned about HP during his time at Ketchum, HP's advertising agency. In an email dated November 11, 2015, Ketchum's General Counsel informed Jessica Batty, a Senior Field Marketing Manager at Taboola, that defendant lacked permission to "produce a case study, or otherwise discuss his work for HP in a book" (Exhibit 4 to plaintiff's motion to dismiss). On November 12, 2015, Batty sent defendant an email stating that Taboola was "terminating [the contractual] relationship and expect[s] a full refund of the sponsorship fee paid" (Exhibit 6 to plaintiff's motion to dismiss). Paioff sent two additional emails to Aitken on November 16 and 23, which demanded payment, reiterated Taboola's reasons for terminating the contractual relationship, and threatened legal action (*id.*). Defendant did not return the \$15,000. On December 28, 2015, Taboola commenced this action, asserting causes of action for breach of

contract, anticipatory breach of contract, and fraud in the inducement.

Aitken's answers raised three counterclaims: first, that Taboola breached the contract, either "by refusing to grant [Mr. Aitken] access to any of the materials or interviews required for the Defendant to write and publish the requisite case study" or by withdrawing from the agreement for the impermissible reason that defendant was no longer employed by Ketchum; second, that Taboola's suit against him was a fraudulent attempt to recoup the \$15,000 sponsorship fee; third, that Taboola defamed him by "knowingly making false inquiries to several of the Defendant's peers and past employer" (Exhibit 4 to plaintiff's motion to dismiss at 12-13).

On a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *see* CPLR 3211 [a] [7]). We "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]) [internal quotation marks and citations omitted]). On the other hand, while factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, where the motion to dismiss is based on documentary evidence (CPLR 3211 [a] [1]), the claim will be dismissed "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88;

*see also 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). Where, as here, the defendants have presented documentary evidence, the court is required to determine “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] [internal quotation marks and citations omitted]).

**First Counterclaim: Breach of Contract**

Defendant’s claim that Taboola “breached the contract by refusing to grant the Defendant access to any of the materials or interviews required for the Defendant to write and publish the requisite case study” (Aitken Answer, ¶84) fails because the contract between plaintiff and defendant does not include that obligation. Taboola’s sole responsibilities under the contract were to (1) pay \$15,000 to defendant, (2) provide certain marketing assistance for the book through their advertising network, and (3) permit defendant to use Taboola’s trademarks in his book, subject to the company’s approval. In that contract, defendant “acknowledge[d] and agree[d] that Taboola [would] not participate in any way in the writing of the Book.” The contract also contains a merger clause stating that it “represents the entirety of the agreement, and that this contract is not contingent on any other offers, understandings or contracts.” Thus, it is a complete document and guarantees made outside its four corners are not enforceable (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]).

As an alternative theory, defendant alleges that plaintiff “breached the contract by withdrawing from the sponsorship because the Defendant was no longer employed by Ketchum” despite the fact that the contract did not require defendant to remain employed at Ketchum (Aitken Answer, ¶85). To rebut this assertion, plaintiff submits Paioff’s November 23, 2016 email. In it, Paioff clarified that “Taboola is not accusing you of violating the agreement because

you no longer are employed at Ketchum” (Exhibit 6 to plaintiff’s motion to dismiss). Paioff explained that she made that reference because “due to [defendant’s] past employment with Ketchum, which represents Hewlett-Packard, [defendant] knew or reasonably should have known that [he] did not, and could not, possess the rights and licenses to publish the case study,” which the contract specifically required be included in the book (*id.*). Paioff’s email, however, is not valid documentary evidence for the purpose of a CPLR 3211 (a) (1) motion. The “letters, summaries, opinions, and/or conclusions” of one party are not “essentially undeniable,” so they do not constitute documentary evidence (*Fontanetta v John Doe 1*, 73 AD3d 78, 87 [2d Dept 2010]). Although letters can be considered as documentary evidence if their “content is ‘essentially undeniable,’” (*DSA Realty Servs., LLC v. Marcus & Millichap Real Estate Inv. Servs. of N.Y., Inc.*, 128 AD3d 587, 588 [1st Dept 2015], quoting *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]), the emails and emailed letter submitted by Taboola do not pass that test. These documents “do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint” (*Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]) because they speak only to the consistency of plaintiff’s reasons when communicating with defendant. Therefore, the first counterclaim shall remain only insofar as it is based on the second, alternative theory of breach of contract.

### **Second Counterclaim: Fraud**

Defendant claims that plaintiff “knowingly and willingly filed a false claim” against him with fraudulent intent in order to recoup the \$15,000 sponsorship fee. To plead common-law fraud, a claimant must “show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable

reliance by the [claimant], and resulting injury” (*Pope v Saget*, 29 AD3d 437 [1st Dept 2006]). A counterclaim of fraud based solely on a perceived fraudulent cause of action asserted in a pleading does not lie where, as here, the alleged fraud is directed at the court and does not involve conduct constituting inducement of, or reliance by, the claimant (*Pasternack v. Lab. Corp. of Am. Holdings*, 2016 NY Slip Op 05179 [2016]). No alleged fraudulent act committed in a judicial proceeding gives rise to an independent cause of action for damages, unless it is merely a means to the accomplishment of a larger fraud (*see N. Shore Envtl. Solutions Inc. v Glass*, 17 AD3d 427, 427-28 [2d Dept 2005], quoting *Yalkowsky v Century Apts. Assocs.*, 215 AD2d 214, 215 [1st Dept 1995]; *see also Yalkowsky v. Shedler*, 94 AD2d 684, 684 [1st Dept 1983]). In such a case, the exclusive remedy lies with the tribunal itself, either by means of sanctions or vacatur of a detrimental order or judgment (*see Century Apts. Assocs.*, 215 AD2d at 215). Therefore, as defendant has a full and fair opportunity to defend against plaintiff’s breach of contract claim and prove it meritless, he cannot allege an injury sufficient to support his counterclaim of fraud.

Defendant’s counterclaim could be read as seeking the imposition of sanctions, but that would be unavailing, as New York does not recognize an independent cause of action for sanctions (*Cerciello v. Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011]).

Defendant’s allegation of unclean hands does not constitute a counterclaim. The doctrine of unclean hands is an equitable defense, unavailable in an action such as this, which exclusively seeks damages (*Manshion Joho Ctr. Co., Ltd. v. Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]).

Finally, this counterclaim may also be dismissed as duplicative of the breach of contract counterclaim, as both seek to retain the \$15,000 payment made under the contract (*see, e.g., Verizon, N.Y., Inc. v Opt. Communications Group, Inc.*, 91 AD3d 176, 179 [1st Dept 2011]).

### **Third Counterclaim: Defamation of Character**

Defendant's claim that Taboola defamed him to past and potential future employers is legally insufficient because it does not include "the particular words complained of" as CPLR 3016 (a) requires. If the statements at issue are written, defendant must "set forth either a copy of the alleged libel or the contents thereof"; if spoken, "the particular words complained of must be set forth in the complaint" (*Liffman v Boone*, 59 AD2d 687, 687 [1st Dept 1977]). That requirement is strictly enforced: "[a]ny qualification in the pleading thereof by use of the words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective" (*Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667, 667 [1st Dept 1967]). Defendant's failure to include the alleged defamatory remarks renders this counterclaim facially insufficient.

### **Imposition of Sanctions**

A frivolous and thus sanctionable claim is made "solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another" or is "without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law" (CPLR 8303-a [c]). Sanctions are typically imposed after a "persistent pattern of repetitive or meritless motions" (*Sarkar v Pathak*, 67 AD3d 606, 607 [1st Dept 2009]). Such circumstances are not present here.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent of dismissing (1) so much of defendant's first counterclaim as alleges that Taboola, Inc., refused to grant defendant access to materials or interviews for the case study, and (2) defendant's second counterclaim for fraud, and

(3) defendant's third counterclaim for defamation, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: 7/14/16

  
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Ellen M. Coin, A.J.S.C.