Tarro v McOsker
2016 NY Slip Op 31851(U)
October 4, 2016
Supreme Court, New York County
Docket Number: 653880/15
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMM. DIV. PART 45

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MIKE TARRO, TREADWAY HOLDINGS, LLC,
and TRACE PLATFORM, LLC,

Plaintiffs,

- against -

THOMAS R. McOSKER, LIENLOGIC INC.,
BESPOKE CAPITAL MARKETS GROUP, LLC,
BLOXTRADE, LLC, LIENANALYTICS, LLC,
and LIENCLEAR LLC,

Defendants.

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Index No. 653880/15
DECISION & ORDER
(Motion Seq. 001)

ANIL SINGH, J.:

Defendants Thomas R. McOsker (McOsker), BloxTrade, LLC (BloxTrade), LienAlytics, LLC s/h/a LienAnalytics, LLC (LienAlytics), LienClear LLC and BCMG Services, LLC s/h/a Bespoke Capital Markets Group, LLC (BCMG) move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint. BCMG also moves to dismiss the complaint based on lack of personal jurisdiction pursuant to CPLR 3211 (a) (8). Plaintiffs cross-move, pursuant to CPLR 3025 (b), for leave to amend the complaint.

FACTUAL ALLEGATIONS

Plaintiffs, Treadway Holdings, LLC (Treadway) and TRACE Platform, LLC (hereinafter TRACE) are New York limited liability companies doing business in Manhattan (Cmplt., ¶¶ 5-6). TRACE is wholly-owned by Treadway (*id.*, ¶ 5). Plaintiff Mike Tarro (Tarro) is the manager of TRACE (*id.*, ¶ 29). TRACE is a "back-end assignment and settlement platform for investors who trade portfolios of real estate tax receivable assets in the secondary market facilitated by front-end brokerage platforms such at BloxTrade" (*id.*, ¶ 13). TRACE allegedly

developed a "hub-and-spoke model" to provide clearing, escrow, validation, and payment functions to meet the needs of a newly created front-end brokerage system where secondary market transactions are conducted in tax lien states throughout the country (*id.*). At the time TRACE was created, it was totally unique since there were no other competing platforms for portfolio assignments and back-end transfer services for real estate tax liens (*id.*, ¶ 14).

The complaint alleges that, in September 2010, an individual named Ronald Oliveri was hired as an independent contractor at the behest of McOsker to populate a TRACE "Salesforce" database that would be used in clearing transactions (Cmplt., ¶¶ 16-17). Although Tarro personally paid Oliveri's salary, it was agreed that McOsker would manage Oliveri and personally oversee the day-to-day process to build the database (*id.*, ¶ 18). Tarro subsequently discovered that McOsker was using Oliveri primarily as a personal assistant in the development of his own brokerage platform and in preparing for an upcoming industry conference, and Tarro terminated the agreement with Oliveri (*id.*, ¶¶ 19-20). When Tarro commenced working on TRACE full-time in October 2011, he learned that the database was inaccurate, incomplete and unusable, and that $45,000 in salary he paid to Oliveri was wasted due to McOsker's lack of supervision and misuse of resources (*id.*, ¶¶ 21-22).

On or about November 16, 2010, the Articles of Organization for TRACE were filed in New York (Cmplt., ¶ 23). In March of 2011, Tarro and McOsker agreed that McOsker was to have a 25% equity interest in TRACE after all start-up expenses were recouped by TRACE (*id.*, ¶ 24). In exchange for his 25% interest, McOsker was to provide exclusive deal flow from a platform then known as Distressed Asset Receivable Trading (DART) to the TRACE platform (*id.*, ¶ 25). The complaint alleges that DART was initially the only institutional brokerage platform of its kind, essentially matching buyers and sellers and taking a spread and/or

commission on the transaction (*id.*, 26 n 1). Once the terms of the transaction were agreed upon by the buyer and seller of the tax liens, the deal was supposed to be handed over to TRACE to provide the clearing, escrow, validation, and payment functions (*id.*).

Despite numerous attempts and many hours of legal fees expended to negotiate an operating agreement for TRACE, "no operating agreement was ever signed" (Cmplt., ¶ 27). This was due to McOsker's "over-reaching and failure and/or refusal" to obtain permission from his then employer, GFI Group, Inc. (GFI), to permit McOsker to be a minority owner of TRACE (*id.*, ¶ 28). As result, on or about June 21, 2011, Tarro, as manager of TRACE, and McOsker allegedly executed a letter agreement (Agreement) that governed the parties' relationship in connection with the business of TRACE (*id.*, ¶ 29). A copy of the Agreement is annexed to the complaint as Exhibit 1. The Agreement is not signed by either Tarro or McOsker, and, in fact, McOsker disputes the existence of the Agreement including its execution (*see* Defs. Mem. in Support [NYSCEF Doc. 11] at 3).

The Agreement's first paragraph states the following, in pertinent part:

> "As you know, we have recently finalized the terms upon which you will become a member of TRACE . . . (the "Company") and, in connection therewith, we have agreed upon the terms for the Amended and Restated Operating Agreement ("Operating Agreement"). As you are also aware, you cannot become a member of the Company and we cannot execute the Operating Agreement of the Company until you obtain the prior written consent of . . . your current employer . . . Therefore, in order for you to continue to learn about and be involved with the Company's activities until such time as we execute the Operating Agreement, if ever, this Agreement will govern certain aspects of our relationship"

(Cmplt., Ex. 1 thereto at 1). The Agreement provides that McOsker's services are "unique, extraordinary and essential to the Business [fn] of the Company" (*id.*, § 1), and since McOsker will have access to TRACE's customer and client lists, trade secrets and other privileged and confidential information, in the event he ceases to be "affiliated with the Company for any

reason whatsoever," he would not, for one year, directly or indirectly, anywhere within the United States, engage or invest in a business which is similar to or competitive with the business of TRACE (*id.*, § 1 [a]). The Agreement also prohibits McOsker from causing or seeking to persuade any employee, customer or client of TRACE to discontinue or materially modify their relationship with TRACE (*id.*, § 1 [b]).

At the time the Agreement was allegedly signed, McOsker ran a conference series for the tax lien industry known as "Tax Lien Talk" that was initially sponsored by GFI (Cmplt., ¶¶ 34-35). The complaint alleges that McOsker insisted that TRACE and Tarro attend the first annual conference in November 2011 in New Orleans, at a cost of $15,000 (*id.*, ¶¶ 36-41). However, no clients showed up and TRACE did not gain any "significant industry exposure" or "generate significant leads with potential clients" (*id.*). The two men then disagreed on whether Tarro would be a presenter at the 2012 tax lien conference to be held in November 2012, again in New Orleans, with Tarro accusing McOsker of using TRACE's name without permission, violating the Agreement and acting in his own self-interest (*id.*, ¶¶ 42-47).

On or about January 4, 2013, McOsker partnered with defendant LienLogic, Inc., a Colorado company, "in connection with the BloxTrade platform (previously known as DART)" (Cmplt., ¶¶ 8, 49). The employment agreement with LienLogic states that McOsker is a 25% owner of TRACE (*id.*, ¶ 49; *see also* Hellman affirmation, Ex. 2 at 3). Upon information and belief, McOsker became unhappy with his partnership with LienLogic, and decided to purchase BloxTrade, requesting that Tarro wire $30,000 from TRACE's escrow account to LienLogic by October 15, 2013 (Cmplt., ¶ 50). After the two men disagreed on using TRACE escrow funds to purchase BloxTrade and the terms of a revenue sharing arrangement, McOsker circumvented TRACE to purchase BloxTrade himself (*id.*, ¶¶ 51-56).

Thereafter, McOsker stopped providing deal flow to TRACE through BloxTrade or otherwise (Cmplt., ¶ 57). Instead, in or about January 2014, McOsker created LienClear to replace and directly compete with TRACE, thereby violating the terms of the Agreement (*id.*, ¶ 58). LienClear is a clearing platform that directly competes with TRACE by performing portfolio assignments and back-end transfer services (*id.*, ¶ 59). LienClear's counsel describes its business as providing "clearing services in connection with buying and selling tax liens" (Davydan affirmation, ¶ 9). The complaint alleges that it was McOsker's intent that LienClear completely replace TRACE, and that since Tarro refused "to illegally fund the purchase of BloxTrade, not one deal has been transacted with BloxTrade since that time" (Cmplt., ¶¶ 62-63). It is further alleged that a telephone call between Florida real estate professionals, TRACE, and representatives from BCMG/BloxTrade/LienClear confirmed that LienClear is transferring portfolios of liens in direct competition with TRACE and doing so using the exact process and documentation created and utilized by TRACE (*id.*, ¶ 65).

In March of 2015, McOsker changed his "LinkedIn" profile to delete any affiliation with TRACE (Cmplt., ¶ 66). Prior to that change, he was promoting himself as the co-founder of the TRACE platform, "where he continues to serve as Principal," and representing that TRACE is "the trusted clearing provided for BloxTrade's LienClear services" (*id.*, ¶ 67). Plaintiffs allege that McOsker used TRACE's name, process and intellectual property to promote the DART, BloxTrade and LienClear businesses during the time of his affiliation with TRACE and for well over a year afterward (*id.*, ¶ 68).

This action was commenced on November 24, 2015. The complaint advances 14 theories of liability against the defendants. The first four causes of action are asserted against McOsker for: (1) breach of the Agreement by participating in a business which competes with

TRACE; (2) an award of legal fees pursuant to paragraph 20 of the Agreement; (3) breach of the fiduciary duties he owed to plaintiffs by virtue of self-dealing and theft of corporate opportunities; and (4) diverting corporate opportunities away from TRACE to the other defendants, LienLogic, BCMG, BloxTrade, LienAlytics, and LienClear. The remaining 10 causes of action allege that each of the five corporate defendants tortiously interfered with the Agreement and aided and abetted McOsker's breach of his fiduciary duties to TRACE.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged in the complaint as true and accord the plaintiff every favorable inference, determining only whether the facts as alleged state a valid legal claim (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Cabrera v Collazo*, 115 AD3d 147, 150-151 [1st Dept 2014]). "[T]he court must determine 'only whether the facts as alleged fit within any cognizable legal theory'" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998], quoting *Leon v Martinez*, 84 NY2d at 87–88). "So liberal is the standard under these provisions that the test is simply 'whether the proponent of the pleading has a cause of action,' not even 'whether he has stated one'" (*Wiener v Lazard Freres & Co.*, 241 AD2d at 120, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The moving defendants argue that the complaint fails to plead that a valid contract existed between TRACE and McOsker, because the terms of the Agreement are not sufficiently definite to be enforced. The lack of a definition for the terms "affiliation," "Cessation of Affiliation" and "Company" is allegedly the problem. Even if the contract satisfies the definiteness requirement, it is purportedly void, because it is not ancillary to any valid business transaction or relationship. Defendants further contend that any duties owed by McOsker

pursuant to the Agreement were subject to an express condition precedent, namely that he ceases his affiliation with TRACE. However, defendants argue that McOsker could not have such an affiliation until and unless he first obtained the written consent of GFI, which apparently did not occur. In response, plaintiffs insist that the Agreement is sufficiently definite to be enforced, and that the non-compete provisions are sufficiently narrow in scope and the court must give wider latitude in judging this restrictive covenant since it was expressly agreed that McOsker's services were unique and extraordinary.

Defendants' motion to dismiss the first cause of action is denied. While "a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]), terms are not to be considered in isolation, but in the context of the overall agreement (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989]). Contracting parties "should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions" (*id.*, quoting 1 Corbin, Contracts § 95, at 396 [1963]). "The conclusion that a party's promise should be ignored as meaningless 'is at best a last resort'" (*id.*, quoting *Cohen & Sons v Lurie Woolen Co.*, 232 NY 112, 114 [1921]).

The Agreement provides that McOsker would have access to TRACE's customer and client lists, trade secrets and other privileged and confidential information in order for him to "learn about and be involved with the Company's activities" until such time as an operating agreement was signed, and, he, in return, would be bound by a restrictive covenant not to compete with TRACE. The fact that the Agreement does not define the term affiliation or cessation of affiliation, both commonly understood terms, does not render the restrictive covenant impermissibly vague. The complaint alleges that McOsker was to provide exclusive

deal flow from DART to the TRACE Platform (Cmplt., ¶ 25). The term "Company" is defined on page 1 of the Agreement as "TRACE Platform, LLC." The fact that a latter contractual provision expands the term "Company" to include "parents, subsidiaries and affiliated entities of the Company as may be in existence from time to time" does not render the Agreement too vague to be enforced, since there is no dispute that Company means TRACE and Treadway is allegedly TRACE's parent company.

Defendants are correct that, "in New York, as elsewhere, a promise to refrain from competition is unreasonable and unenforceable where the promise is not ancillary either to a contract for the sale of a business or to existing employment or a contract of employment" (*Zellner v Stephen D. Conrad, M.D., P.C.*, 183 AD2d 250, 254 [2d Dept 1992], citing *Paramount Pad Co. v Baumrind*, 4 AD2d 944 [1st Dept 1957], *affd* 4 NY2d 393 [1958]). However, accepting the allegations of the complaint as true and plaintiffs' documentary evidence offered in opposition to this motion, some type of business relationship may have existed between Tarro and McOsker regarding the TRACE platform.

Restrictive covenants are subject to specific enforcement to the extent that they are "'reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999], quoting *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). The court does not find that a one-year restriction on engaging in "back-end" transfer services for real estate tax lien sales in the United States to be an unreasonable restraint of trade. Not only did the parties allegedly agree that McOsker was providing unique and extraordinary services to TRACE (*see BDO Seidman v Hirshberg*, 93 NY2d at 389-390), but this restriction does not appear to prevent McOsker from earning a

livelihood by engaging in the front-end side of business via DART, later BloxTrade. Thus, the restrictive covenant does not prevent McOsker from pursuing his vocation and serves the acceptable purpose of protecting TRACE from unfair competition (*see Rifkinson-Mann v Kasoff*, 226 AD2d 517, 517-518 [2d Dept 1996]).

The court agrees that the complaint does not specifically plead the exact point in time when there was a "cessation of affiliation," and that this was a condition precedent to McOsker's covenant not to compete with TRACE. However, the complaint alleges that Tarro and McOsker had a final falling out over the purchase of BloxTrade, which occurred sometime around October 2013, that McOsker circumvented TRACE to purchase BloxTrade himself, and that he thereafter stopped providing deal flow to TRACE (Cmplt., ¶¶ 50-57). The complaint also alleges that in January/February 2014 McOsker established LienClear, a company that allegedly directly competes with TRACE (*id.*, ¶¶ 58 & 65). Accepting these facts as true and giving plaintiffs every favorable inference, the complaint sufficiently pleads the occurrence of the express condition precedent that triggered McOsker's alleged contractual duty not to compete with TRACE in the back-end tax lien business. The court rejects the argument that obtaining the consent of GFI was a second condition precedent to any of McOsker's contractual obligations, since the Agreement states that it was to govern the parties' relationship until such time as a formal operating agreement was executed.

The second cause of action seeks an award of attorney's fees and expenses in connection with the enforcement of the Agreement. A request for attorney's fees is an item of damages, not a separate cause of action (*Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006]). However, since paragraph 20 of the Agreement authorizes an award of attorney's fees, the cause of action will be deemed ancillary to, and dependent upon, a successful outcome on the

first cause of action for breach of the Agreement (*cf. Burke v Crosson*, 85 NY2d 10, 17-18 [1995] [plaintiff cannot divide a single cause of action by dividing the damage claims]).

The third cause of action alleges that McOsker breached his fiduciary duties to the plaintiffs by engaging in self-dealing and the diversion of corporate opportunities away from TRACE. Defendants contend that the complaint fails to allege the basis of a fiduciary relationship between any of the plaintiffs and McOsker. While plaintiffs contend that McOsker was a 25% member of TRACE, the complaint provides that the two men agreed that "McOsker *was to have* a twenty-five (25%) equity ownership in TRACE *after* all start-up expenses were recouped by TRACE, including the legal fees necessary to draft the operating agreement [emphasis added]" (Cmplt., ¶ 24). This suggests a future intent for McOsker to become a member of TRACE, and there is no allegation as to whether these start-up expenses were recouped. In addition, the document offered as evidence of the parties' relationship in connection with the business of TRACE provides that McOsker cannot become a member of TRACE until such time as the consent of GFI was obtained and a formal operating agreement was executed, two events that apparently did not occur (*id.*, ¶ 29).

Nevertheless, although the language of the Agreement seems to counteract plaintiffs' claim that McOsker is and was a member of TRACE, a plaintiff is entitled to advance inconsistent theories in alleging a right to a recovery (*see* CPLR 3014; *Cohn v Lionell Corp.*, 21 NY2d 559, 563 [1968]). Indeed, McOsker denies the existence of the Agreement or its purported execution. If the Agreement was never executed, then this document does not govern the parties' business relationship. In addition, plaintiffs allege that Tarro and McOsker orally agreed upon the actual terms of an operating agreement. The absence of a signed operating agreement is not fatal to the claim that McOsker was a member of TRACE, since "[t]here is no

provision in the Limited Liability Company Law imposing any type of penalty or punishment for failing to adopt a written operating agreement. The statute does not require an operating agreement prior to the formation of this type of entity" (*Matter if Spies v Lighthouse Solutions, LLC*, 4 Misc 3d 428, 431 [Sup Ct, Monroe County 2004], citing Limited Liability Company Law § 417). In addition to these allegations, McOsker apparently represented to LienLogic in January 2013 that he was a 25% owner of TRACE and was allegedly promoting himself on LinkedIn as the "co-founder" of the TRACE platform and a "principal" of the company as late as March 2015. Whether McOsker was, in fact, a member of TRACE and, thus, owed the company a fiduciary duty, is a question of fact that cannot be resolved on this pre-answer dismissal motion.

The court, however, rejects plaintiffs' alternative argument that, "in the absence of an Operating Agreement, the relationship was clearly akin to a partnership or joint venture, whereby McOsker undertook to 'be involved with the Company's activities' and provide deal flow to TRACE in exchange for a 25% ownership interest" (Pls. Mem. of Law at 10). If plaintiffs wish to plead a separate legal basis for holding McOsker to a fiduciary standard, either as a partner of or member of a joint venture with Tarro, it is incumbent upon them to so do. An implied partnership, or partnership in fact, may exist based on the conduct, intention, and relationship between the parties (*Brodsky v Stadlen*, 138 AD2d 662, 663 [2d Dept 1988]). It is well-established that "[a]n indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses" (*Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]; *see also Andrews v Cerberus Partners*, 271 AD2d 348, 348 [1st Dept 2000]). The existing complaint does not adequately plead this type of

relationship between Tarro and McOsker. In fact, plaintiffs allege just the opposite, that Tarro was independently shouldering the financial burdens of this start-up business (*see* Cmplt., ¶¶ 18-22, 24, 27, 38, 41, 44).

For these reasons, defendants' motion to dismiss the third cause of action is denied.

The fourth cause of action alleges that McOsker diverted corporate opportunities away from TRACE. As such plaintiffs must allege and establish that McOsker was a corporate fiduciary or employee of TRACE (*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]). Even if a fiduciary relationship existed between McOsker and TRACE, this claim is wholly duplicative of the third cause of action and is dismissed on that basis.

Dismissal of the seventh through twelfth causes of action against BCMG, BloxTrade, and LienAlytics is granted. Except for alleging that BCMG owns and/or operates BloxTrade and LienAlytics, the complaint is silent as to the business of these three companies or how any of these entities aided and abetted any breach of fiduciary by McOsker or tortuously interfered with the Agreement. With respect to the thirteenth and fourteenth causes of action against LienClear, the complaint not only alleges that McOsker set up LienClear as a direct competitor of TRACE in violation of the Agreement, but that LienClear's description of the process for real estate tax receivable portfolio assignments is identical to the one that TRACE created, developed and implemented. The motion is therefore denied with respect to these causes of action.

Plaintiffs' cross-move for leave to amend the complaint pursuant to CPLR 3025 (b). That cross motion is denied as premature, since an amendment of right pursuant to CPLR 3025 (a) is available even before a dismissal motion is decided by the court (*see* CPLR 3025 [a]). In addition, plaintiffs failed to submit a proposed amended complaint as required by the 2012 amendment to CPLR 3025 (b).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) by defendants Thomas R. McOsker, BloxTrade, LLC, LienAnalytics, LLC, LienClear, LLC and Bespoke Capital Markets Group, LLC is granted with respect to the fourth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action, and the motion is denied with respect to the first, second, third, thirteenth and fourteenth causes of action; and it is further

ORDERED that the cross motion by plaintiffs for leave to amend the complaint pursuant to CPLR 3025 (b) is denied; and it is further

ORDERED that defendants Thomas R. McOsker and LienClear, LLC are directed to serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the action against defendants BloxTrade, LLC, LienAnalytics, LLC, and Bespoke Capital Markets Group, LLC, with costs and disbursements to the defendants as taxed by the Clerk; and it is further

ORDERED that the remainder of the action is severed and continued.

Dated: October 4, 2016

ENTER:

J.S.C.
ANIL C. SINGH