SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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COPIER AUDIT, INC., JAN DEBASSAC

Plaintiffs,

DECISION/ORDER
Index No. 653461/2016

-against-

COPYWATCH, INC., MATTHEW SMITH,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiffs Copier Audit, Inc. ("Copier Audit") and Jan Debassac ("Debassac") commenced the instant action seeking damages arising out of an agreement entered into by the parties. Plaintiffs now move to dismiss defendants Copywatch, Inc. ("Copywatch") and Matthew R. Smith's ("Smith") (hereinafter collectively referred to as "defendants") counterclaims. Defendants cross-move for leave to amend their answer. For the reasons set forth below, the motions are granted in part and denied in part.

The relevant facts are as follows. Both plaintiff Copier Audit and defendant Copywatch specialize in audit and document management services for their client companies' document production needs. Defendant Smith founded Copywatch but had previously worked for plaintiff Copier Audit. In or around February 2013, Copier Audit commenced a lawsuit in Florida against Copywatch and Smith arising out of the breakdown of their business relationship and sought damages.

On or about December 19, 2013, Copier Audit and defendants entered into a Mutual Release and Settlement Agreement (hereinafter referred to as the "Agreement") which purported to settle "all of the issues raised or that could have been raised in the pending litigation." The Agreement provides, *inter alia,* "that Copier Audit and Copywatch will agree not to make disparaging remarks of any kind to any person or entity regarding each other." The Agreement further provides that it "shall be construed and interpreted in accordance with the laws of the State of Florida."

Plaintiffs allege that in or around September 2015, they received a letter from Ryan J. Kidder ("Kidder"), Procurement Analyst for Springfield, Massachusetts Public Schools, in which Kidder stated as follows:

> I am writing to inform you that in the beginning of July, I received a phone call from Matt Smith of the company Copy Watch…Mr. Smith stated that your company was fraudulent and had stolen the proprietary system he had developed for the copy auditing field. He further went on to state that the school district should never do business with Copier Audit, INC. and that "Jan Debassac is a washed up copier salesman who could not hack it and now has to pretend to do consulting." Since I believe calling prospective clients to defame industry competitors to be poor business practice, and since I have found your organization to be reliable and straightforward, having never badmouthed a competitor, I thought you should be aware that such allegations and disparagements are being levied against you….

Thereafter, plaintiffs commenced the instant action asserting two causes of action for defamation and breach of contract. Defendants then interposed an answer in which they asserted seven affirmative defenses and counterclaims for defamation, breach of contract, trademark infringement and attorney's fees based on defendants' allegation that "Plaintiffs have knowingly brought a frivolous suit."

Plaintiffs now move to dismiss defendants' counterclaims. Defendants cross-move for leave to amend their answer to withdraw their counterclaim for trademark infringement and add more specific allegations to their counterclaims for breach of contract and defamation.

As an initial matter, that portion of defendants' cross-motion for leave to amend their answer to withdraw their counterclaim for trademark infringement is granted without opposition. As defendants have withdrawn their counterclaim for trademark infringement, the court need not address that portion of plaintiffs' motion to dismiss such counterclaim.

The court next turns to plaintiffs' motion to dismiss defendants' counterclaim for defamation on the ground that defendants have failed to plead such counterclaim with the requisite specificity. Pursuant to CPLR § 3016(a), "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint…."

In the instant action, the court finds that defendants' counterclaim for defamation must be dismissed on the ground that it fails to set forth the particular words of which defendants complain. Defendants'

counterclaim for defamation states that "[p]laintiffs have made multiple untrue, defamatory, and disparaging statements against the Defendants. Said statements have been made negligently and knowingly, and have been published to third parties" and that "[d]efendants seek damages against the Plaintiffs in an amount to be determined at trial." However, such allegations fail to set forth the specific words that defendants allege were defamatory which is required by CPLR § 3016(a).

That portion of defendants' cross-motion for leave to amend their answer to add more specific allegations to their counterclaim for defamation is denied. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

Here, defendants' cross-motion for leave to amend their answer to add more specific allegations to their defamation counterclaim is denied on the ground that the proposed amendment is palpably insufficient and patently devoid of merit. The proposed amendment to defendants' counterclaim for defamation only adds the following allegation: "[a]s demonstrated in the attached affidavit of Edward Mahoney, the Plaintiff did make disparaging remarks to Edward Mahoney and Larry Dwyer concerning Defendant Matthew Smith, including unfavorable statements concerning Matthew Smith's alleged criminal record and arrest history." However, such proposed amendment still fails to set forth the specific words of which defendants complain. Further, the affidavit of Mr. Mahoney which is referenced in the counterclaim for defamation constitutes hearsay as it states as follows:

> In the summer of 2016 I was informed that the Plaintiff had made improper and disparaging remarks about Defendant Matthew Smith, specifically spreading gossip and rumors in the industry concerning Mr. Smith's alleged criminal record.
> I was specifically told this by Larry Dwyer, another agent of Copywatch's who had had direct contact with Copier Audit. Mr. Dwyer is currently in ill health and cannot be reached for an affidavit outlining more specifics.

Thus, as the proposed amendment to the counterclaim for defamation fails to plead the specific words of which defendants complain, defendants' motion for leave to amend their answer to add such allegations is denied.

The court next turns to that portion of plaintiffs' motion to dismiss defendants' counterclaim for breach of the Agreement on the ground that defendants have failed to plead such counterclaim with the requisite specificity. Pursuant to CPLR § 3013, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Here, plaintiffs' motion to dismiss defendants' counterclaim for breach of the Agreement is denied as this court finds that defendants have pled such counterclaim with the requisite specificity. Defendant's counterclaim for breach of the Agreement alleges that "Plaintiffs have made multiple untrue, defamatory, and disparaging statements against the Defendants. Said statements have been made negligently and knowingly, and have been published to third parties"; that "[s]uch statements violate the Florida-based stipulation of settlement containing a mutual non-disparagement clause between parties"; and that "Defendants seek damages against the Plaintiffs in an amount to be determined at trial." These allegations are sufficiently specific to plead a cause of action for breach of the Agreement and plaintiffs fail to provide any basis for their assertion that a claim for breach of contract is subject to the heightened pleading requirement set forth in CPLR § 3016 for claims such as fraud and defamation.

To the extent defendants cross-move to amend their answer to assert more specific allegations to their breach of contract claim, such motion is denied as the proposed amendment provides no new allegations. Indeed, the only additional allegation included in the breach of contract counterclaim states "[a]s demonstrated in the attached affidavit of Defendant Matthew Smith,…." However, the counterclaim fails to discuss what such affidavit states and defendants have failed to attach such affidavit to their motion papers.

Finally, the court next turns to that portion of plaintiffs' motion to dismiss defendants' counterclaim for attorney's fees. Under both CPLR § 8303-a and 22 NYCRR § 130-1.1, the court, in its discretion, may

award to a party reasonable attorney's fees to penalize specific frivolous conduct. However, it is well-settled that "New York does not recognize an independent cause of action for the imposition of sanctions under either CPLR 8303-a or Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1." *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 A.D.3d 967, 968 (2d Dept 2011). *See also Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc.*, 145 Misc.2d 282, 283 (Sup. Ct. Rensselaer County 1989)("A counter-claim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper.") Here, plaintiffs' motion to dismiss defendants' counterclaim for attorney's fees is granted as there is no independent cause of action for attorney's fees based on a party's frivolous conduct.

Accordingly, defendants' motion to amend their answer is granted solely as to the withdrawal of their counterclaim for trademark infringement but otherwise denied and defendants' counterclaims for defamation, trademark infringement and attorney's fees are dismissed.

DATE: 2/14/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.