

Grand Prize Network, LLC v The Blu Mkt., Inc.
2018 NY Slip Op 30589(U)
April 2, 2018
Supreme Court, New York County
Docket Number: 651799/2017
Judge: Gerald Lebovits
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NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 04/04/2018

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

GRAND PRIZE NETWORK, LLC,

Plaintiff,

-against-

THE BLU MARKET, INC. a/k/a THE BLU MARKET, LLC and,
STEVEN FORKOSH,

Defendants.

Index No.: 651799/2017
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss and plaintiff's cross-motion for leave to amend the complaint.

Papers

NYSCEF Documents Numbered

Defendants' Notice of Motion	7
Defendants' Memorandum of Law in Support	8
Defendants' Affirmation in Support	9-13
Plaintiff's Notice of Cross-Motion	17-23
Plaintiff's Memorandum in Opposition to Motion and in Support of Cross-Motion	24
Defendants' Memorandum of Law in Support of Motion and in Opposition to Cross-Motion	25

Kupillas, Unger & Benjamin, New York (Jeffrey Benjamin of counsel), for plaintiff.
Amster, Rothstein & Ebenstein, LLP, New York (Charles R. Macedo & Jessica A. Capasso of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff, Grand Prize Network, LLC, sues defendants Blu Market, Inc. a/k/a Blu Market, LLC, and Steven Forkosh, raising seven causes of action: (1) deceptive business practices in violation of GBL § 349; (2) fraudulent inducement and concealment; (3) conversion; (4) breach of contract; (5) breach of implied covenant of good faith and fair dealing; (6) unjust enrichment; and (7) accounting.

Defendants move (1) under CPLR 3211 (a) (1) and (a) (7) to dismiss plaintiff's complaint in its entirety against Blu Market, Inc., and Forkosh for failure to state a cause of action; and (2) under CPLR 3211 (a) (1) and (a) (7) to dismiss plaintiff's fourth cause of action against all defendants for breach of contract based on documentary evidence and failure to state a cause of action. Defendants also seek sanctions against plaintiff.

Plaintiff cross-moves for leave to amend the complaint and to deem the amended complaint, filed August 27, 2017, properly served and filed.

In defendants' motion to dismiss, defendants argue that Blu Market, LLC ("BMLLC") and Blu Market, Inc. ("BMI"), are two separate entities, registered in two different states, even though both entities have the same CEO, Forkosh. Plaintiff does not dispute that BMLLC and BMI are separate entities.

On November 1, 2016, plaintiff entered into a Revenue and Equity Sharing Agreement ("RESA") with BMLLC to acquire users of an app plaintiff created. On the same day, plaintiff entered into a separate agreement, the Mutual Non-Disclosure Agreement ("MNDA"), with BMI to protect confidential information exchanged between the parties.

I. Plaintiff's Cross-Motion to Amend the Complaint

The court addresses plaintiff's cross-motion for leave to amend the complaint before addressing defendants' motion to dismiss. Doing so resolves several issues in defendants' motion.

Courts should freely grant leave to amend a pleading if there is no surprise or prejudice to the other party. (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011].) Plaintiff's amended complaint, attached to plaintiff's cross motion as Exhibit E (NYSCEF Document 23), does not prejudice or surprise defendants. Defendants assert that BMLLC and BMI are separate entities, registered in separate states. Plaintiff's amended complaint reflects these changes by naming BMLLC and BMI as separate parties and by affirming that BMLLC is registered in Delaware and BMI is a registered corporation of New York. Therefore, plaintiff's motion for leave to amend the complaint is granted, the amended complaint (NYSCEF Doc. 23) is deemed properly served and filed, and the named defendants are Blu Market, Inc., Blu Market, LLC, and Steven Forkosh.

II. Defendants Forkosh and BMI's motion to dismiss plaintiff's complaint in its entirety under CPLR 3211 (a) (1) and (a) (7) for failure to state a cause of action

A. CPLR 3211 (a) (1)

A court will grant a motion to dismiss under CPLR 3211 (a) (1) only if the documentary evidence conclusively disposes of plaintiff's claim by resolving all factual issues as a matter of law. (*Fontanetta v Doe*, 73 AD3d 78, 83 [2d Dept 2010].) Defendants attach four documents to its motion. Two documents are letters between defendants and plaintiff. The remaining two documents are from the websites of the Department of State, Division of Corporations for New York and Delaware, showing that BMI is incorporated in New York and that BMLLC is registered in Delaware. Letters are not considered documentary evidence under CPLR 3211 (a) (1). (*Fontanetta*, 73 AD3d at 87.) Additionally, the documents from the Delaware and New York Department of State show only that BMI and BMLLC are incorporated in different states. None of these documents resolves all factual issues as a matter of law. Defendants' motion to dismiss under CPLR (a) (1) is denied.

B. CPLR 3211 (a) (7)

Defendants' motion to dismiss under CPLR 3211 (a) (7) is also denied. On a motion to dismiss under CPLR 3211 (a) (7), pleadings are construed liberally, the alleged facts stated in the complaint are presumed true, and plaintiffs are given the benefit of favorable inferences where the facts fit within any recognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) Plaintiff argues that although both BMLLC and BMI are considered separate entities, both entities had agreements with plaintiff. Plaintiff alleges all causes of action against both BMLLC and BMI. The court must presume these facts as true and give plaintiff the benefit of favorable inferences. Therefore, the motion to dismiss the complaint in its entirety against BMI is denied.

Plaintiff has pleaded sufficient facts in the complaint to allege that defendant Forkosh acted in an individual capacity so as to hold CEO Forkosh personally liable. (*See Shugrue v Stahl*, 117 AD3d 527, 528 [1st Dept 2014] [holding that the court erred in dismissing several causes of action against a CEO because plaintiff had alleged sufficient facts to hold him personally liable for the alleged commission of various torts].) That aspect of defendants' motion to dismiss the entire complaint against defendant Forkosh is denied.

III. Defendants' motion to dismiss plaintiff's fourth cause of action for breach of contract under CPLR 3211 (a) (7) and request for sanctions

A. Blu Market Inc.

The motion to dismiss under CPLR 3211 (a) (7) the fourth cause of action for breach of contract against BMI is granted. The elements for a breach-of-contract claim include the existence of a contract, plaintiff's performance under the contract, defendant's breach of contractual obligations, and damages as a result of the breach. (*Meyer v N. Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016].) Plaintiff fails to allege a breach of the MNDA between plaintiff and defendant BMI. Plaintiff's claim for breach of contract refers only to the RESA between plaintiff and defendant BMLLC. Therefore, with respect to plaintiff's contract with BMI, plaintiff fails to demonstrate defendant's breach of contractual obligations.

B. Steven Forkosh

The motion to dismiss the fourth cause of action for breach of contract against defendant Forkosh is granted. Even though Forkosh signed the RESA on BMLLC's behalf , no evidence exists that Forkosh was binding himself individually to the contract. (*See Shugrue*, 117 AD3d at 528 [finding that dismissal of a cause of action for breach of contract against the CEO of a company in his personal capacity was proper].) Plaintiff fails to show that defendant was bound to perform individually under the contract. Therefore, this aspect of defendants' motion is granted.

C. Blu Market, LLC

The motion to dismiss plaintiff's fourth cause of action against BMLLC is also granted. On a motion to dismiss under CPLR 3211 (a) (7), the facts pleaded are presumed true and given every favorable inference. (*CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais*, 270 AD2d 138, 138 [1st Dept 2000].) Allegations that consist of bare legal conclusions and factual claims contradicted by documentary evidence are not entitled to this consideration. (*Id.*)

Many inconsistencies exist between the facts alleged in plaintiff's complaint and the language in the RESA. For example, plaintiff claims that the contract does not have an integration clause, but paragraph 6 of the RESA is an integration clause: it prevents modifying the agreement other than by "writing executed by both parties." (NYSCEF Doc. 19). When a written contract provides that it may only be modified by a signed writing, oral modification of that agreement is unenforceable. (*Tierney v Capricorn Invs., LP*, 189 AD2d 629, 631 [1st Dept 1993] [holding that plaintiff's cause of action for breach of contract should have been dismissed by the trial court because plaintiff pleaded facts inconsistent with the terms of the agreement, which contained a provision precluding oral modification], citing General Obligations Law § 15-301 [1]; *Goodyear Publ. Co. v Mundell*, 75 AD2d 556, 557 [1st Dept 1980].) The inconsistencies between the facts plaintiff alleged in the complaint and the language of the RESA are insufficient to support a claim for breach of contract. Plaintiff fails to demonstrate a breach of defendant BMLLC's contractual obligations. Therefore, this aspect of defendants' motion to dismiss is also granted.

D. Defendants' request for sanctions against plaintiff

In defendants' memorandum of law in support of the motion to dismiss, defendants request sanctions against plaintiff. Defendants allege that plaintiff intentionally states false statements in the complaint, which constitutes frivolous conduct. The court denies defendants' that request.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion to deem the amended complaint, NYSCEF Document 23, as properly served and filed is granted, and the caption is amended to reflect the following defendants: Blu Market, LLC, Blu Market, Inc., and Steven Forkosh; and it is further

ORDERED that defendants motion to dismiss is granted in part and denied in part: the fourth cause of action for breach of contract against all defendants is dismissed and the motion is otherwise denied; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on plaintiff; and it is further

ORDERED that defendants serve a copy of this decision and order on the County Clerk and General Clerk's Office, which are directed to amend their records accordingly; and it is further

NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 04/04/2018

ORDERED that the parties appear for a preliminary conference at 60 Centre Street, Room 345, Part 7, on July 18, 2018, at 11:00 a.m.

Dated: April 2, 2018



J.S.C.

HON. GERALD LEOVITS
J.S.C.