

Stat RX Pharm., Inc. v Mersini
2018 NY Slip Op 30978(U)
April 13, 2018
Supreme Court, Bronx County
Docket Number: 20146/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

STAT RX PHARMACY, INC.,

Plaintiff,

Index No. 20146/2016E

-against-

**MEMORANDUM
DECISION/ORDER**

ROLAND MERSINI, ROMAN ILYAYEV and
RJ PHARMACY, INC.,

Defendants.

HON. RUBEN FRANCO

This is an action for an alleged fraud. Plaintiff retail pharmacy claims that defendants Mersini and Ilyayev, while associated with plaintiff, “engaged in the theft of health and identity information” (Compl. ¶ 2) of plaintiff’s customers, and used this information to defraud the customers by falsely informing them that plaintiff had changed its name, address and telephone number to a location where defendant RJ Pharmacy was conducting business, and thus, also perpetrated a fraud upon plaintiff in order to steal its business.

Defendants move to dismiss, pursuant to CPLR § 3211(a)(7), claiming that an alleged fraud upon third parties, is not a fraud upon the plaintiff.

Inasmuch as this is a pre-Answer motion, perforce, the facts before the court are those contained in the Complaint; they are, in sum and substance, as follows: Oleg Aronov was 90% owner and president of plaintiff retail pharmacy. Defendant Mersini was recipient of 10% of the stock, although he made no financial contribution. In late 2007 and early 2008, Aronov hired him to serve as general manger and pharmacy technician of plaintiff, and defendant Ilyayev was hired as an hourly employee to assist Mersini. After working at the plaintiff for several years, defendant Mersini was given the opportunity to purchase 45% of the shares of stock of the plaintiff, however, he was unable to acquire to the necessary financing to make the purchase.

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Nevertheless, he demanded that Aronov gratuitously transfer to him, sufficient shares of the stock in order to make him a 50% shareholder of plaintiff. Defendant Mersini threatened that if Aronov did not comply with his demand, “Mersini would ‘screw’ and ‘destroy’ [plaintiff] by stealing all of its patients/customers” (Compl. ¶ 13).

The Complaint further alleges that Aronov expended substantial time, effort and money in marketing plaintiff’s services, including extensive direct marketing, brochures, public relations, education lectures and seminars to physicians, and the development of a company website. A significant amount of the marketing was directed to potential customers with HIV/AIDS, cancer and other chronic diseases. Plaintiff also hired the services of a company to create and organize its software infrastructure, including designing a patient/customer database. The database included information regarding medical conditions, prescription history and contact information. This patient/customer information was confidential and could not be determined or duplicated through publicly available sources. The database was accessible only by plaintiff’s pharmacists, as well as a select group of pharmacist technicians and managers, including defendants Mersini and Ilyayev. Aronov took substantial measures to safeguard the confidentiality and secrecy of the patient/customer information, including, maintaining the database on a secure server that was password protected. Additionally, Aronov informed those who had access to the patient/customer database, including defendants Mersini and Ilyayev, that this information was owned by plaintiff and was not to be used for any purpose that was not in furtherance of plaintiff’s business and interests, and that the information was not to be disclosed to third parties for any purpose without Aronov’s written consent.

Plaintiff alleges that in or about 2009, Mersini and Ilyayev formed defendant RJ Pharmacy at a location approximately two blocks from Mersini’s home. Ilyayev went to work for RJ Pharmacy in the capacity of President in or about April 2010, and although Mersini continued to

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work at the plaintiff, he was serving as de facto partner of RJ Pharmacy. During this time, these two defendants accessed plaintiff's confidential patient/customer database for the purpose of stealing information in order to divert it for the use of defendant RJ Pharmacy. This included contacting patients/customers by telephone to inform them that plaintiff had changed its name to RJ Pharmacy and that it moved to a new location, and that all prescriptions would be filled, and future pharmaceutical needs would be provided, from the new location. Upon learning of defendants' activities, Aronov terminated Mersini's employment with plaintiff in October, 2010. During the period of April 2010 to October 2010, while Ilyayev was working at RJ Pharmacy, and Mersini was still employed by plaintiff, defendants secretly accessed plaintiff's patient/customer database, including on one occasion, at about 4:00 A.M., and stole information which they intended for the use of RJ Pharmacy, and altered the contact information of patients/customers so that plaintiff would not be able to reach them. The result is that these patients/customers are no longer served by plaintiff, but instead, are customers of RJ. Moreover, defendants Mersini and Ilyayev appropriated, for the use of RJ, plaintiff's vendor list, resulting in a large number of clinics which previously had their prescriptions filled by plaintiff, now having them filled by RJ.

On a motion to dismiss a Complaint pursuant to CPLR§3211(a)(7), a court must liberally construe the Complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (see Nonnon v. City of New York, 9 N.Y.3d 825, 827 [2009], citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]; Siegmund Strauss, Inc. v. East 149th St. Realty Corp., 104 A.D.3d 401 [1st Dept. 2013]).

The elements of a fraud cause of action are “a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of

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inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (Mandarin Trading Ltd. v. Wildenstein, 16 NY3d 173, 178 [2011], quoting Lama Holding Co. v. Smith Barney, 88 NY2d 413, 421[1996]). Defendants are correct in asserting that third-party reliance does not satisfy the reliance element of a fraud claim (see Pasternack v. Laboratory Corp. Of America Holdings, 27 NY 817 [2016]), thus, plaintiff here could not prevail if its fraud claim were based solely upon the misrepresentations that defendants Mersini and Ilyayev made to plaintiff’s customers. However, a motion brought pursuant to CPLR § 3211(a)(7), will not be granted unless the movant conclusively establishes that no cause of action exists (see Ming v. Hoi, 163 AD2d 268 [1st Dept 1990]).

Upon a review of the arguments set forth in support of, and in opposition to the motion, as well as combing the four corners of the Complaint, the court finds that the Complaint states causes of action. Moreover, it is not fatal to plaintiff’s action that the wrong relief may have been requested, so long as the allegations, culled from the Complaint as a whole, manifest that plaintiff has a cause of action upon which some relief may be granted (see O’Reilly v. Cahill, 50 Misc.2d 629 [Sup Ct, New York County 1966]), *rev’d on other grounds* 28 AD2d 527 [1st Dept 1967]; *see also*, John R. Higgitt, Practice Commentary, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25)

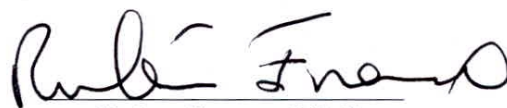
Accordingly, defendants’ motion is denied.

Plaintiff may, if it is so advised, move pursuant to the appropriate statute, to amend the relief clause of its Complaint.



This constitutes the Decision and Order of the court.

Dated: April 13 2018



Ruben Franco, J.S.C.

HON. RUBÉN FRANCO