SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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JEREMY WIESEN

Plaintiff,

- v -

VERIZON COMMUNICATIONS INC.,

Defendant.

INDEX NO. 654956/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84
were read on this motion to/for DISMISSAL

This is an action for tortious interference with contract and with business relations and economic advantage, brought by plaintiff Jeremy Wiesen against defendant Verizon Communications Inc. (Verizon). Verizon moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint.

Background

According to the complaint, Wiesen contracted with non-party Ram Telecom International, Inc. (RTI) to introduce RTI to industry and investment contacts, including Verizon, needed for the financing and construction of a submarine cable project, called the SEA-US Cable System. (Compl., ¶¶ 1, 4, 17.)

Wiesen alleges that two kinds of agreements govern Wiesen's relationship with RTI: a series of standstill agreements and a compensation agreement. (Compl., ¶¶ 5, 32-36.) "[A]fter Wiesen identified a promising contact for RTI, but before any direct interaction between RTI and Wiesen's contact occurred, Wiesen and RTI would enter into brief standstill agreements for the contact." (Id., ¶ 33.) "The standstill agreements required that if RTI wished to pursue a relationship or to enter into a transaction with the contact, or with anyone or any entity to which RTI might be introduced through Wiesen's contact, RTI would first ensure that the agreement to compensate Wiesen for his role in facilitating RTI's introduction to the contact was formalized to his satisfaction." (Id., ¶ 34.) The compensation agreement, which was defined "through [Wiesen's and RTI's] course of conduct" and memorialized in emails, provided that Wiesen would receive "success-based compensation." (Id., ¶ 35.) A December 16, 2013 email exchange allegedly "reflect[s] that in compensation for success in facilitating a strategic alliance for RTI, without which RTI would not achieve its fundraising goal, RTI agreed and understood that Wiesen would receive: a warrant on equity equal to 20% of Russ Matulich's [RTI CEO's] and Brian Mass's [RTI Director of Finance's] equity in RTI after the financing; and a 5-year consulting contract with RTI at $15,000 per month, plus expenses, if such services were desired . . . [and] a 15% commission on any contracts for the sale of capacity on SEA-US that he brokered." (Id., ¶ 36.)[1]

As further alleged in the complaint, by October 25, 2013, Wiesen had "convinced" Verizon to meet with RTI. (Compl., ¶ 41.) On an unspecified date, RTI reconfirmed by email exchange its standstill agreement with Wiesen. (Id.) On November 18, 2013, RTI and Verizon

[1] These agreements and emails are not in the record before the court.

held their first conference call, which Wiesen facilitated. (Id.) "[D]uring the fall of 2013 and into the winter of 2014, Wiesen, Verizon, and RTI remained in communication, with Wiesen always involved." (Id., ¶ 42.) The parties met in Honolulu, Hawaii on January 19, 2014. (Id.) "The meeting was by all accounts a success." (Id., ¶ 48.) At the meeting, RTI expressed its interest in connecting its cable from ocean to land at a building in Hermosa Beach, California owned by Verizon. (Id.)

"Wiesen's relationship with RTI changed dramatically after the Honolulu meeting." (Compl., ¶ 53.) The day after the meeting, RTI broke an appointment with Wiesen and refused to include him in any other events at the conference. (Id., ¶ 50.) "After the meeting, Wiesen requested that he and RTI formalize their agreement addressing the terms of his compensation for introducing RTI to Verizon and others." (Id., ¶ 53.) On February 12, 2014, RTI "proposed compensation for Wiesen totally out of line with the agreed compensation terms to which Wiesen and RTI had already agreed. . . . Wiesen invoked proof of the parties' existing compensation agreement. RTI then cut off all communications with Wiesen." (Id., ¶ 54.) RTI, however, continued to communicate with Verizon. (Id., ¶ 55.)

The complaint alleges that "despite full knowledge of Wiesen's agreements with RTI, Verizon willfully and tortiously interfered with these agreements, without Wiesen receiving a single dollar of compensation for his work, which resulted in Verizon de-risking the cable project for investors." (Compl., ¶ 6.) Further, the complaint alleges that RTI's continued communications with Verizon, without Wiesen or his consent, breached the standstill agreement. (Id., ¶ 55.) As to Wiesen's entitlement to compensation, the complaint alleges that as an August 28, 2014 deadline for RTI's $125 million "capital raise" approached – i.e., the deadline for RTI's required capital contribution to the project – RTI "touted" to potential investors these discussions

and a non-disclosure agreement with Verizon, in order "to significantly assist" with the capital raise. (Id., ¶¶ 22, 65-66.) Through its relationship with Verizon, RTI allegedly "de-risked" the investment—i.e. "remove[d] some of the risk to its prospective investors through strategic alliance partners, such as potential users of the cable." (Id., ¶ 22.)

Discussion

The complaint pleads a first cause of action for tortious interference with existing contracts (Compl., ¶¶ 71-75); a second for tortious interference with business relations (id., ¶¶ 76-81); and a third denominated as a cause of action for tortious interference with economic advantage. (Id., ¶¶ 82-87.)

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see also 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." (Godfrey v Spano, 13 NY3d 358, 373 [2009].)

To plead a claim for tortious interference with a contract, a plaintiff must allege "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996]; accord Oddo Asset Mgt. v Barclays Bank PLC, 19 NY3d 584, 594 [2012], rearg denied 19 NY3d 1065.) "Specifically, a plaintiff

must allege that the contract would not have been breached 'but for' the defendant's conduct." (Burrowes v Combs, 25 AD3d 370, 373 [1st Dept 2006], lv denied 7 NY3d 704; accord Carlyle, LLC v Quik Park 1633 Garage LLC, 160 AD3d 476, 477 [1st Dept 2018].)

"A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship." (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 542 [1st Dept 2011], citing NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc., 87 NY2d 614 [1996].)

"The degree of protection" available to a plaintiff for tortious interference with a contract "is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant." (NBT Bancorp Inc., 87 NY2d at 621 [internal citations omitted]; accord Carvel Corp. v Noonan, 3 NY3d 182, 189-190 [2004].)

Tortious Interference With Existing Contracts

The allegations of the complaint, discussed above, are sufficient to plead that RTI breached the standstill agreement by communicating with Verizon without Wiesen and/or by failing to formalize the compensation agreement. The complaint, however, fails to sufficiently allege that Verizon's conduct was the "but for" cause of the breach of contract or that Verizon

intentionally procured RTI's breach. (See CDR Créances S.A. v Euro-Am. Lodging Corp., 40 AD3d 421, 422 [1st Dept 2007] ["The tortious interference cause of action was deficient for failure to allege the required 'but for' causation and intent to induce a breach in nonconclusory fashion. . . ."]; see also Carlyle, LLC, 160 AD3d at 477 [dismissing the tortious interference claim where plaintiff failed to sufficiently allege that the contract would not have been breached "but for" the defendant's conduct, the court reasoning that "[t]he relevant allegations were vague and conclusory and supported by 'mere speculation'"], citing Burrowes, 25 AD3d at 373 [holding that, in "offering only scant speculation without the support of relevant facts," plaintiff failed to allege that but for defendants' actions, the contract would not have been breached].) The complaint alleges that as early as the day after the January 19, 2014 Honolulu meeting, RTI and Wiesen's relationship began to sour when RTI cancelled meetings and refused to include Wiesen in other events at the Honolulu conference. (Compl., ¶ 50.) Following the Honolulu conference, and after the disagreement in February 2014 between Wiesen and RTI concerning the terms of the compensation agreement, RTI "cut off all communications with Wiesen" and continued to communicate with Verizon without Wiesen or his consent. (Id., ¶¶ 54-55.)

The complaint asserts generally that Verizon knew about the standstill agreement. (E.g. Compl., ¶ 55 [Verizon "continued to communicate with RTI, even though Verizon knew RTI had a standstill agreement with Wiesen that prohibited RTI from communicating with Verizon without Wiesen or his consent"], ¶ 73 ["Verizon had actual knowledge of the Agreements].)[2] The complaint fails, however, to plead nonconclusory allegations that Verizon knew about the standstill agreement prior to a March 6, 2014 email, in which Wiesen informed Verizon of this

[2] The fact that Verizon knew that Wiesen was working as a consultant to RTI (id., ¶ 43) is not sufficient to allege knowledge of a standstill agreement.

agreement. (Id., ¶ 58.)[3] This March 6, 2014 email was sent approximately 1 1/2 months after the January 19, 2014 Honolulu meeting at which RTI allegedly decided to stop communicating with Wiesen. (Id., ¶¶ 50, 54, 58.) Thus, according to the complaint, while Verizon "ignored Wiesen's email and . . . continued to communicate with RTI" thereafter (id., ¶ 59), RTI had already determined to breach, and had breached, the standstill agreement prior to Verizon's alleged knowledge of the agreement. (See North Star Contr. Corp. v MTA Capital Constr. Co., 120 AD3d 1066, 1071 [1st Dept 2014] ["[B]ecause defendant's alleged inducement occurred after [the] alleged breaches, [defendant] could not have been the 'but for' cause of [the] purported breaches"]; see also Bogoni v Friedlander, 197 AD2d 281, 287 [1st Dept 1994], lv denied 84 NY2d 803 ["[T]he operative consideration for tortious interference with contractual relations is the state of a defendant's knowledge at the time breach of a valid contractual obligation is induced. The duration of the ensuing beach is immaterial"]; compare Deitrick v Cibolo Capital Partners I, LLC, 2018 WL 1603869, * 2, 6 [SD NY, 17 Civ 04165 (ER), 2018] [holding, under New York law, that plaintiff adequately pleaded that defendant induced the contracting party to breach an engagement letter prohibiting that party from communicating with defendant without plaintiff's consent, where plaintiff alleged that defendant "instructed" the contracting party to exclude plaintiff from negotiations, intentionally contacted the contracting party after having knowledge of the prohibition in the engagement letter, thereby causing that party to breach its contract, and created a separate entity "for the sole purpose of circumventing Plaintiff. . . ."].)

The complaint will accordingly be dismissed as it fails to adequately allege that Verizon intentionally procured RTI's breach. The court will nevertheless address alternative pleading

[3] The fact that Verizon knew that Wiesen was working as a consultant to RTI (id., ¶ 43) is not sufficient to allege knowledge of a standstill agreement.

deficiencies, which also support the dismissal. As to the compensation agreement, the complaint fails to set forth any nonconclusory allegations as to when Verizon knew about the agreement, alleging merely that "Verizon had actual knowledge of the Agreements." (Compl., ¶ 73.) At the oral argument of the motion, Wiesen's counsel in fact acknowledged that Wiesen does not know whether RTI told Verizon about the compensation agreement. (Oral Argument Tr. [Tr.], at 27-28 ["[D]id Verizon know all of the compensation terms? We are not sure what RTI and Verizon talked about. . . . We know that RTI was told of the standstill agreement. . . . RTI had the obligation to say we have a compensation agreement with them . . . but we don't know"].) Failure to sufficiently plead Verizon's knowledge of the compensation agreement is fatal to Wiesen's claim. (See Mautner Glick Corp. v Edward Lee Cave, Inc., 157 AD2d 594, 594 [1st Dept 1990] [dismissing tortious interference claim where plaintiffs failed to show that defendants had knowledge of a co-brokerage agreement]; New York Tile Wholesale Corp. v Thomas Fatato Realty Corp, 153 AD3d 1351, 1354 [2d Dept 2017] [dismissing tortious interference claim where plaintiff failed to allege facts sufficient to establish that defendants caused the breach of a lease agreement or that defendants had knowledge of the lease at the time of the alleged breach].)

The complaint also makes apparently inconsistent allegations as to whether a compensation agreement was reached between Wiesen and RTI. (Compare Compl., ¶¶ 35-36 ["By the time Wiesen introduced RTI to Verizon, the terms of Wiesen's success-based compensation were set and agreed upon"], with id., ¶¶ 53-54 [alleging that Wiesen did not request to "formalize" the compensation agreement until after the meeting in Honolulu].)

Assuming for purposes of this motion that the allegations are sufficient to plead an enforceable compensation agreement, Wiesen fails to allege in a nonconclusory fashion that the compensation agreement was breached. According to the complaint, RTI would be entitled to

"compensation for success in facilitating a strategic alliance for RTI. . . ." (Compl., ¶ 36.) The complaint alleges that there were discussions about RTI's use of Verizon's Hermosa Beach building and possible "future commercial agreements" (id., ¶¶ 60-61, 66), and Verizon itself acknowledges that there is "some business between RTI and Verizon." (Tr., at 40.) Significantly, however, the complaint does not allege that a strategic alliance was ever formed. The complaint merely pleads that Verizon and RTI entered into a nondisclosure agreement and that "Verizon and RTI continued to talk about, but did not execute, a lease agreement permitting RTI to connect the SEA-US cable to Hermosa Beach and power the data center at Verizon's building in Hermosa Beach." (Compl., ¶¶ 60-61, 65.) The complaint also does not allege that Verizon ever entered into an agreement to purchase capacity on SEA-US or any other agreement that would rise to the level of a "strategic alliance." (See Compl., ¶¶ 21-22.)

Unable to allege an agreement between RTI and Verizon, Wiesen argues on this motion that RTI's and Verizon's continuing discussions amounted to a strategic alliance, as RTI was able to "de-risk" the project by touting its "interactions" with Verizon to potential investors. (See Def's. Memo. In Opp., at 8, 17-18.) Specifically, Wiesen argues that "[t]he mere possibility of RTI developing a partnership with Verizon or using a Verizon building . . . was an integral part of RTI's successful effort to reduce the perceived risk for investors in the project, which was at the heart of RTI's agreements with Wiesen." (Id., at 8.) Wiesen then asserts that because "RTI succeeded in September 2014 at leveraging its relationship with Verizon to meet its fundraising goals," RTI's obligation to compensate Wiesen was "fully trigger[ed]." (Id., at 11.)

The complaint pleads that Wiesen's work for which he has not received compensation "resulted in Verizon de-risking the cable project for investors." (Compl., ¶ 6.) This assertion is based only on allegations that RTI "touted" its discussions with Verizon to others (id., ¶ 66)—

i.e., informed investors that it was engaged in discussions with Verizon about potential transactions which, as discussed above, the complaint does not allege were ultimately concluded.

Wiesen points to no allegation in the complaint that Verizon's mere participation in discussions about a future agreement constituted a "strategic alliance" within the meaning of the compensation agreement. Wiesen does not attach the emails containing the terms of the standstill and compensation agreements, or other evidence as to their terms or the de-risking of the investment. Although he was not required to do so, he could have offered such evidence to preserve or correct deficiencies in the complaint. (See generally Rovello v Orofino Realty Co. Inc., 40 NY2d 633, 635 [1976]; Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1st Dept 2001].) Moreover, Wiesen cites no authority finding a strategic alliance, involving significant compensation like that claimed here (see supra, at 2), based merely on discussions about potential transactions.

Tortious Interference With Business Relations or Economic Advantage

The court holds that the second cause of action for tortious interference with business relations and the third cause of action for tortious interference with economic advantage must be dismissed. These claims "are not distinct causes of action." (Valley Lane Indus. Co. v Victoria's Secret Direct Brand Mgt., L.L.C., 455 Fed Appx 102, 105 [2d Cir 2012]; see 534 E. 11th St. Housing Dev. Fund Corp., 90 AD3d at 542.) Wiesen's allegations, among others, that "Verizon knowingly and consistently participated directly in breaching the standstill agreement," and that Verizon "stonewalled" Wiesen, calling his actions "harassment" (Pl.'s Memo. In Opp., at 20; Compl., ¶¶ 55, 63-64), do not give rise to an inference that Verizon's alleged interference was accomplished by "wrongful means" or "for the sole purpose of inflicting intentional harm" on Wiesen. (See generally Carvel Corp., 3 NY3d at 191-192 [internal quotation marks and

citation omitted]; Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 194 [1980].) In addition, Verizon's interactions with Wiesen, including its referral of the dispute with Wiesen to its legal team (Pl.'s Memo. In Opp., at 21), are plainly insufficient to support this cause of action. "[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." (Carvel Corp., 3 NY3d at 192.)

Discovery

Wiesen argues that he "has pleaded claims that warrant discovery" (Pl.'s Memo. In Opp., at 1), and seeks discovery regarding the discussions between RTI and Verizon and "what people believed." (Id., at 20; Tr., at 32-33.) As discussed above (supra, at 6-7), the allegations of the complaint contradict the claim that Verizon intentionally procured RTI's breach. This case is therefore not one in which Wiesen shows that discovery may lead to relevant evidence. (See CPLR 3211 [d].)

It is accordingly hereby ORDERED that the motion of defendant Verizon Communications Inc. to dismiss is granted to the extent of dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

10/01/2018
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE