Maxim Inc. v Gross
2019 NY Slip Op 30067(U)
January 7, 2019
Supreme Court, New York County
Docket Number: 654137/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MAXIM INC. and SARDAR BIGLARI

INDEX NO. 654137/15

MOT. DATE

- v -

MOT. SEQ. NO. 016, 017 and 018

WAYNE GROSS and JASON FEIFER

The following papers were read on this motion to/for preclude (016), default judgment (017) + dismiss (018)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In an exercise of the court's discretion, motion sequence numbers 016, 017 and 018 are hereby consolidated for consideration and disposition in this single decision/order.

The court will first consider motion sequence number 017 and 018. In the former motion sequence, defendant Jason Feifer ("defendant") moves for a default judgment on his counterclaims and for an inquest. Plaintiffs oppose that motion. In motion sequence number 018, plaintiffs move to dismiss defendant's counterclaims.

At the outset, the court denies the motion for a default judgment. Public policy in New York strongly favors a disposition on the merits (*Meyer v. Rose*, 160 AD2d 565 [1st Dept 1990]; *Picinic v. Seatrain Lines, Inc.*, 117 AD2d 504 [1st Dept 1986]; see also *Luderowski v. Sexton*, 152 AD3d 918 [2d Dept 2017]). Further, the court finds that plaintiffs have demonstrated both a reasonable excuse for the default and a meritorious defense (CPLR § 5015). As to the former, plaintiffs explain that, at best, there was confusion regarding agreed-upon extensions of time for plaintiffs to reply to the counterclaim. In a so-ordered stipulation dated May 22, 2018, the parties agreed that:

> Plaintiff's reply to counterclaim shall be made to Feifer's amended counterclaim, due to be filed by no later than June 10, 2018.

Defendant, however, only filed its amended counterclaims on July 24, 2018. Plaintiffs did not, and still have not, filed a reply to the counterclaims. Defendant moved by order to show cause filed on September 21, 2018 for the default judgment. Plaintiffs then moved to dismiss the counterclaims on October 17, 2018, almost three months after the amended counterclaims were filed. The court notes that this is the second time plaintiffs defaulted in replying to defendant's counterclaim(s), and instead moved to dismiss after their time to respond had expired.

Dated: 1/7/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (018) ☒ DENIED (017) ☒ GRANTED IN PART (016) ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Both parties' litigation strategies have resulted in a waste of this court's resources. Prior to the instant motions, there were more than twenty motions filed in this and a now-since dismissed action, as well as multiple appeals to the appellate division. Defendant's counsel wrings her hands about deadlines, but even defendant has not complied with self-imposed deadlines. Further, the court is sympathetic to plaintiffs' counsel's circumstances over the summer, including two deaths in the family. In light of all these circumstances and public policy, the court finds that plaintiffs have demonstrated a reasonable excuse for their default in replying to the counterclaim and will go on to consider the merits of their defenses.

Generally, this is an action for defamation, breach of contract and fraudulent inducement. In the interests of judicial economy, the facts stated by the court in its decision/order dated March 2 2018 are restated herein:

> Plaintiffs claim that Feifer is a terminated and disgruntled former employee of plaintiff Maxim Inc. ("Maxim") who made false statements to the New York Post (the "Post") about a photograph shoot of a model named Alessandra Ambrosio for Maxim's magazine. Maxim is owned by Biglari Holdings Inc. ("BH"), the CEO of which is plaintiff Sardar Biglari. On or about February 12, 2015, Feifer was hired to work as a Deputy Editor at Maxim. Fiefer's amended answer to the amended complaint in Action No. 1 asserts a counterclaim for fraudulent inducement. Fiefer alleges that he was hired to work at Maxim after a 're-brand' which occurred after BH bought Maxim and assembled a new team. Feifer claims that several events transpired which constituted "breach[es of] the most material conditions of Feifer's acceptance of employment at Maxim" and "caused [Feifer] serious professional and personal harm."

Defendant previously interposed a counterclaim for fraudulent inducement which was dismissed by the court in the 3/2/18 Order. The court also granted plaintiffs' motion to amend the complaint in that same decision/order. Defendant then served an amended answer with three counterclaims which are the subject of the instant motions. Defendant's counterclaims are for: [1] fraudulent inducement; [2] malicious prosecution; and [3] abuse of process.

The court dismissed the original fraudulent inducement because:

> Fatal to the counterclaim is the fact that Feifer's claims lack a temporal nexus to his decision to accept a position with Maxim. Feifer does not advance any facts which would demonstrate that Maxim or Biglari knew there would be no "new Maxim" magazine when he was offered the job. That Biglari began exerting influence five months after Feifer began working at Maxim, that there was internal strife within the corporate hierarchy, or that journalistic integrity was allegedly neglected and/or discarded months after Feifer began working at Maxim is of no moment. Viewing these allegations in the most favorable light, Feifer cannot show that plaintiffs knowingly made misrepresentations or omitted facts regarding the underlying events which Feifer justifiably relied upon when he decided to accept employment at Maxim.

Now, defendant alleges that plaintiffs made four categories of misrepresentations which induced him to accept employment at Maxim: [1] plaintiffs would make significant financial investments to publish Maxim magazine; [2] plaintiffs were focused on growing the magazine and readership; [3] the magazine would be transformed into a periodical focused on ethical, quality journalism that would appeal to sophisticated audiences; and [4] Kate Lanphear and her relaunch team would lead the transformation. Defendant claims that these misrepresentations cause him professional and reputational damage.

Defendant specifically alleges that plaintiffs misrepresented and/or failed to tell him the following:

(1) plaintiff Sam Biglari and Biglari Holdings ("BH") purchased Maxim not to publish a magazine, but to generate "nonmagazine" revenue, such as licensing agreements;

(2) the success of Maxim would be measured not by the magazine, but by licensing revenue;

(3) the creative content and direction for Maxim magazine would not be set by Kate Lanphear and her relaunch team, but by Biglari, who had zero experience in publishing a magazine;

(4) neither Biglari, BH, or Maxim would invest in publishing Maxim magazine because the goal was to cut costs and lay off nearly 90% of Maxim's staff;

(5) neither Biglari, BH, or Maxim was intent on growing the magazine or readership because the focus was all along on licensing revenue;

(6) Biglari and Maxim did not intend to transform Maxim into a publisher of ethical, quality journalism;

(7) Biglari intended to make Maxim magazine into a magazine about himself while merging the Maxim brand with his personal brand because he believed this would enhance Biglari's earnings pursuant to a licensing agreement between Biglari and BH; and

(8) Biglari's reputation was already sullied, in part due to his proxy battle involving Cracker Barrel.

Plaintiffs argue that the first counterclaim should be dismissed because defendant signed a release and the counterclaim still fails to state a cause of action. As for the release, defendant contends that a motion to dismiss based upon documentary evidence should be denied since the release is not properly before the court and there is a dispute as to the enforceability of the release.

The court agrees with defendant as to the release, since it is not in admissible form and therefore is not properly before the court. As for whether defendant has stated a claim, the court finds that defendant still has not. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

In order to state a claim for fraud, Feifer must allege [1] a misrepresentation or material omission of fact; [2] which was false and known to be false by plaintiffs; [3] that the misrepresentation or material omission was made for the purpose of inducing Feifer party to accept the job with Maxim; [4] justifiable reliance on the misrepresentation or material omission; and [5] injury (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]). A cause of action for fraudulent inducement further requires an allegation that plaintiffs had a duty to disclose to defendant material information and that they failed to do so (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173 [2011]). A cause of action based upon misrepresentation or fraud must be pled with specificity: "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]).

Even accepting the allegations as true, many of the allegations asserted by defendant still has failed to state a *prima facie* claim for fraudulent inducement. In "everything but the kitchen sink" form, defendant has made a number of allegations concerning misrepresentations/omissions which are unavailing because they either occurred after he accepted employment, are not pled with specificity insofar as

they fail to assert a specific representation or omission made by the plaintiffs herein (CPLR 3016[b]), or otherwise amount to nothing more than "[v]ague expressions of hope or future expectation" (see i.e. *High Tides LLC v. DeMichele*, 88 AD3d 954 [2d Dept 2011]; see also *Laduzinski v. Alvarez & Marsal Taxand LLC*, 132 AD3d 164 [1st Dept 2015]).

For example, the claim that plaintiffs purchased the magazine "not to publish a magazine, but to generate 'nonmagazine' revenue, such as licensing agreements" is simply not actionable. At the least, such a claim would need to be supported by a specific allegation that defendant accepted employment based upon the specific representation that the magazine would not generate revenue from licensing agreements, a claim that defendant does not assert.

The court previously rejected defendant's claim predicated on Lanphear's removal: "[c]ertainly, if Feifer's own continued employment cannot give rise to a fraudulent inducement claim, then Lanphear's departure, the departure of "Key directors" or the layoff of any other Maxim employee cannot state a *prima facie* claim" (decision/order dated 3/2/18). That decision is law of the case and cannot be relitigated by defendant herein.

Defendant's claim about Biglari's reputation" is unavailing because defendant has not alleged how plaintiffs misrepresented Biglari's reputation prior to accepting employment. Indeed, the term "reputation" implies that a cursory examination would have revealed what was commonly known about Biglari in terms of defendant's vague reference to Cracker Barrel. While the court must accept the facts as true, the court need not turn a blind eye to a patently meritless claim.

Defendant's remaining allegations are that plaintiffs falsely represented their intent, at the time defendant accepted a position with the magazine, to invest and grow the magazine and transform it from a "lad mag" to a more high quality publication. These claims, however, lack sufficient specificity. Defendant still fails to allege who said specifically what to him prior to him taking a position with the magazine. Indeed, its unclear based upon defendant's factual allegations what role, if any, the individual plaintiff had with respect to defendant's hiring process. Nor are there sufficient facts as to anyone acting on the magazine's behalf that would support the cause of action. Defendant's claims are insufficient "to permit a reasonable inference of the alleged conduct including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*High Tides, LLC*, *supra* quoting *Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008] [internal quotations omitted]).

Accordingly, the motion to dismiss the claim for fraudulent inducement is granted and the first counterclaim is severed and dismissed. In light of this result, plaintiffs' remaining arguments with respect to the first counterclaim are denied as moot.

Defendant's remaining counterclaims are for malicious prosecution and abuse of process. These counterclaims arise from the second now-dismissed action detailed in the court's decision/order dated ___/18 (*Maxim Inc. v. Jason Feifer and Charna Sherman*, Index Number 162933/15). This second action was ultimately dismissed by the First Department in a decision/order dated May 17, 2018.

The elements of a cause of action for malicious prosecution in a civil case are: [1] the commencement or continuation of a judicial proceeding; [2] malice; [3] lack of probable cause; and [4] a successful termination of the precedent action in defendant's favor (*G&T Terminal Packaging Co., Inc. v. Western Growers Ass'n*, 56 AD3d 266 [1st Dept 2006]). Further, defendant must allege that the second action was filed with "a purpose other than the adjudication of a claim," and that there was an entire lack of probable cause in the prior proceeding" (*Wilhelmina Models, Inc. v. Fleisher*, 19 AD3d 267 [1st Dept 2005]). Defendant must also allege special injury (*Engel v. CBS, Inc.*, 93 NY2d 195 [1999]).

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v. Suozzi*, 63 NY2d 113 [1984]). A claim for abuse of

process also requires proof of special damages (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397 [1975]).

The court agrees with plaintiffs' counsel that defendant has wholly failed to allege special injury sufficient to support either of the remaining claims. Instead, defendant alleges in conclusory fashion that he was merely injured: [1] by the preliminary injunction and sealing order in the second action; [2] by the denial of his counsel of choice; [3] legal fees; and [4] "extreme emotional distress." Defendant further seeks compensatory and punitive damages.

Special damages sufficient to satisfy the pleading standard are "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel*, supra at 205). Clearly, defendant has failed to allege any such damages and therefore, the second and third counterclaims are also severed and dismissed.

Accordingly, the motion to dismiss is granted and the motion for a default judgment is denied.

The motion to preclude

In motion sequence number 016, defendant moves in a heavy-handed motion to preclude, for sanctions and attorneys fees. The motion is based, in part, upon a preliminary conference order dated May 22, 2018, which, as is relevant, provides:

> Plaintiffs shall answer interrogatories from Feifer by June 1.
>
> Plaintiffs shall complete their document production by no later than June 20, 2018.
>
> Defendant Feifer shall complete his document production by no later than June 30, 2018.

Meanwhile, defense counsel states in her affirmation of good faith dated June 24, 2018: "I have made numerous efforts to communicate with plaintiffs' counsel to obtain disclosure from plaintiffs that is required by the CPLR and has been ordered by the Court." This statement is conclusory.

Next, defense counsel states that her "last communication about discovery was by email, an exchange dated June 6, 2018... Plaintiffs' counsel never responded to my email." The subject email states in pertinent part:

> Alex – I had asked Eric to confirm that the deficiencies noted in my May 30th letter, were going to be cured. Please confirm that. I assume the complete document production will be made by June 20, as currently ordered.
>
> Beth.

That email was in response to the following email:

> Beth,
>
> Please see the attached correspondence.
>
> We are sending a messenger to hand deliver the check to your office.
>
> I am coordinating with the client to get responses to the interrogatories/notice to admit, and hope to have them to you by next Friday.

Best regards,

Alex

Defense counsel next states in her affirmation of good faith that the June 6, 2018 email was sent as a follow-up to a May 30, 2018 letter she sent to plaintiffs' counsel to "remind[] him of upcoming discovery deadlines, outlined plaintiffs' outstanding discovery deficiencies and requested that those deficiencies be cured." The May 30, 2018 letter is not annexed to the motion.

Finally, defense counsel states:

> The last phone conversation I had with Mr. Stern occurred on June 25, 2018 and addressed matters other than discovery. Although Mr. Stern told me in that conversation that his grandfather had died, he did not address his clients' missed discovery deadlines, or request any extension of them, and he has not done so since then.

The court finds the timeline between the preliminary conference and the motion to preclude disconcerting. The May 30, 2018 letter has not been provided to the court, so it is unclear what deficiencies were identified therein nor is there any explanation as to why those deficiencies weren't raised at the May 22, 2018 preliminary conference. Further, the court finds that neither the June 6, 2018 email nor the substance of defense counsel's conversation on June 25, 2018 demonstrate a good faith effort to resolve the underlying discovery dispute before resorting to motion practice. Instead of making a real attempt to secure plaintiffs' compliance with underlying discovery deadlines, defense counsel resorted to filing the sixteenth motion in this case. A movant's failure to demonstrate a good faith effort to resolve a discovery dispute or otherwise establish good cause for declining to do so is a proper basis to deny a motion to strike and/or preclude (see *Kelly v. New York City Transit Authority*, 162 AD3d 424 [1st Dept June 6, 2018]).

Otherwise, plaintiffs' opposition to the motion warrants its denial as well. Defendant has failed to demonstrate that plaintiffs' failure to comply was willful and contumacious so as to warrant preclusion or sanctions. Further, plaintiffs' counsel explains that his personal circumstances inform plaintiffs' failure to comply with certain discovery deadlines.

The motion to preclude is therefore granted only to the extent that any outstanding discovery shall be addressed at a compliance conference to be held before the court on January 17, 2019 at 9:30am.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that motion sequence number 016 is granted only to the extent that any outstanding discovery shall be addressed at a compliance conference to be held before the court on January 17, 2019 at 9:30am; and it is further

ORDERED that motion sequence number 017 is denied; and it is further

ORDERED that motion sequence number 018 is granted and defendant's counterclaims are severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/7/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.