

TMT Entertainment Group, Inc. v Gasparro
2019 NY Slip Op 30542(U)
March 4, 2019
Supreme Court, New York County
Docket Number: 652970/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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TMT ENTERTAINMENT GROUP, INC. D/B/A BLEECKER AND
BOND PRODUCTIONS,

Plaintiff,

- v -

MICHAEL GASPARRO, GASPARRO MANAGEMENT LLC,
BRIDGET REGAN, RAUL CASTILLO, SHANE MCRAE, NICK
SANDOW

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29

were read on this motion to/for

DISMISS

Upon the foregoing documents and for the reasons set forth on the record (2/28/2019), the defendants' motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) is granted without prejudice as to the fourth, sixth, seventh, eighth, and ninth causes of action but is otherwise denied in its entirety.

Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence "utterly refutes [plaintiffs'] factual allegations" and "conclusively establishes a defense to the asserted claims as a matter of law. (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].) Under CPLR 3211 (a) (7), a party may move for judgment dismissing a cause of action on the basis that the pleading fails to state a cause of action. The pleading should be "given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference." (*Simkin v Blank*, 19 NY3d 46, 52 [2012]). The issue to resolve is "whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon v Martinez*, 84 NY2d 83, 86 [1994]).

1. Breach of Fiduciary Duty/Faithless Servant (First Cause of Action)

The defendants argue that Michael Gasparro did not owe the plaintiff (TMT) a fiduciary duty because Mr. Gasparro was not a corporate officer, or director of the plaintiff and there was no employment agreement between plaintiff and Mr. Gasparro. The argument however fails. A fiduciary relationship exists where one party is under a duty to act and give advice for the benefit of another on matters within the scope of their relationship. (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). At-will employees can be found "to have breached a fiduciary duty to their employer if they 'acted directly against the employer's interests'." (*Beach v Touradji Capital Mgt., LP*, 144 AD3d 557, 562 [1st Dept 2016]).

The plaintiff alleges that it hired Mr. Gasparro as a talent manager and producer in September 2005. (Complaint, ¶¶ 15-16). Mr. Gasparro was compensated by receiving a base salary, benefits and a discretionary portion of the management fees he generated. (*Id.*, ¶¶ 17-18). Mr. Gasparro was to remit to TMT any fees that he received in connection with his role as a producer. (*Id.*, ¶ 16). The Complaint alleges, *inter alia*, that Mr. Gasparro (i) surreptitiously exploited TMT's time, resources and reputation in order to establish Gasparro Management LLC (**GM LLC**, GM LLC together with Mr. Gasparro, the **Gasparro Defendants**) while working at TMT, (ii) induced the Actor Defendants (hereinafter defined) to breach their management agreements with TMT, (iii) misappropriated management fees due TMT to GM LLC, (iv) misappropriated producer fees from TMT to GM LLC and (v) interfered with TMT's existing business relations. (*Id.*, ¶ 67). Taking the allegations set forth in the Complaint as true, the defendants' motion to dismiss the first cause of action is denied.

2. Usurpation of a Corporate Opportunity (Second Cause of Action)

The defendants argue that the plaintiff cannot assert the second cause of action and such cause of action must be dismissed because one must be a corporate fiduciary and the plaintiff could not have expected to receive the producer's fees. In its opposition papers, the plaintiff asserts that a fiduciary duty was owed by Mr. Gasparro, and he was therefore subject to the duties of loyalty and trust. Usurpation of corporate opportunities occurs where a corporate fiduciary diverts for its own benefit "an opportunity that should be deemed an asset of the corporation." (*In re Gupta*, 38 AD3d 445, 447 [1st Dept 2007]).

As explained above, Mr. Gasparro was in a fiduciary relationship with the plaintiff. The plaintiff asserts that Mr. Gasparro advised TMT of two projects where he would work as a producer: the "Kalief Project" and the "Trayvon Project." (*Id.*, ¶ 21, 29). The plaintiff alleges that Mr. Gasparro and other parties then entered into separate agreements to provide production services for these projects, and Mr. Gasparro would receive producer's fees of \$50,000 for the Kalief Project and \$375,000 for the Trayvon Project. (*Id.*, ¶¶ 22, 36). The plaintiff asserts that Mr. Gasparro then advised that the Kalief Project producer's fee was only \$10,000 and paid \$5,000 to plaintiff. (*Id.*, ¶¶ 23-24). The plaintiff seeks the remaining \$45,000 balance for Mr. Gasparro's work on the Kalief Project. (*Id.*, ¶ 24-28). Regarding the Trayvon Project, the plaintiff alleges that Mr. Gasparro claimed exclusive entitlement to the associated producer's fee on the same date that he resigned from employment with the plaintiff in July 2017. (*Id.*, ¶ 44). The pleaded facts sufficiently allege that the plaintiff could expect to receive producer's fees from the two projects and that Mr. Gasparro diverted fees that should have been treated as an asset of the plaintiff's management company. (*Id.*, ¶¶ 70-75). Accordingly, the defendants' motion to dismiss plaintiff's second cause of action for usurpation of a corporate opportunity against Mr. Gasparro is denied.

3. Tortious Interference with Existing Contractual Relations (Third Cause of Action)

The defendants argue that the third cause of action must be dismissed because the plaintiff did not enter into management agreements with four actors: Bridget Regan, Raul Castillo, Shane McRae and Nick Sandow (collectively, the **Actor Defendants**). In its opposition papers, the

plaintiff asserts that it has pled sufficient facts to establish that the parties entered into management agreements. Tortious interference with an existing contract occurs where (1) there exists a valid agreement with a third party, (2) defendant has knowledge of that agreement, (3) defendant's interference is intentional and improper, and (4) plaintiff suffers damages. (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

The plaintiff alleges that (i) it entered into management agreements with the Actor Defendants. (Complaint, ¶¶ 49-50), (ii) the Gasparro Defendants had knowledge of Plaintiff's management agreements with the Actor Defendants. (*Id.*, ¶¶ 58-59, 77), (iii) the Gasparro Defendants intentionally interfered with such management agreements and induced damages of no less than \$116,939.18. (Complaint, ¶¶ 77-78). Taking all of the allegations as true, the defendants' motion to dismiss plaintiff's third cause of action for tortious interference with existing contractual relations against the Gasparro Defendants is denied.

4. Tortious Interference with Prospective Contractual Relations (Fourth Cause of Action)

The defendants argue that the fourth cause of action is not adequately pled because the Complaint lacks allegations that the defendants committed any crime in connection with the prospective business contracts. In its opposition papers, the plaintiff asserts that it has pled sufficient facts concerning Mr. Gasparro's false representations that (i) induced the Actor Defendants to leave plaintiff's management, and (ii) prevented plaintiff from being involved in the Kalief Project and Trayvon Project. Tortious interference with a prospective contract requires (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]). The First Department has made clear that acting with malice means conduct amounting to a crime or independent tort. (*See Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 469 [1st Dept 2018]). Giving the plaintiff every favorable inference, the complaint fails to sufficiently allege that the Gasparro Defendants conduct meets this standard. (Complaint, ¶¶ 80-85). Accordingly, the plaintiff's fourth cause of action for tortious interference with prospective contractual relations against the Gasparro Defendants is dismissed without prejudice.

5. Unjust Enrichment (Fifth Cause of Action)

The defendants argue that the claim for unjust enrichment is duplicative because the plaintiff asserts that it had valid agreements with the Actor Defendants. Unjust enrichment is sufficiently pled where the plaintiff shows that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*McMurray v Hye Won Jun*, 168 AD3d 435 [1st Dept 2019]). A plaintiff may not maintain a claim for unjust enrichment where a contract exists and covers the same subject matter. (*Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004]). However, a claim for unjust enrichment may be pled where the parties dispute the existence of the contract at issue. (*Livathinos v Vaughan*, 121 AD3d 485, 486 [1st Dept 2014]).

While the plaintiff has pled that it entered into agreements with the Actor Defendants, the Actor Defendants dispute the existence and/or duration of any contract with the plaintiff. (NYSCEF Docs. #17-20). In addition, the plaintiff does not have a contract with the Gasparro Defendants with respect to the Kalief Project or the Trayvon Project. Accordingly, the defendant's motion to dismiss plaintiff's fifth cause of action is denied.

6. Breach of Contract (Sixth through Ninth Causes of Action)

The plaintiff alleges that it suffered damages when the Actor Defendants breached their management agreements with plaintiff. (Complaint, ¶¶ 90-114). Although Ms. Regan, Mr. McRae and Mr. Sandow dispute that they executed management agreements, in support of his motion to dismiss, Mr. Castillo attached a copy of his management agreement. (NYSCEF Doc. #12). Section 7 of the Castillo Management Agreement provides in relevant part:

In any event of any dispute under or relating to any term of this agreement, or the breach, validity or legality thereof, ***it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in New York City and in accordance with the rules promulgated by the said Association***, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof ... This arbitration provision shall remain in full force and effect in perpetuity notwithstanding the nature of any claim or defense hereunder (***emphasis added***).

Accordingly, the case must be dismissed as to Mr. Castillo. In addition, the plaintiff alleges that each of the Actor Defendants executed a management agreement. (Complaint, ¶ 50). The Complaint asserts that the management agreements contained *inter alia* the same provisions. (*Id.*). Therefore, the documentary evidence indicates that disputes with the plaintiff were to be resolved by arbitration and the case should be dismissed against Ms. Regan, Mr. McRae and Mr. Sandow. Therefore, the plaintiff's sixth, seventh, eighth, and ninth causes of action for breach of contract are dismissed without prejudice.

Inasmuch as the first, second, third and fifth causes of action were not dismissed, the defendants' motion for costs under 22 NYCRR 130-1.1 is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted solely to the extent that the plaintiff's fourth, sixth, seventh, eighth, and ninth causes of action are dismissed without prejudice but is otherwise denied in its entirety; and it is further

ORDERED that defendants' motion for costs under 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days of this decision and order; and it is further

ORDERED that the Clerk is directed to amend the caption of the case as follows:

TMT ENTERTAINMENT GROUP INC d/b/a BLEECKER AND BOND PRODUCTIONS
Plaintiff

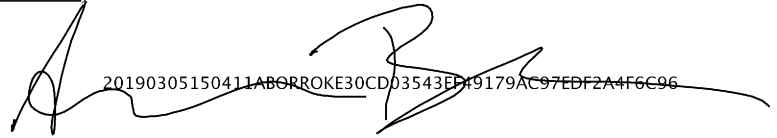
-against-

MICHAEL GASPARRO, GASPARRO MANAGEMENT LLC
Defendants

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that the parties appear for a preliminary conference at 60 Centre Street, Courtroom 238 on May 2, 2019 at 11:30 AM; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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3/4/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: