

MCAN LLC v Costa
2019 NY Slip Op 30669(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 653522/2018
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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MCAN LLC and SCTOT, LLC,

Plaintiffs,

-against-

**THOMAS COSTA, ACCREDITED BUSINESS
SOLUTIONS, LLC, and PINE ACRE HOLDINGS, LLC,**

Defendants.

-----X

O. PETER SHERWOOD, J.:

**DECISION AND ORDER
Index No.: 653522/2018**

Motion Sequence No.: 002

1. BACKGROUND

According to the Complaint, defendant Thomas Costa (Costa) owns 34% of plaintiff MCAN, LLC (MCAN). Plaintiff SCTOT, LLC (SCTOT) owns 40% of MCAN. MCAN owns a half of defendant Accredited Business Solutions, LLC (ABS). Defendant Pine Acre Holdings, LLC (Pine Acre) also owns half of ABS. Plaintiffs claim Costa resigned, went to work for ABS, and took proprietary information with him, including passwords to plaintiffs’ accounts. Plaintiffs sued for breach of the operating agreement, breach of fiduciary duty, misappropriation of confidential/trade secret information, conversion, misappropriation of business opportunities, and for an accounting.

Costa answered the complaint, counterclaimed and thereafter amended the counterclaim to assert that the plaintiffs have “engaged in tortious interference with contracts, breach of fiduciary duties, breach of contract, misappropriation of funds, misappropriation of proprietary information, conversions (*sic*), and other intentional acts to benefit themselves to the detriment of MCAN and COSTA”. The counterclaim also alleges that “SCTOT fraudulently conveyed data . . .” (§ 2), “failed to defend and indemnify Costa” (§ 6) and “libeled and slandered Costa” (§ 7) (*see* Doc. No. 67). The amended counterclaim offers little more to inform the claims. Vague and perfunctory pleadings such as these violate multiple provisions of the CPLR, including CPLR 3013, 3014 and 3016.

The answer asserts cross claims against non-parties ABS and Pine Acre in which Costa alleges that each entity’s “relationship with MCAN has been misused to the detriment of COSTA

and MCAN, and for the purposes of benefitting parties other than those to which it owes a duty” and that its operation should be stopped (NYSCEF Doc. No. 54, ¶¶ 32-34). These cross claims too do not comply with the pleading requirements of the CPLR.

II. ARGUMENTS

A. Plaintiffs’ Motion to Dismiss Counterclaims and Cross-Claims

On this motion, plaintiffs move to dismiss defendants’ counterclaims and cross-claims. Plaintiffs argue that the single paragraph asserting at least seven causes of action is deficient, as it fails to plead any facts to support those causes of action (Memo at 1). Plaintiffs also argue that the cross-claims against ABS and Pine Acre should be dismissed because plaintiffs have already discontinued their claims against those entities (Memo at 1).

Defendant opposed the motion and amended his counterclaims (but not the cross-claims), adding some factual allegations.

In addition to complaining that the opposition and amendment were untimely, plaintiffs argue the amendment still fails to allege sufficient facts to support the various claims mentioned by defendant Costa (Reply at 3-5).

III. DISCUSSION

CPLR 3025 allows a party to amend a pleading without leave of court at any time before the period for responding to it expires. That time had not yet passed when Costa amended his counterclaims, so the amendment is timely. Plaintiffs have nonetheless opted to apply the motion to dismiss to the new pleading (*see Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]).

As to the cross-claims, a notice of discontinuance of the plaintiffs’ claims against ABS and Pine Acre was filed on August 7, 2018. The answer and cross-claims were filed on August 13. Cross-claims are made pursuant to CPLR 3019 (b), which permits a party to bring a “cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable.” At the time of the answer, ABS and Pine Acre were not defendants, and so the cross-claims fail.

As to the counterclaims, on a motion to dismiss a claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Costa has alleged the following counterclaims:

Tortious Interference with Contracts.

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants’ intentional procurement of the third-party’s breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). The amended counterclaims do not specify the contract at issue. Costa has not alleged a valid contract or plaintiffs’ knowledge of that contract, or what plaintiffs allegedly did to procure a breach. Accordingly, this claim fails.

Breach of Fiduciary Duties.

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant’s misconduct (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is “held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive” (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is “necessarily fact-specific” and looks to whether the relationship is “grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions” *Oddo Asset Mgt.*, 19 NY3d at 593 [internal quotation marks and citation omitted]). A fiduciary relationship may be found where a party “is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation,” or “when confidence is reposed on one side and there is resulting superiority and influence on the other” (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Although “a contractual relationship is not required for a fiduciary relationship, ‘if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them’” (*Oddo Asset Mgt.*, 19 NY3d at 593, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

The Complaint in this action alleges that SCTOT and Costa both own membership interests in MCAN, with SCTOT owning the greater share. A majority shareholder owes a fiduciary duty to a minority shareholder (*see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1st Dept 2013]). Costa alleges plaintiffs failed to pay his accrued salary and other amounts due, and failed to distribute his equity share, among other misconduct. Costa also alleges he was injured by this conduct. An alleged failure to distribute company earnings or to pay salaries is insufficient to constitute a breach of fiduciary duty. Accordingly, the breach of fiduciary duty claim must be dismissed.

Misappropriation of Funds and “Conversions”.

Although Costa identifies “misappropriation of funds” in a list of counterclaims being asserted, it is unclear what funds plaintiff is accused of misappropriating.

Further, “[t]he tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff’s possessory right or interest in certain property and (2) defendant’s dominion over the property or interference with it in derogation of plaintiff’s rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers’ Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff’s right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v*

Albion Mobile Homes, Inc., 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

At most, Costa has alleged a failure to pay him, not misappropriation or conversion. These claims fail.

Misappropriation of Proprietary Information.

“To establish a claim for misappropriation of trade secrets, plaintiff must show (1) that it possesses a trade secret, and (2) that defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means” (*Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, 5 Misc 3d 285, 297 [Sup Ct, NY County 2004]).

Although “[t]here is no generally accepted definition of a trade secret, that found in section 757 of Restatement of Torts, comment b has been cited with approval by [the Court of Appeals]” (*Ashland Mgmt. v Janien*, 82 NY2d 395, 407 [1993]). A trade secret is “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it” (*id.*, quoting Restatement of Torts § 757, Comment b). One is liable for the tort of misappropriation if “his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him” (Restatement of Torts § 757). When evaluating a trade secrets claim, courts should consider:

“(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others” (*Ashland Mgmt.*, 82 NY2d at 407, quoting Restatement of Torts § 757, Comment b).

Here, Costa has not alleged the existence of a trade secret or other confidential or proprietary information. Accordingly, this claim must also fail.

Defamation.

While defamation is not one of the listed claims, the amendment includes an allegation that plaintiffs “have libeled and slandered [Costa] including in professional publications so as to irreparably damage [Costa’s] reputation and credibility in the business community and with the general public so as to prevent him from employment and business opportunities” (Amended

Complaint, ¶ 7). The basis for a claim for libel or slander must be pled with specificity, and “the particular words complained of shall be set forth in the complaint” while their application to the plaintiff may be more generally stated (CPLR 3016[a]). Plaintiff has not alleged the specific words giving rise to the defamation claim, so this claim fails.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs to dismiss the cross-claim of defendant Thomas Costa against non-parties ABS and Pine Acre is hereby **GRANTED** and those cross-claims are dismissed; and it is further

ORDERED that the motion to dismiss the counterclaims is **GRANTED** and the counterclaims are dismissed, with leave to replead within twenty (20) days of service of this Decision and Order with notice of entry.

This constitutes the decision and order of the court.

DATED: March 13, 2019

ENTER,


O. PETER SHERWOOD J.S.C.