

Iacovacci v Brevet Holdings, LLC

2019 NY Slip Op 31604(U)

June 5, 2019

Supreme Court, New York County

Docket Number: 158735/2016

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

-----X

PAUL IACOVACCI,

Plaintiff,

- v -

BREVET HOLDINGS, LLC, BREVET SHORT DURATION PARTNERS, LLC, BREVET SHORT DURATION HOLDINGS, LLC

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 015) 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 478, 479, 480, 481, 482, 484

were read on this motion to/for

INDEX NO. 158735/2016
MOTION DATE 05/08/2019
MOTION SEQ. NO. 015

DECISION AND ORDER

SANCTIONS

Upon the foregoing papers, plaintiff moves to dismiss certain counterclaims asserted in defendants' Amended Answer dated December 12, 2018 pursuant to CPLR 3211. At a conference held on May 8, 2019, the Court pointed out that those newly asserted counterclaims went beyond the scope of that permitted by the Court (Cohen, J.) in prior motion decisions, and were therefore made without leave of the Court. Accordingly, without a stipulation to amend (CPLR 3025 [b]) it is procedurally improper for defendants to assert them. Rather than making another motion for leave to amend, at the conference the parties all agreed to treat the instant motion as one for leave to amend.

CPLR 3025 (b) provides that a party may amend his pleading at any time by leave of court or by stipulation of parties. "While it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise... it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions" (Heller v Louis Provenzano, Inc., 303 AD2d 20, 25 [1st Dept 2003]); see Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475 [1st Dept 2003] ["We have consistently held ... that in an effort to conserve judicial resources, an

examination of the proposed amendment is warranted”]). Leave to amend will be denied where the proposed pleading is “palpably insufficient or patently devoid of merit” (*id.*).

CFAA

The Computer Fraud and Abuse Act (CFAA) is a criminal statute that provides a private right of action against persons or entities who commit one of the enumerated computer crimes (*see* 18 USC § 1030[g]). Defendants’ Amended Answer and Counterclaims allege violations of CFAA subsections 1030(a)(2)(A), § 1030(a)(2)(C), and § 1030(a)(4). These subsections provide a cause of action against a person or entity who:

“(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution...

(C) information from any protected computer...

(4) knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtained anything of value...”

(18 USC § 1030)

Each of these subsections require that plaintiff have either acted “without authorization” or “exceed[ed] authorized access.” The CFAA does not define “without authorization” but subsection 1030 (e)(6) defines “exceeds authorized access” as “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter.” While there is judicial debate concerning the scope of the CFAA and whether it includes misuse or misappropriation, most districts within this Circuit agree with the “narrow approach” i.e., that the definition speaks to access and not use (*see JBCHoldings NY, LLC v Pakter*, 931 F Supp 2d 514, 522 [SDNY 2013] [citing cases]). In light of that interpretation, the Court finds that defendants’ claims are insufficient and devoid of merit because plaintiff had authorized access.

In the instant matter, defendants argue that plaintiff violated the CFAA in that he exceeded his authorized use of a company computer by *inter alia*, accessing confidential information under false

pretenses, impermissibly altering the information, and eventually stealing the information to compete with them. Defendants' argument almost solely relies on the decision in Starwood Hotels & Resorts Worldwide, Inc. v Hilton Hotels Corporation, which distinguished between a "company insider who lawfully accesses the employer's information in the ordinary course of his duties and eventually uses that information against the employer's interest...[and] a company employee who essentially perpetrates a fraud against the company by obtaining the employer's information under false pretenses" (2010 WL 11591050, *5 [SDNY, June 16, 2012, No. 019-CV-3862 (SCR)]). In an attempt to liken the factual scenario presented here to that in Starwood, defendants contend that plaintiff used his "insider status" to access confidential information with the intent of altering and stealing it in order to compete with defendants (NYSCEF Doc. No. 480, p 6). Further, defendants allege that plaintiff strategically remained at Brevet specifically to maintain his ability to access and steal confidential information.

Contrary to defendants' assertion, the scenario in Starwood is notably distinct from the case at bar. There, the focus was not on the intent of the parties at the time of the access, but rather the use of false pretenses and trickery to *gain* access to confidential information in the first instance. The defendants were working for two different employers concurrently, Starwood and Hilton. Plaintiff in Starwood alleged that one defendant "misused his position as President of Starwood's Luxury Brands group to request Starwood Confidential Information from Starwood employees" (Starwood, 2010 WL 11591050 at 5 [emphasis added]) Additionally, the defendants "used Starwood employees as corporate spies to provide Hilton with even more Starwood Confidential Information" and that said employees were unaware defendants had resigned and that providing said information "was a violation of their obligations to Starwood" (*id.* at 6). Here, fatal to defendants' claims is the admission that plaintiff already had access to the confidential information. Plaintiff had been a senior employee with access to

the subject confidential information starting in 2009. Absent is any allegation that Plaintiff used trickery or fraud to gain access to additional confidential information.

In any event, since the decision in Starwood, the Second Circuit narrowed the interpretation of the term ‘exceeds authorized access’ in the criminal case of United States v Valle, 807 F3d 508 (2d Cir 2015).¹ Applying the rule of lenity, Valle interpreted the term to mean when one “obtains or alters information that he does not have authorization to access for any purpose which is located on a computer that he is otherwise authorized to access” (Valle, 807 F3d at 511). Moreover, Valle found that the purpose of the access was not relevant (id. at 526). Following that decision, it has been held that the CFAA therefore, “does not apply to a ‘so-called faithless or disloyal employee’ — that is, an employee who has been granted access to an employer’s computer and misuses that access, either by violating the terms of use or by breaching a duty of loyalty to the employer” (Chefs Diet Acquisition Corp. v Lean Chefs, LLC, 2016 WL 5416498, *6 [SDNY Sept. 28, 2016, 14-CV-8467 (JMF)]). Rather, to state a claim under the CFAA, a plaintiff must allege that “defendants accessed its computer system without approval; it is not enough to prove access to information beyond the scope of approval” (id.). As plaintiff had been granted access to the computer and the confidential information, defendants’ allegations fail to state a claim. Accordingly, that part of the motion seeking dismissal of the three claims under the CFAA is granted.

Defamation

To make out a prima facie case for defamation, there must be: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at

¹ Even though Valle was a criminal case, the Supreme Court of the United States has noted “that courts, when analyzing a statute that “has both criminal and noncriminal applications.... must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context” (Leocal v Ashcroft, 543 US 1, 11 [2004]).

least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication” (Franklin v Daily Holdings, Inc., 135 AD3d 87, 91 [1st Dept 2015] quoting Restatement [Second] of Torts § 558). Defendants are alleging that plaintiff made the following defamatory statements in an email sent to plaintiff’s Christian prayer group:

- a) Plaintiff claimed that although Brevet began as “a venture ... between two Christians to honor God’s name in the financial community,” it “has deteriorated into such an ugly situation” (NYSCEF Doc. No. 417 [Amended Answer and Counterclaims] ¶ 186);
- b) Plaintiff characterized defendants as “irrational people” (id. at 187);
- c) Plaintiff claimed to have been directed by God to certain religious scriptures in relation to defendants, implying that God himself had judged defendants and found “jealousy and selfishness” and “many troubles and every kind of meanness” (id. at 188); and
- d) Plaintiff also suggested that defendants bore “evil intentions” to “harm him” (id. at 189).

In opposing the leave to amend, plaintiff argues that the claim for defamation is both time-barred by the statute of limitations and that the statements are non-actionable opinions. Defendants maintain that the defamation claim relates back to its original answer and that all that is required at this stage is the claim be sufficiently pled. The Court agrees with plaintiff that the relation-back doctrine is inapplicable to the case at bar.

Under New York law, the statute of limitations for a defamation claim is one year and accrues when the material is published (Fleischer v Inst. For Research in Hypnosis, 57 AD2d 535 [1st Dept 1977]; CPLR 215 [3]). However, pursuant to CPLR 203 (f), “a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences.” Even though the standard is liberal when adding a claim against a defendant already a party to litigation, the original allegations must still put defendant on notice of the need to defend against the allegations in the amended complaint (see Infurna v City of New York, 270 AD2d 24 [1st Dept 2000]). Here, the original answer did not allege a single fact that would give plaintiff notice of

defendants' intent to bring a claim for defamation. The solitary allegation that plaintiff had taken actions to harm defendants' reputation is insufficient to apprise plaintiff of the need to prepare a defense.

Therefore, that part of the motion seeking dismissal of the claim for defamation is granted.

Trespass to Chattel

Finally, defendants seek to add a claim for trespass to chattel based on plaintiff's alleged refusal to return a computer and cell phone given to him by the company. As this claim was not addressed by plaintiff, it may proceed.

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss the amended answer is granted with respect to the proposed twelfth, thirteenth, fourteenth, and fifteenth counterclaims and those counterclaims are stricken; and it is further

ORDERED that the motion is denied to the extent that defendants are permitted leave to amend their answer to assert the eleventh counterclaim and to this extent the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the plaintiff shall respond within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 623, 111 Centre Street, on July 10, 2019, at 9:30 AM.


HON. ALEXANDER M. TISCH

6/5/2019

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: