

Mediaocean LLC v Juice DMS Adv. Ltd.

2019 NY Slip Op 32925(U)

October 3, 2019

Supreme Court, New York County

Docket Number: 650575/2018

Judge: Tanya R. Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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MEDIAOCEAN LLC,

Index No. 650575/2018
Mot. Seq. No. 001

Plaintiff,

- against -

JUICE DMS ADVERTISING LIMITED,
9644105 CANADA INC., and YELLOW
PAGES DIGITAL & MEDIA SOLUTIONS
LIMITED,

Defendants.

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HON. TANYA R. KENNEDY, J.S.C.:

Defendants Juice DMS Advertising Limited (“Juice DMS”), 9644105 Canada Inc. (“9644105”), and Yellow Pages Digital & Media Solutions Limited (“Yellow Pages”) (collectively “defendants”) move to dismiss the complaint, pursuant to CPLR 3211(a)(1), (5), (7), and (8)¹. Mediaocean LLC (“Mediaocean”) cross-moves to consolidate this action with *Mediaocean LLC v Oriole Media Corp. d/b/a Juice Mobile and Juice Mobile USA, Inc. d/b/a Juice Mobile*, pending in Supreme Court, New York County under Index No. 655825/2016 (“Prior Action”).²

¹ Defendants concede that the branch of the motion to dismiss the complaint, pursuant to CPLR 3211(a)(5) is rendered moot considering the June 4, 2019 order of Justice Arthur Engoron, which granted Oriole Media Corp.’s motion to vacate the default judgment entered against it in favor of Mediaocean. As such, the Court will not address the parties’ arguments regarding dismissal under such ground, and the branch of the motion to dismiss pursuant to CPLR 3211(a)(5) is denied as moot. The Court will limit its analysis to those branches of the motion for dismissal pursuant to CPLR 3211(a)(1), (7) and (8).

² This Court permitted the parties to submit additional letter briefs to address how the June 4, 2019 Order Justice Arthur Engoron rendered in the Prior Action would affect this Court’s determination of the pending motion. This Court considered the July 2, 2019 letter submission of Mitchell D. Frankel, Esq., counsel for Mediaocean (Frankel Letter); the July 17, 2019 response letter from defense counsel, Melissa S. Geller, Esq. (Geller Letter); and the July 24, 2019 reply letter from Mitchell D. Frankel, Esq., counsel for Mediaocean (Frankel Reply Letter).

FACTUAL AND PROCEDURAL BACKGROUND

On or about September 5, 2014, Mediaocean and non-party Oriole Media Corp. d/b/a Juice Mobile and Juice Mobile USA, Inc. d/b/a Juice Mobile entered into an agreement to integrate Juice Mobile's Nectar Platform into Mediaocean's Prisma Agency Platform ("the Mediaocean Agreement") (Exhibit A of Geller Supporting Affirmation). Juice Mobile was required to pay Mediaocean a connect fee and a minimum monthly fee regarding the integration (*id.*). Mediaocean and Juice Mobile then amended the Mediaocean Agreement on April 4, 2016 for Mediaocean to provide additional services and for Juice Mobile to pay increased fees regarding these services ("Amended Mediaocean Agreement") (*id.*).

Oriole Media Corp. d/b/a Juice Mobile ("Oriole") then entered into an Asset Purchase Agreement with 9644105, a wholly owned subsidiary of Yellow Pages, on or about March 14, 2016, in which 9644105 and Yellow Pages purchased all of Oriole's assets, and assumed certain liabilities, including the Mediaocean Agreement (Exhibits A and O of Frankel Supporting Affirmation). However, it appears that 9644105 was amalgamated into Juice DMS and ceased its existence as an active entity on March 17, 2016 (Exhibit B of Frankel Supporting Affirmation).

Mediaocean commenced the Prior Action on or about November 4, 2016 against Oriole d/b/a Juice Mobile and Juice Mobile USA, Inc. d/b/a Juice Mobile, asserting causes of action for breach of contract and quantum meruit (Exhibit B of Geller Supporting Affirmation). Juice Mobile USA then moved to dismiss the complaint in the Prior Action, pursuant to CPLR 3211(a)(1) and (7), which the court (Engoron, J.) granted, without prejudice to re-argument, on January 12, 2018, due to the "confusion as to the exact nature of the relationship" between Oriole and Juice Mobile, USA "in case MEDIAOCEAN [was] able to present new significant information relevant to this issue" (Exhibit C of Geller Supporting Affirmation). The court (Engoron, J.) dismissed the breach

of contract claim pursuant to CPLR 3211(a)(1) because Juice Mobile USA was not a party to the Mediaocean Agreement and dismissed the quantum meruit claim pursuant to CPLR 3211(a)(7) considering the existence of such Agreement (*id.*).

On or about February 6, 2018, Mediaocean commenced this action, asserting causes of action for breach of contract (two claims each against Juice DMS, 9644105 and Yellow Pages) and quantum meruit (against all defendants) after determining that the Asset Purchase Agreement existed (Exhibit A of Geller Supporting Affirmation).

Mediaocean then sought a default judgment against Oriole in the Prior Action for its failure to answer or appear, which the court (Engoron, J.) granted on April 4, 2018 (Exhibit H of Kaplan Supporting Affirmation). Oriole subsequently moved to vacate the default judgment, and the court (Engoron, J.) issued a June 4, 2019 order granting the motion and vacated the judgment entered against Oriole (Exhibit A of Frankel Letter).

Trenea Cooper (“Cooper”), Head of Legal Affairs and Assistant Corporate Secretary for Yellow Pages, submits a supporting affirmation and avers that she has knowledge of the operations of Juice DMS, 9644105, and Yellow Pages (Exhibit E, ¶1 of Frankel Letter). According to Cooper, Juice DMS is a Canadian company which neither maintains an office nor conducts business in New York (*id.*, ¶2). Cooper also maintains that 9644105 is a Canadian company which never maintained a New York office or conducted business there, and is now inactive (*id.*, ¶4).

Additionally, Cooper maintains that Yellow Pages is a Canadian company which does not maintain a New York office or conducts business in the state, although it conducts business in the United States through its subsidiaries (*id.*, ¶6). Lastly, Cooper maintains that Juice Mobile, 9644105, and Yellow Pages never purchased any assets from Oriole or obtained from Oriole an assignment of any contract (*id.*, ¶¶3, 5, 7).

Mediaocean submits the affidavit of Neil Sweeney, Oriole President and CEO, in opposition to the motion and in support of the cross-motion to consolidate (Exhibit O of Frankel Supporting Affirmation). Sweeney avers that Oriole and 9644105, a wholly owned subsidiary of Yellow Pages, entered into an Asset Purchase Agreement on March 14, 2016, in which 9644105 and Yellow Pages purchased all of Oriole's assets, and assumed certain liabilities, including the Mediaocean Agreement (*id.*, ¶¶2-3). According to Sweeney, as Oriole CEO, he was "intimately involved in the negotiation, execution and implementation of the Mediaocean Agreement" (*id.*, ¶4).

Sweeney also avers that he became a 9644105 employee under an employment agreement, which was included in the Asset Purchase Agreement, and that he reported to the President and CEO of Yellow Pages, the parent company of 9644105, where his duties included, *inter alia*, overseeing and managing the Mediaocean Agreement (*id.*). Additionally, Sweeney maintained that prior to the Asset Purchase Agreement, Oriole formed Juice Mobile USA to act as a sales and marketing entity for the Juice Mobile division of Oriole in the United States and that Juice Mobile USA maintained a New York office and conducted negotiations there regarding the Mediaocean Agreement prior to such Agreement (*id.*, ¶¶5-6).

Further, Sweeney maintained that after the Asset Purchase Agreement and while he was a 9644105 employee, the Juice Mobile division continued to conduct and transact business on behalf of 9644105 and Yellow Pages at the New York office, which included discussions regarding the Mediaocean Agreement and the amendment of such Agreement (*id.*, ¶6).

Schedule 5.1(1) of the Asset Purchase Agreement identifies New York as among the locations listed in the "Company Jurisdictions" of Juice Mobile USA (Exhibit A of Frankel Supporting Affirmation). Schedule 5.1(21) of the Asset Purchase Agreement indicates that Juice

Mobile entered an office lease for 315 West 36th Street, New York, New York 10018, to commence January 1, 2016 (*id.*). Under Schedule 5.1(23) of the Asset Purchase Agreement, the Mediaocean Agreement is listed under “Material Contacts and Other Contracts” (*id.*). Lastly, Schedule 5.1(42) lists two full-time employees in New York: Account Manager (start date: December 15, 2014) and Director of Sales East Coast U.S. (start date: January 5, 2015) (*id.*, lines 73-74).

Copies of email correspondence between Sweeney and persons from Juice Mobile and Mediaocean are also annexed to the papers in opposition to the motion and in support of the cross-motion with respect to the Mediaocean Agreement regarding the services rendered and payment (Exhibit P of Frankel Supporting Affirmation).

Defendants move to dismiss the complaint for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), because they are Canadian companies which neither conduct business nor maintain any office in New York. Defendants also maintain that the second, fourth, and sixth causes of action should be dismissed for documentary evidence pursuant to CPLR 3211(a)(1), and that the first, third, fifth and seventh causes of action fail to state a cause of action, pursuant to CPLR 3211(a)(7).

Mediaocean argues in opposition that jurisdiction exists since Juice Mobile USA transacted business in New York by maintaining a New York office from which it conducted its affairs and negotiations regarding the Mediaocean Agreement. Although Mediaocean does not challenge the dismissal of the claim for quantum meruit, Mediaocean argues that the documentary evidence supports the remaining claims herein, which are sufficiently stated to avoid dismissal.

With respect to the cross-motion to consolidate, Mediaocean argues that consolidation is appropriate since the claims in the Prior Action and this action arise from the Mediaocean Agreement and the Asset Purchase Agreement. However, defendants oppose such relief on the

ground that consolidation would cause delay, “confusion and complication” (Geller Letter, Page 3).

DISCUSSION

Motion to Dismiss - CPLR 3211(a)(8)

CPLR 302(a)(1) provides, *inter alia*, that:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods in the state. . .

Further, CPLR 302 “is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant enters New York, so long as the defendant’s activities here were purposeful and there is a “substantial relationship” or “articulable nexus” between the transaction and the subject claim (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [internal quotation marks and citations omitted]); *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012] [internal quotation marks and citations omitted]).

Further, “CPLR 302(a)(1) does not require that every element of the cause of action pleaded must be related to the New York contacts, rather, where at least one element arises from the New York contacts, the relationship between the business transaction and the claim supports specific jurisdiction under the statute” (*Licci v Lebanese Can. Bank, SAL, supra* at 341).

Contrary to defendants’ contention, Mediaocean has established that defendants are subject to jurisdiction under CPLR 302(a)(1) since defendants purposefully conducted and transacted business here in New York which directly relate to Mediaocean’s claims regarding breach of the Mediaocean Agreement, which defendants assumed under the Asset and Purchase Agreement. Although Cooper maintained in her supporting affirmation that Juice DMS, 9644105 (which is

now inactive), and Yellow Pages never maintained an office or conducted business in New York, and that Juice Mobile, 9644105, and Yellow Pages neither purchased any assets from Oriole nor obtained an assignment of any contract, the Asset Purchase Agreement refutes such assertions.

Schedule 5.1(23) of the Asset Purchase Agreement lists the Mediaocean Agreement as among the contracts assumed therein and Schedule 5.1(21) of such Agreement indicates that Juice Mobile leased office space at 315 West 36th Street, New York, New York 10018, commencing January 1, 2016. New York is also among the locations listed as “Company Jurisdictions” of Juice Mobile USA under Schedule 5.1(1) of the Asset Purchase Agreement. The papers submitted in opposition to the motion and in support of the cross-motion appear to indicate that 9644105 no longer exists and was amalgamated into Juice DMS.

Moreover, the Asset Purchase Agreement demonstrates, as Sweeney avers in his supporting affidavit, that he was the Oriole CEO when 9644105 and Yellow Pages purchased the Juice Mobile division from Oriole and assumed certain liabilities, including the Mediaocean Agreement; that Sweeney became a 9644105 employee under an employment agreement included in said Agreement; and that Juice Mobile maintained and operated out of a New York office prior to and following the Agreement’s execution (as set forth under Schedules 5.1(21) and 5.1(42), lines 73-74 in such Agreement). Additionally, the email correspondence annexed to the opposition papers demonstrate Sweeney and Juice Mobile’s involvement with the Mediaocean Agreement.

Therefore, considering the foregoing, the Court denies that branch of the motion to dismiss pursuant to CPLR 3211(a)(8).

Motion to Dismiss - CPLR 3211(a)(1) and (7)

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court is required to "afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*id.*, at 591) [internal citations and quotation marks omitted].

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The complaint herein alleges that Mediaocean and Juice Mobile entered into an agreement, which was later amended, to integrate Juice Mobile's Nectar Platform into Mediaocean's Prisma Agency Platform, and for Juice Mobile to pay Mediaocean certain fees regarding this integration (Exhibit G of Frankel Supporting Affirmation, Complaint, ¶¶19, 22). The complaint also alleges that Oriole, Juice DMS, 9644105, and Yellow Pages entered into an Asset Purchase Agreement, where Juice DMS, 9644105, and Yellow Pages acquired all of Oriole's assets, and assumed certain liabilities and obligations, including the Mediaocean Agreement (*id.*, ¶¶ 25-27, 37-39, 49-51, 61-63). Further, the complaint also alleges that while Mediaocean performed its obligation under the initial and amended agreements, defendants breached same by failing to pay the agreed fees (*id.*, ¶¶ 23, 30, 33, 41-42, 53-54, 65-66).

Following this Court's review of the complaint, the Mediaocean Agreement, and the Asset Purchase Agreement, the Court finds that the documentary evidence does not conclusively refute

Mediaocean's breach of contract claims and that the complaint adequately alleges all essential elements regarding such claims. Therefore, the Court denies that branch of the motion to dismiss the second, fourth, and sixth causes of action for documentary evidence, pursuant to CPLR 3211(a)(1), and the first, third, and fifth causes of action, pursuant to CPLR 3211(a)(7).

However, the Court grants that branch of the motion to dismiss the seventh cause of action, pursuant to CPLR 3211(a)(7), which Mediaocean does not oppose, since the existence of a written contract precludes recovery under the quasi-contract theory of quantum meruit (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY 2d 382, 388 [1987]).

Cross Motion to Consolidate

CPLR 602(a) provides:

When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs and delay.

A court may exercise its discretion granting a motion to consolidate in the interest of judicial economy where there are common questions of law or fact in the absence of any showing that consolidation would result in substantial prejudice to the party opposing such relief (*see Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.)*, 10 AD3d 518, 519 [1st Dept 2004]).

Defendants oppose consolidation on the ground that such relief would result in delay, "confusion and complication." However, defendants presented no facts to support such assertion, and failed to meet their required burden to demonstrate how consolidation would prejudice any substantial right (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74 [1st Dept 2002]).

As Mediaocean correctly contends, consolidation is appropriate since the claims in the Prior Action and this action arise from the Mediaocean Agreement and the subsequent assignment and assumption of same. Moreover, both matters are at the preliminary stage since issue has yet to be joined in either action and no discovery order has been issued.

Considering the foregoing, it is

ORDERED that the Defendants' motion is granted to the extent that the seventh cause of action is dismissed pursuant to CPLR 3211(a)(7), without opposition; and it is further

ORDERED that defendants are directed to serve and file an answer within 20 days after service on the attorney for Mediaocean LLC a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion by Mediaocean LLC to consolidate this action in this court with *Mediaocean LLC v Oriole Media Corp. d/b/a Juice Mobile and Juice Mobile USA, Inc. d/b/a Juice Mobile*, pending in Supreme Court, New York County under Index No. 655825/2016, for all purposes, including discovery and trial, is granted; and it is further

ORDERED that the consolidation shall take place under Index No. 650575/2018 and the consolidated action shall bear the following caption:

MEDIAOCEAN LLC,

Plaintiff,

– against –

ORIOLE MEDIA CORP. d/b/a JUICE MOBILE and JUICE MOBILE USA, INC., d/b/a JUICE MOBILE, JUICE DMS ADVERTISING LIMITED, 9644105 CANADA INC., and YELLOW PAGES DIGITAL & MEDIA SOLUTIONS LIMITED,

Defendants.

and it is further,

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court 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); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; 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 aforesaid *Protocol*; and it is further

ORDERED that the October 9, 2019 blockbuster calendar conference date is vacated, and the parties are directed to appear for a conference on November 6, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 3, 2019

ENTER:


HON. TANYA R. KENNEDY