

<b>Getintent USA, Inc. v Sileo, LLC</b>
2019 NY Slip Op 33014(U)
October 8, 2019
Supreme Court, New York County
Docket Number: 650980/2019
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

-----X

GETINTENT USA, INC.,

Plaintiff,

- v -

SILEO, LLC, CROWN PREDATOR HOLDINGS, LLC,
CROWN PREDATOR HOLDINGS II-IV, LLC, MARK
YACKANICH, JOSHUA FEUER, TOBY DINGEMANS,
JOHN DOE 1-3 BEING FICTIOUS DESIGNATIONS FOR
THREE DEFENDANTS WHO HAVE NOT YET BEEN
IDENTIFIED

Defendant.

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INDEX NO. 650980/2019
MOTION DATE 05/08/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 44, 47, 48, 49, 50, 51

were read on this motion to/for DISMISS

Upon the foregoing documents and for the reasons set forth on the record (10/4/2019), the defendants' motion to dismiss, pursuant to CPLR 3211(a)(7), is granted to the extent that the second cause of action is dismissed with prejudice and the first, third, and fourth causes of action are dismissed without prejudice.

RELEVANT FACTUAL BACKGROUND

The verified complaint (the Complaint) alleges: (1) fraud, (2) deceptive business practices in violation of GBL § 349, (3) successor liability, and (4) fraudulent conveyance.

Reference is made to a certain Agreement (the Agreement) entered into in 2016 between Getintent USA, Inc. (GetIntent) and Genesis Media, LLC (Genesis) pursuant to which

GetIntent agreed to provide advertising services to now-defunct Genesis (Compl., ¶ 21).

Defendant Mark Yackanavich is Genesis's former CEO. "Upon information and belief," Sileo, LLC (**Sileo**), one of the defendants, is the successor entity to Genesis (Compl., ¶¶ 55-57).

"Crown Predator Holdings," another one of the Defendants (although not distinguished in the Complaint from Crown Predator Holdings, LLC and Crown Predator Holdings II-IV, LLC) – is a venture capital investment company affiliated with Mr. Yackanavich and Genesis (*id.*, ¶¶ 60-63). The other individual defendants are former officers of Genesis who are currently officers of "Column6." Column6 is the successor entity that the Complaint treats as indistinguishable from Sileo (*see id.*, ¶¶ 55-56).

In sum and substance, the Complaint alleges that Genesis never compensated GetIntent for over \$1.5 million in advertising services, which resulted in a 2017 lawsuit by GetIntent against Genesis. The lawsuit settled but Genesis defaulted upon the settlement agreement. At some point after the settlement but before the default on the settlement agreement, GetIntent alleges that it performed additional advertising services for Genesis (Compl., ¶¶ 23-26, 44). The Complaint also alleges that in 2016 and 2017, Genesis incurred a number of substantial debts to other service providers and/or creditors, which led to other settlement agreements and litigation (*id.*, 29-40).

As part of the defendants' "deceptive scheme and plan to evade creditors," in August of 2017, Genesis and Mr. Yackanavich allegedly decided to merge Genesis with an entity called Altitude to create AdGenesis Holdings, LLC (**AdGenesis**) (*id.*, ¶¶ 46, 51). According to the Complaint, in February 2016, Altitude also solicited GetIntent's advertising services, and although GetIntent

“provided its services to Altitude,” it was never compensated (*id.*, ¶¶ 47-50). None of the agreements referenced in the complaint are provided to the court. Instead, GetIntent relies on an email dated September 28, 2017 that was sent to GetIntent, which provides as follows:

On August 1, 2017 Altitude Digital Partners, Inc. (“Altitude”) combined its resources with GenesisMedia LLC to become AdGenesis Holdings LLC (the “Company”). The Company will continue to operate the business of Altitude under the name “Genesis Media”, and seeks your consent to assign the agreement between your business and Altitude to the Company. The existing terms of the agreement will remain the same, and the Company will assume all the obligations of Altitude for all going forward performance under the agreement.

Please sign the attached letter and return it to me by email as soon as possible.

(Compl., Ex. 3).

The Complaint is silent with respect to whether GetIntent ever signed the “attached letter” referenced in the email and the exhibit attached to the Complaint is unsigned (*id.*).

## DISCUSSION

In essence, GetIntent alleges that the defendants incurred their debts – to GetIntent and to other creditors - as part of a larger, fraudulent scheme to defraud everyone. GetIntent’s allegations with respect to its claims, however, areas pled, insufficient.

To state a cause of action for fraud, a plaintiff must allege: (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Eurycleia Partners L.P. v Seward & Kissel, LLP*, 12 NY3d 553 [2009]).

Notwithstanding the lenient standard for reviewing complaint under CPLR 3211, a cause of action for fraud must be pled with particularity and the circumstances constituting the wrong must be stated in detail (CPLR 3016[b]; *Ramos v Ramirez*, 31 AD3d 294 [1<sup>st</sup> Dept 2006]). As an

initial matter, GetIntent's use of group pleading makes it impossible for any of the defendants to have adequate notice of the claims against them (*see Ramos*, 31 AD3d at 295). This, alone, is sufficient reason to dismiss the fraud claims asserted. In addition, it is well settled that a fraud claim does not lie on allegations that a party did not intend to perform its obligations under contract (*Smalley v Dreyfus Corp.*, 10 NY3d 55, 59 [2008]). The Complaint fails to allege any duty to GetIntent that would be independent from a contract (*Cronos Group Ltd. v XCompIP LLC*, 156 AD3d 54, 63 [1<sup>st</sup> Dept 2017] ["a fraud claim can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed"]). At most, the allegations in support of this claim allege a failure by the defendants to comply with certain contractual obligations. The Complaint does not contain any specific representation of present fact or any factual allegations to support reasonable reliance by the plaintiff. This simply does not meet the heightened pleading standard to make out a claim for fraud. Accordingly, the first cause of action is dismissed without prejudice.

A plaintiff who brings an action under GBL § 349, governing consumer protection from deceptive acts and practices, must prove three elements: (1) that the challenged act or practice was consumer-oriented, (2) that it was misleading in a material way, and (3) that the plaintiff suffered injury as a result of the deceptive act. Here, the Complaint does not meet this standard. All that is pled with respect to first element is a conclusory allegation that, "Defendants' actions were consumer oriented in that they engaged in acts and practices that has a broader impact on consumers at large" (Compl., ¶¶ 112). This is not sufficient. The other two elements are similarly not sufficiently pled (*see id.*, ¶¶ 110-111). Inasmuch as there does not seem to be any basis to proceed on this theory of liability, the second cause of action is dismissed with prejudice.

The third cause of action for successor liability is also dismissed without prejudice as successor liability does not constitute an independent cause of action but is merely a theory of recovery on an underlying liability (*Long Oil Heat, Inc. v Spencer*, 375 F Supp3d 175, 200 [ND NY 2019]).

Finally, to state a cause of action for fraudulent conveyance, a plaintiff must plead the following three elements: (1) that a conveyance was made without fair consideration, (2) that at the time of transfer, the transferor was a defendant in an action for money damages or that a judgment in such action had been docketed against him, and (3) that a final judgment has been rendered against the transferor that remains unsatisfied (*Robles v Patel*, 165 AD3d 858 [2d Dept 2019], citing *Fischer v Sadov Realty Corp.*, 34 AD3d 632 [2d Dept 2006]). Here, as with the fraud claim, the complaint is not pled with any particularity whatsoever. All GetIntent alleges is that the defendants were aware of GetIntent and other creditors' claims and their inability to pay said claims, and that "Defendants [] acted with fraudulent intent by making conveyances – while they were defendants in pending lawsuits for money damages – without fair consideration" (Compl., 133, 136). This is palpably insufficient under the heightened standard applicable to fraud claims. There are no specific allegations of what was transferred, when it was transferred or even how and to whom (*e.g.*, the Complaint alternatively treats Column6 and Sileo as a single entity and as different entities [*compare* Compl., ¶¶ 55-56 with ¶ 137]). Accordingly, the fourth cause of action is dismissed without prejudice.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the second cause of action is dismissed with prejudice and the first, third, and fourth causes of action are dismissed without prejudice; and it is further

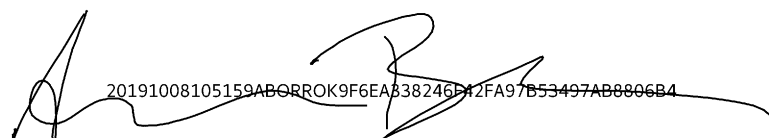
ORDERED that plaintiff is granted leave to serve and file an amended complaint so as to replead the first, third, and fourth causes of action within 30 days after notice of entry of this decision and order; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by defendant’s counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

ORDERED that such service 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](http://www.nycourts.gov/supctmanh)).

10/8/2019

DATE



ANDREW BORROK, J.S.C.

20191008105159ABORROK9F6EAB38246FA2FA97B53497AB8806B4

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: