

Linkable Networks, Inc. v Mastercard Inc.
2019 NY Slip Op 34011(U)
September 12, 2019
Supreme Court, New York County
Docket Number: 651964/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD

Justice

PART IAS MOTION 49EFM

-----X

INDEX NO. 651964/2019

LINKABLE NETWORKS, INC.

MOTION DATE June 25, 2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

MASTERCARD INCORPORATED, *et al.*,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, it is ordered that this motion to dismiss (Motion Sequence Number 001) is decided in accordance with the accompanying decision and order.

9/12/2019

DATE


O. PETER SHERWOOD, 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

----- X
LINKABLE NETWORKS, INC.,

Plaintiff,

- against -

**MASTERCARD INCORPORATED AND
MASTERCARD INTERNATIONAL INCORPORATED,**

Defendants.
----- X

**DECISION AND ORDER
Index No.: 651964/2019**

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

This is a case about the alleged misappropriation of trade secrets and a subsequent “smear campaign.” The motion to dismiss shall be granted in part.

Plaintiff Linkable Networks, Inc. (Linkable) owned and operated a proprietary Card Linked Offers (CLO) platform from, 2010 to September 2017. A CLO platform allows “merchants and product manufacturers to replace paper coupons and rebates with targeted digital alternatives. . . . [A] consumer registers her credit or debit card on a . . . partner’s website and ‘links’ her card to her choice of virtual coupons offered by merchants and product manufacturers. After the consumer makes a purchase at the linked merchant (or of the linked product) using the linked card, [the] platform automatically processes the digital coupon and rewards the consumer, typically with cash back or loyalty points. This infrastructure benefits consumers in the form of automatic, relevant offers and discounts. It also enables retailers and brands to attract more consumers and better assess the efficacy of their marketing strategies” (Complaint, NYSCEF Doc. No. 1, ¶ 2, 11). Defendant Mastercard International Inc. is a wholly owned subsidiary of defendant Mastercard Inc. (together, Mastercard). Mastercard owns and operates payment card networks.

By 2015, Linkable had created a proprietary CLO platform which was the product of over 5 years’ worth of research and development, at a cost of over \$40 million. Linkable’s platform was industry leading because prior CLOs worked through the specific bank that issued the card, the processor of the transaction, or a data aggregator. Linkable’s CLO introduced “open enrollment” where consumers could use any payment card, regardless of the issuing bank. In 2011, Linkable alone offered open enrollment. To use a payment card, the platform used data

from the payment card network over which the card was issued, requiring Linkable to pay major payment card networks such as Mastercard, Visa, and American Express, to get the required data.

On June 27, 2011, Linkable (using the name Clovr Media, Inc.) and Mastercard entered into a Mutual Confidentiality Agreement (MCA) which allowed Mastercard to use Linkable's confidential information to explore a business relationship using the Linkable CLO. On July 15, 2011, Mastercard issued Linkable an RFP seeking confidential information. In response and pursuant to the MCA, Linkable provided sensitive trade secrets about its CLO, including its pricing model and forecasts, revenue models, market testing data, lists of clients and potential clients, source code, and more (*id.*, ¶ 22).

On September 6, 2012, Linkable and Mastercard entered into the MasterCard Rewards System Value Network Services Agreement (Services Agreement), effective for three years and automatically renewed for subsequent one-year periods, unless one of the parties gave timely notice (*see* NYSCEF Doc. No. 13 § 10[a]). In addition, either party could terminate without cause at anytime upon . . . 120 days written notice" (*see id.*, § 10[b]). Under the Services Agreement, Mastercard provided a data feed to Linkable to support the services provided by the CLO. It also included a confidentiality clause restricting dissemination and use of Linkable's data.

The CLO platform went live in 2013. By 2015, Linkable had loyalty programs with multiple national retailers.

In early 2015, Mastercard demanded new, higher, pricing terms, which Linkable declined. Mastercard then began an audit of Linkable's business, requiring Linkable to provide detail on all aspects of its business. Linkable cooperated. On May 15, 2015, Mastercard notified Linkable it was terminating the Services Agreement for cause. Linkable disputed the cause, and thereafter Mastercard notified Linkable it was also terminating without cause. Instead of providing the required notice period, Mastercard immediately cut its data feed, rendering Linkable unable to service Mastercard credit card holders. At approximately the same time, Mastercard began offering its own "outside the bank" CLO.

In September 2017, Linkable learned that Mastercard had been sabotaging Linkable's customer relationships since 2015 by spreading false and disparaging statements about Linkable, including that Linkable was stealing Mastercard data, breaching its contract, and defrauding Mastercard (*id.*, ¶ 34). Linkable had to cut prices to keep business and lost many customers

anyway. Due to Mastercard's actions, Linkable had to cease operations and sold its assets at a huge discount.

Linkable asserts claims for:

- 1) Misappropriation of Trade Secrets;
- 2) Unfair Competition;
- 3) Misappropriation of Ideas;
- 4) Breach of Contract;
- 5) Tortious Interference with Prospective Business Relations; and
- 6) Unjust Enrichment

II. DISCUSSION¹

A. Statute of Limitations

Mastercard asserts that the first (misappropriation of trade secrets), second (unfair competition), third (misappropriation of ideas), fifth (tortious interference with prospective business relations) and sixth (unjust enrichment) causes of action are barred by the three-year statute of limitations. Linkable responds that these tort claims are continuing and as a result, are not time barred. However, except for the first cause of action (Compl. ¶ 44), the complaint does not allege that any of these torts are ongoing. As to the first cause of action, Mastercard argues it, too, should be dismissed because the complaint "provides no factual basis" for the claim (Reply at n. 3), but Mastercard cites no statute or caselaw that requires a particularized pleading. Because the first and third causes of action are grounded in contract, the six-year statute of limitations for breach of contract claims applies (*see Dolgoff Holophase, Inc. v E.I. DuPont de Nemours & Co.*, 212 AD2d 661, 662 [2d Dept 1995]). These claims are not barred by the statute of limitations.²

The statute of limitations for tortious interference with prospective business relationships (fifth cause of action) is three years (*see 10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 1368 [4th Dept 2011] ["It is well settled that a three-year statute of limitations applies" to a claim for tortious interference with prospective economic advantage]). Linkable asserts the period

¹ Upon the representation of counsel for Linkable made at an oral argument on this motion that Linkable has paid all applicable Delaware taxes, Mastercard withdrew its claim of lack of legal capacity to sue as a result of Delaware's cancellation of Linkable's corporate status for failure to pay taxes. Accordingly, that defense is rejected as moot.

² As to the First Cause of action, for misappropriation, the claim may be viewed as continuing (*see Andrew Greenberg, Inc. v Syane, Inc.*, 36 AD3d 1094, 1098 [3d Dept 2007] or as a series of torts occurring over time (Tr. at 38) and survives on these basis as well.

of limitation is tolled when the conduct is ongoing (Opp. at 10) but, again, the complaint does not allege such conduct.

In New York, there is no identified statute of limitations period within which to bring a claim for unjust enrichment (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013]). Instead, the applicable statute of limitations is that breach to which the unjust enrichment claim is pleaded in the alternative (*see Md. Of Mgrs. Of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010]). In this case, plaintiff denies that its unjust enrichment claim is an alternative to the breach of contract claim, in which case the six-year statute of limitations would apply (*see Maya NY, LLC*, 106 AD3d at 585). Rather, it is “a claim based on misconduct that extends far beyond the Services Agreement” (Opp at 19). Accordingly, the three-year statute of limitations ‘stemming’ from tortious conduct applies (*see id.*).

B. Failure to State a Claim Based on Documentary Evidence

On a motion to dismiss a plaintiff’s 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]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit

of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable.’” (*id.* at 84-85). Here, the documentary evidence is the MCA and the Services Agreement, which are undisputedly authentic and are appropriate documentary evidence.

Mastercard argues that the first, second, third and sixth causes of action should be dismissed as duplicative of the fourth cause of action for breach of contract. The court agrees.

Claim 1-Misappropriation of Trade Secrets. “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]). Here, Mastercard’s alleged use of the confidential information in a prohibited fashion is the same conduct which underlies the breach of contract claim (in addition to other breaches). Accordingly, this claim is duplicative and shall be dismissed.

Claim 2- Unfair Competition. Following the United States Supreme Court’s decision in *International News Service v. Associated Press* (248 US 215 [1918]), recognizing the misappropriation theory of unfair competition, New York courts have entertained claims based on “[t]he principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor” (*ITC Ltd*, 9 NY3d at 477, quoting *Electrolux*, 6 NY2d at 567). Plaintiff has alleged Mastercard misappropriated plaintiff’s confidential information. However, the claim is duplicative of the breach of contract claim as it alleges improper use of the confidential information

in violation of the confidentiality clauses of the Services Agreement. Accordingly, this claim shall be dismissed as it too is duplicative of the breach of contract claim.

Claim 3- Misappropriation of Ideas. For the same reasons discussed above, this claim, for misappropriation of Linkable's confidential information, fails as duplicative of the breach of contract claim and will be dismissed.

Claim 5- Tortious Interference with Prospective Business Relations. Interference with a business relationship, where there is no contract, is actionable if unlawful means are used, or (under the theory of prima facie tort), if lawful means are used to inflict intentional harm, resulting in damage, without either excuse or justification (*Sommer v Kaufman*, 59 AD2d 843, 843-44 [1st Dept 1977]). Wrongful means includes physical violence, threats, fraud, misrepresentation, civil suits and criminal prosecutions, and extreme and unfair economic pressure (72 N.Y. Jur. 2d Interference § 42). Simple persuasion is insufficient (*id.*). Mastercard argues this claim must fail because Linkable has not pled criminal or independently tortious conduct. Misrepresentation would constitute the wrongful means to support this claim, and Linkable has alleged Mastercard made misrepresentations about Linkable's actions. Contrary to Mastercard's position, Linkable does allege Mastercard's misrepresentations affected Linkable's business relationships. Affording the pleadings a liberal construction and providing plaintiff the benefit of every possible inference, this claim survives.

Claim 6- Unjust Enrichment. "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affid.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). This claim is also duplicative of the breach of contract claim. There is a contract covering the same conduct, specifically, the use of the confidential information. Further, to the extent this claim stems from alleged tortious conduct, it is barred by the three-year statute of limitations. This claim fails.

B. Punitive Damages

Mastercard asks the court to dismiss the claims for punitive and exemplary damages as the Services Agreement precludes consequential, punitive, or special damages (Memo at 13, citing Services Agreement § 11[b]). Linkable contends the limitations of the Services Agreement do not apply, since the tort claims are outside the bounds of the Services Agreement. They are not. The Services Agreement has a provision prohibiting unauthorized use of the confidential information, and the limitation on liability in section 11(b) covers related tort claims, even if they are not deemed duplicative of the breach of contract claim (NYSCEF Doc. No. 13, § 11[b]). According to Black's Law Dictionary, exemplary damages are punitive damages. They are barred by the Services Agreement, which governs here. This portion of the motion must be granted.

Accordingly, it is hereby

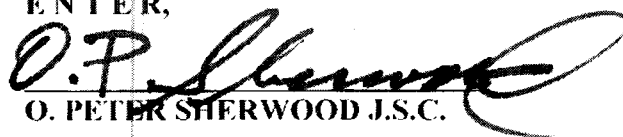
ORDERED that the motion to dismiss is **GRANTED** to the extent that the first (misappropriation of trade secrets), second (unfair competition), third (misappropriation of ideas), fifth (tortious interference with prospective business relations) and sixth (unjust enrichment) cause of action are **DISMISSED**, the demand for punitive damages is **DISMISSED**, and the motion to dismiss is otherwise **DENIED**; and it is further

ORDERED that counsel shall appear at a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York 10007, on October 8, 2019 at 10:30 am.

This constitutes the decision and order of the court.

DATED: September 12, 2019

ENTER,



O. PETER SHERWOOD J.S.C.