

SPG Advance LLC v Corlin

2019 NY Slip Op 35243(U)

December 5, 2019

Supreme Court, Kings County

Docket Number: Index No. 515739/19

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SPG ADVANCE LLC,

Plaintiff,

Decision and order

- against -

Index No. 515739/19

TZVI HERSCH CORLIN a/k/a TZVI CORLIN a/k/a
STEVE CORLIN, COR CAPITAL FUNDING LLC,
ABRAHAM FELSENSTEIN a/k/a ABIE FELSENSTEIN,
a/k/a JORDAN SPECTOR, AXCESS ADVANCE GROUP
INC., BEVERLY CASH GROUP CORP., JUDY FRIEDMAN
& CHAIM CORLIN,

MS # 1

Defendants,

December 5, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants have all moved seeking to dismiss the complaint pursuant to CPLR §3211. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Verified Complaint from November 2018 through May 2019 "Defendant Tzvi Hersh Corlin, through Defendant Cor Capital, worked as an underwriter for SPG" (see, Verified Complaint, ¶ 33). The plaintiff is a merchant cash advance company that provides businesses with access to funding in exchange for a percentage of the businesses future receivables. The plaintiff hired Corlin as an underwriter to review whether applications submitted should be accepted by the plaintiff and thus whether the plaintiff should fund a particular business. The Verified Complaint alleges that while working for the

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plaintiff Corlin stole confidential information in the form of business application information and forwarded the information to competing merchant cash advance companies including the Felsenstein defendants. The Verified Complaint contains ten causes of action including misappropriation of trade secrets, unfair competition, breach of duty of loyalty, breach of fiduciary duty, tortious interference with contracts, with contractual relations and with prospective economic advantage, breach of contract, a claim based on the faithless servant doctrine and unjust enrichment. The Corlin defendants have now moved seeking to dismiss the complaint. The defendants argue there has been no allegation that Steve Corlin was an employee of the plaintiff thus the first, second, third, fourth and eighth causes of action must be dismissed. Further, the defendants allege that Cor Capital was not served with process and that in any event there is likewise no evidence Cor Capital was an employee of the plaintiff and the same causes of action should be dismissed. In addition, the defendants seek dismissal of the ninth and tenth causes of action on the grounds they are duplicative. The plaintiff has opposed the motion arguing the causes of action all have merit.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will

fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, as a preliminary matter service on the defendants was proper.

There can be little dispute that Steve Corlin and Cor Capital performed services for the plaintiff for which they were paid. The precise nature of that relationship must now be explored. Thus, Paragraph 61 of the Verified Complaint states that "while working for SPG, Corlin, through Cor Capital, was paid a weekly salary, with a portion of it constituting an advance on commissions that the Corlin Defendants would earn" (see, Verified Complaint, ¶ 61). The exact term utilized "through Cor Capital" is vague but it surely does not

conclusively mean the Verified Complaint failed to allege Steve Corlin was an employee of the plaintiff. Likewise, even if true, then the Verified Complaint surely alleged that Cor Capital was an employee of the plaintiff, something the defendants assert is not possible. As noted, the Verified Complaint states that "Corlin through Cor Capital, was paid a weekly salary" (id) surely establishing that an employment relationship has been established with Steve Corlin. Further, the Verified Complaint notes that "the Corlin Defendants worked primarily out of SPG's office" (Verified Complaint, ¶ 34). In addition, the Verified Complaint states that "as part of their duties, the Corlin Defendants reviewed the Applications submitted to SPG" (Verified Complaint, ¶ 35) clearly establishing duties the defendants were required to perform. Moreover, Paragraph 40 of the Verified Complaint states that "SPG trusted, and directed the Corlin Defendants, to only use the Merchant information in their work for SPG and relied on them to safeguard and protect this information" (Verified Complaint, ¶ 40). These allegations which must be taken as true for the purposes of this motion, clearly establish an employee relationship with Steve Corlin. The definite nature of the relationship will be explored during discovery, however, the mere fact the Verified Complaint states that Steve Corlin worked "through" Cor Capital is not a basis to dismiss the lawsuit. Likewise, there are significant questions

of fact whether Cor Capital was an employee of the plaintiff. The defendants assert "COR Capital could not have been an employee of SPG" (Memorandum of Law in Support, page 12) but does not explain why that cannot be true. Thus, the Verified Complaint surely alleges an employment relationship with both Steve Corlin and Cor Capital sufficient to survive this motion to dismiss.

Thus, examining the individual causes of action, it is well settled that to establish a cause of action for the misappropriation of trade secrets the defendant must be in possession of a trade secret and the use of that secret by the defendant was in breach of an agreement, confidential relationship or duty (see, Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]). Generally, customer information can be considered trade secrets if the plaintiff took measures requiring the defendant to guard the secrecy of the information (Starlight Limousine Service Inc., v. Cucinella, 275 AD2d 704, 713 NYS2d 195 [2d Dept., 2000]). However, customer information cannot be considered trade secrets if the information is readily available from other sources (MGM Court Reporting Service Inc., v. Greenberg, 143 AD2d 404, 532 NYS2d 553 [2d Dept., 1988]). According to the Verified Complaint, when a merchant needs access to funds, the merchant completes an application and submits it to a broker who then

"refers the Application to multiple MCA's including SPG." The defendant Corlin was hired by the plaintiff as an underwriter to evaluate the financial strength of a merchant seeking funds and to determine whether the plaintiff should fund the particular merchant (see, Verified Complaint, ¶¶ 17-21). The plaintiff argues that "SPG expended labor, skill and money developing relationships with the Brokers and Merchants who sent it business, as well as developing guidelines for approving and funding Merchants, and as training underwriters such as the Corlin Defendants to identify which Applications were appropriate for funding and on what terms" (see, Memorandum of Law in Opposition, pages 25,26). The defendants counter this information cannot be considered trade secrets because the potential customers are not exclusive to the plaintiff "and are known to other MCA funders who compete with SPG" (see, Memorandum of Law in Support, page 16). Specifically, the defendants argue that "Plaintiff does not allege that the Brokers worked exclusively for SPG nor that anything prevented the Brokers from simultaneously submitting the same Application both to SPG and its competitors" (id at page 17). While the precise nature of the relationship between the brokers and the plaintiff is not fully explained in the Verified Complaint, there is a strong inference that brokers do not in fact submit the same application to multiple funders at the same time. Thus, in paragraphs 152-

156 of the Verified Complaint the plaintiff alleges the defendant harmed the relationship the plaintiff maintained with various brokers who no longer forward them potential customers due to defendant's alleged self funding of such applications. This implies the confidential nature of the customer information flowed from the broker to the plaintiff whereby the plaintiff maintained an expectation of confidentiality and the broker facilitated such confidentiality. The Verified Complaint alleges the defendants utilized confidential information "contained in the Applications submitted to it" (Verified Complaint, ¶ 90) that included "the Merchant's phone numbers, addresses, financial statements, and any other information necessary for funding" (Verified Complaint, ¶ 92). Therefore, the plaintiff has asserted allegations the information did consist of trade secrets. At the very least, there are questions of fact in this regard which mandate a denial of the dismissal of this cause of action. Therefore, based on the foregoing the motion seeking to dismiss the first cause of action is denied.

The claim of unfair competition consists where it is alleged the defendants engaged in bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (see, Beverage Marketing USA, Inc., v. South Beach Beverage Co., Inc., 20 AD3d 439, 799 NYS2d 242 [2d Dept., 2005]). Since the cause of action

concerning trade secrets remains viable, this cause of action remains viable as well as the motion seeking to dismiss the second cause of action is denied.

The court has determined that at this juncture the Corlin defendants were employees of the plaintiff, therefore, the motion seeking to dismiss the third and fourth causes of action sounding in breaches of loyalty and fiduciary duty is denied.

The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). Thus, to succeed upon these allegations the complaint must allege sufficient facts. Vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996]). The Verified Complaint alleges that "the Corlin Defendants

submitted the Applications of already funded Merchants to the Felsenstein Defendants and/or C. Corlin, who then sought further funding for the Merchant from other MCAs" (see, Verified Complaint, ¶ 56). Further, this behavior "was explicitly prohibited by SPG and hurt SPG's chances of having the cash advance repaid by the Merchant" (id at ¶ 57). Thus, the Verified Complaint explicitly describes the tortious interference of contracts between merchants and the plaintiff. The allegation is not speculative merely because the plaintiff did not identify which merchant contracts were allegedly breached by defendants conduct. Further discovery will surely explore those issues. Therefore, the motion seeking to dismiss the fourth count is denied.

To establish the tort of tortious interference with prospective contractual relations the plaintiff must demonstrate the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure (Guard-Life Corp., v. Parker Hardware Manufacturing Corp., 50 NY2d 183, 428 NYS2d 628 [1908]). In Smith v. Meridian Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]

the court held that engaging in unfair competition was sufficient to allege wrongful conduct. The Verified Complaint alleges the defendants diversion of potential merchants seeking funding caused the broker to lose their brokerage fee and to thus harm the relationship between the broker and the plaintiff. While the Verified Complaint does not list the identity of the broker, as noted above, further discovery will explore that issue. Therefore, the motion seeking to dismiss the sixth cause of action is denied.

Further, in order state a claim for tortious interference with prospective economic advantage the plaintiff must allege specific business relationships with an identified third party with which the defendant interfered (Mehrhof v. Monroe-Woodbury Central School District, 168 AD3d 713, 91 NYS3d 503 [2d Dept., 2019]). The plaintiff alleges the defendants conduct caused a disruption of the relationship between the brokers and the plaintiff. The defendants argue the cause of action cannot be sustained since the plaintiff did not allege the defendants conduct was undertaken for the sole purpose of harming the plaintiff's business rather than merely increasing their own profits. However, that requirement only applies where the basis for the tort is rooted in conduct that is not criminal or independently tortious (Carvel Corp., v. Noonan, 3 NY3d 182, 785 NYS2d 359 [2004]). Since, as noted, the plaintiff adequately

alleged the defendants engaged in independent tortious conduct they need not demonstrate the defendants acted solely to cause harm to the plaintiff. Therefore, the motion seeking to dismiss the seventh count is denied.

As noted, the plaintiff has presented allegations the Corlin defendants were employees of the SPG, therefore, the motion seeking to dismiss the breach of contract claim is denied.

The faithless servant doctrine was first coined in Herman v. Branch Motor Express Co., 67 Misc2d 444, 323 NYS2d 794 [Civil Court of the City of New York, 1971] where the court stated "a servant who is faithless to his master on Tuesday thereby forfeits the wages he earned on Monday" (id). The doctrine states that an agent who owes a duty of fidelity to a principal and is faithless in that duty thereby forfeits compensation due (see, Phansalkar v. Anderson Weinroth & Company L.P., 344 F3d 184 [2d Cir. 2003]). The plaintiff has presented allegations in this regard and any motion seeking to dismiss the ninth cause of action is denied.

Lastly, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since the plaintiff has alleged tort and

contract causes of action the motion seeking to dismiss the unjust enrichment cause of action is granted.

Thus, the motion seeking to dismiss the complaint is denied in all respects except the unjust enrichment claim is dismissed.

So ordered.

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DATED: December 5, 2019

Brooklyn N.Y.

Hon. Leon Ruchelsman

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