Vector Media, LLC v Go N.Y. Tours Inc.
2020 NY Slip Op 30409(U)
February 11, 2020
Supreme Court, New York County
Docket Number: 653808/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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VECTOR MEDIA, LLC

Plaintiff,

- v -

GO NEW YORK TOURS INC.,

Defendant.

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INDEX NO. 653808/2019

MOTION DATE 08/01/2019, 09/09/2019

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 48, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISMISS.

Motion sequences 003 and 004 are consolidated for disposition. Upon the foregoing documents and for the reasons set forth on the record (2/10/2020), Go New York Tours, Inc. (the **Defendant**)'s motion to dismiss (Mtn. Seq. 003) is granted solely to the extent that the third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed without prejudice.

Vector Media, LLC (the **Plaintiff**)'s motion to dismiss (Mtn. Seq. 004) is granted as follows: (1) solely to the extent that the portion of the second counterclaim for breach of contract preceding March 1, 2014 and the fourth counterclaim for an accounting as a separate cause of action are dismissed and (2) the first counterclaim for fraudulent inducement and the third counterclaim for breach of the implied covenant of good faith and fair dealing are dismissed without prejudice.

The Relevant Facts and Circumstances

The Plaintiff is a media company that provides advertising space to varied brands and services. The Defendant operates a privately-owned bus fleet that is used for hop-on, hop-off sightseeing tours. The parties entered into a Transit Advertising Agreement, dated November 28, 2011 (the **Original Agreement**), by and between Vector Media, LLC and Go New York Tours Inc., which was amended and restated pursuant to the Amended and Restated Transit Advertising Agreement, dated March 1, 2014 (NYSCEF Doc. No. 7, the **Amended and Restated Agreement**).

Section 1 (a) of the Amended and Restated Agreement provides that the Plaintiff has the exclusive right to sell ads on the Defendant's buses:

> **SECTION 1. SCOPE OF WORK AND TERRITORY**
>
> **(a) Scope.** Licensor hereby grants to Licensee, on an exclusive basis, the rights to sell, post, and maintain advertising both on the exterior of and within the interior of all of Licensor's vehicles including but not limited to, the Fleet set forth in Exhibit A, as well as any vehicles added to the Fleet after the date of this Agreement in the Territory.
>
> (*id.*, at 1).

Section 1 (b) of the Amended and Restated Agreement mandated minimum operational requirements for the length of time and the number of buses that would run for the period from March 1, 2014 onwards (*id.*, at 1-2).

The Amended and Restated Agreement also provided the Plaintiff the exclusive right to advertising on the Defendant's bus fleet:

> **(c) Exclusive Right.** The advertising rights granted by this Agreement shall be the exclusive rights to sell, place and maintain advertising and shall include all printed materials on the exterior of and within the interior of the Fleet, as detailed in Exhibit A. Throughout the duration of this Agreement, neither Licensor nor any third-party shall display advertising in or on the Fleet, with the sole exception that Licensee, in its sole discretion may agree to integrate Licensor's branding in a manner so as not to unduly burden or diminish Licensee's ability to display advertising or the value of that advertising.
>
> (*id.*, § 1 (c), at 2).

Pursuant to the Amended and Restated Agreement, the Plaintiff would compensate the Defendant by payment equal to the greater of (i) the Minimum Guarantee (as defined in the Amended and Restated Agreement) or (ii) 50% of Net Advertising Revenue (as defined in the Amended and Restated Agreement):

> **SECTION 4. COMPENSATION**
>
> **(a) Payment.** In exchange for Licensee's exclusive right to sell and place advertising copy the Fleet granted by Licensor herein, Licensee agrees to pay Licensor, or its designee, a cash amount equal to the greater of (i) the sum of all "Minimum Guarantee" payments made in any calendar year, or (ii) 50% of Net Advertising Revenue (as defined herein) collected in that Contract Year.
>
> (*id.*, at 3).

Section 4 (c) of the Amended and Restated Agreement defines Net Advertising Revenue as "the total contract revenue for advertising space collected in each Contract Year." (*id.*, at 4). Section 2 of the Amended and Restated Agreement defines Contract Year as "commence[ing] on January 1 and end[ing] on December 31" (*id.*, at 3).

The Amended and Restated Agreement also required the Defendant to provide the Plaintiff with timely access to the buses:

> **SECTION 6. ACCESS**
>
> Licensor shall provide Licensee access to the Fleet as set forth in Exhibit A for the purpose of installing, maintaining and removing advertising copy during the duration of the Term. Such access shall be provided in a timely manner so as to carry out the provisions of this Contract. Licensee shall not incur any additional charge for any time which a vehicle is out of service for the purposes of installing, removing or maintaining advertising copy on a vehicle. In the event that there are Additional Vehicles added to the Fleet, Licensor agrees that such Additional Vehicles shall also be subject to the terms of this Section 6.
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> (*id.*, at 4).

Significantly, Section 11 of the Amended and Restated Agreement provides:

> **SECTION 11. ENTIRE AGREEMENT, MODIFICATIONS AND WAIVER**
>
> **(a)** This Agreement and the documents and other agreements specifically referred to herein constitute the final, exclusive and complete understanding of the parties with respect to the subject matter hereof. ***Any previous agreement governing the rights and obligations described herein shall be superseded by the term of this Agreement.***
>
> **(b)** No amendment, modification or extension of this Agreement and no waiver of any provision or condition hereof or granting of any consent contemplated hereby, shall be valid unless it is in writing, expressly refers to this Agreement and states that it is an amendment, modification, extension, or waiver and signed by both parties, in the case of an amendment, modification or extension, or the party granting the waiver, in the case of a waiver. No waiver by any party of any term or condition of this Agreement, in any one or more instances, shall be deemed or construed as a waiver of the same term or condition or any other term or condition of this Agreement on any future occasion.
>
> (*id.* [emphasis added]).

In 2017, the Plaintiff alleges that the Defendant sought to further amend the Amended and Restated Agreement in order to obtain greater compensation, but that these negotiations were ultimately unsuccessful (NYSCEF Doc. No. 3, ¶¶ 44-46). The Plaintiff asserts that the

Defendant became frustrated with its inability to obtain more compensation and/or greater flexibility in their arrangement and by April 2019, sought to impede the Plaintiff's access to buses by changing the location for the Plaintiff's installation of ads and charging additional fees (*id.*, ¶¶ 47-59).

The Plaintiff filed its Summons and Complaint (NYSCEF Doc. No. 1) on July 1, 2019 and its Amended Complaint on July 15, 2019 (NYSCEF Doc No. 3, the **Amended Complaint**) for (1) breach of contract – access rights, (2) breach of contract – removal of advertisements, (3) breach of the implied covenant of good faith and fair dealing, and (4) breach of contract – operational requirements, and (5) breach of contract – exclusivity.

On July 15, 2019, the Plaintiff moved by order to show cause for a temporary restraining order and preliminary injunction, pursuant to which a temporary restraining order was granted (NYSCEF Doc. No. 18). The Defendant filed its Answer with Counterclaims on July 31, 2019 (NYSCEF Doc. No. 24, **Answer**) for (1) fraudulent inducement, (2) express breach of contract, (3) breach of implied duty of good faith and fair dealing, and (4) an accounting. Pursuant to a decision and order (NYSCEF Doc. No. 54), dated August 12, 2019, this Court granted the Plaintiff a preliminary injunction "in accordance with §§ 1(a) and 6 of the advertising agreement."

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Pursuant to CPLR § 3211 (a) (1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a) (5) may be granted for expiry of the statute of limitations. CPLR § 3211 (a) (7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

I. Defendant's Motion to Dismiss the Amended Complaint (Mtn. Seq. 003)

The Defendant moves pursuant to CPLR § 3211 (a) (7) to dismiss the second through fifth causes of action in the Amended Complaint.

A. The Second, Fourth, and Fifth Causes of Action (Breach of Contract)

The Defendant argues that the Plaintiff's second, fourth, and fifth causes of action should be dismissed because they are duplicative of the first cause of action that the Plaintiff denied exclusive access regarding the placement of ads on buses. In opposition, the Plaintiff argues that each of its breach of contract claims involves distinct facts and distinct breaches in relation to the Amended and Restated Agreement. The Court agrees.

Although the Plaintiff divides its claim for breach of contract into four components, each claim can be read in relation to separate portions of the Amended and Restated Agreement. According every favorable inference to the facts alleged, as the court must on this motion to dismiss, the first claim for breach of contract regarding access rights would relate to those rights set forth in Section 6 of the Amended and Restated Agreement, "ACCESS," whereas the fifth alleged claim for breach of contract can be linked to Section 1 (c) of the Amended and Restated Agreement,

"Exclusive Right" (*see* NYSCEF Doc. No. 7). Notwithstanding the separate causes of action asserted for various provision of the Amended and Restated Agreement, these claims are not duplicative because each claim arises from a separate factual basis. As a result, the Plaintiff's second, fourth, and fifth causes of action for breach of contract are sustained.

B. The Third Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing)

The obligation of good faith and fair dealing implied in every contract requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995], citing *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79, 87 [1933]). However, no obligation can be implied if it would be inconsistent with other terms of the contract (*id.*).

In sum and substance, the Plaintiff alleges that an implied obligation of the Amended and Restated Agreement was breached because the Defendant's demand for additional sums beyond that set forth in the Amended and Restated Agreement deprived the Plaintiff of its exclusive right to install ads on the buses (NYSCEF Doc. No. 3, ¶¶ 81-84). This alleged conduct necessarily implicates those facts that form the basis for the breach of contract claim, namely that the Defendant's demand for additional payment impeded the Plaintiff's contractual right to access the buses and exclusively install ads in the buses (*id.*, ¶¶ 73, 95). Thus, at this stage of the proceedings, the pleadings fail to set forth a claim for breach of the implied covenant of good faith and fair dealing that is distinct from the Plaintiff's alleged breach of contract such that the Plaintiff's third cause of action is dismissed without prejudice (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010] [dismissing the claim for breach

of implied covenant of good faith and fair dealing as duplicative of the breach of contract claim because both claims arose from the same facts and sought identical damages for each alleged breach]).

II. Plaintiff's Motion to Dismiss the Defendant's Counterclaims (Mtn. Seq. 004)

The Plaintiff moves pursuant to CPLR § 3016 (b) and CPLR § 3211 (a) (1), (5), and (7) to dismiss the Defendant's first, second, third, and fourth counterclaims.

A. The First Counterclaim (Fraudulent Inducement)

A claim for fraud requires (i) the material misrepresentation of a fact, (ii) knowledge of its falsity, (iii) an intent to induce reliance, (iv) justifiable reliance by the plaintiff, and (v) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). CPLR § 3016 (b) imposes a heightened pleading standard for fraud and requires that "the circumstances constituting the wrong … be stated in detail" (Edison Stone Corp. v 42nd St. Dev. Corp., 145 AD2d 249, 257 [1st Dept 1989]).

The Defendant alleges that the Plaintiff made certain representations to induce the Defendant to enter into an exclusive license with the Plaintiff (NYSCEF Doc. No. 24, ¶ 33). These representations included a promise that the parties would have a true partnership to make money over the years, the terms of the Amended and Restated Agreement would be changed to keep up with the growth of the Defendant's company, that the Plaintiff would maximize ad revenue to be made by selling as much advertising as possible, and that the Defendant would be treated as equally as the Plaintiff's competitors (*id.*, ¶¶ 33-35, 41-42, 45).

However, the Defendant fails to identify any specific statement made with respect to the alleged misrepresentations, which occurred prior to November 28, 2011 and thereby induced the Defendant to enter into the Amended and Restated Agreement. Although the Defendant refers to certain statements and emails made in 2012, 2018, and 2019, these statements were made after the parties entered into the Amended and Restated Agreement such that there can be no reasonable reliance (NYSCEF Doc. No. 24, ¶¶ 37, 39, 40, 44).

The Defendant's first counterclaim is also dismissed to the extent that it claims fraud by omission because the Defendant does not sufficiently plead any fiduciary relationship between the parties (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42-43, 944 NYS2d 30 [1st Dept 2012] [explaining that an allegation of fraud based on an omission requires that the pleadings also allege the existence of a fiduciary relationship requiring disclosure of the unknown facts]). Accordingly, the first counterclaim for fraudulent inducement is dismissed without prejudice.

B. The Second Counterclaim (Breach of Contract)

The Plaintiff argues that the second counterclaim for breach of contract should be dismissed concerning any conduct in 2012 and 2013 because those claims were extinguished when the Defendant entered into the restated version of the Amended and Restated Agreement in 2014. The court agrees. Section 11 of the Amended and Restated Agreement expressly provides that "[a]ny previous agreement governing the rights and obligations described herein shall be superseded by the term of this Agreement" (NYSCEF Doc. No. 7, at 5-6). The Original

Agreement entered on November 28, 2011 was therefore extinguished when the parties entered into the Amended and Restated Agreement on March 1, 2014 (*see Citigifts, Inc. v Pechnik*, 112 AD2d 832, 834 [1st Dept 1985], aff'd *Citigifts, Inc. v Pechnik*, 67 NY2d 774 [1986] [dismissing the claim for breach of contract because the last contract superseded all prior or currently existing agreements between the parties and reduced the remedy for breach of contract on the last agreement]). In any event, any portion of the Defendant's counterclaim for breach of contract preceding July 1, 2013 is also barred by the statute of limitations as the complaint was filed in this action on July 1, 2019 (CPLR § 213 (2)). Accordingly, the portion of the second counterclaim for breach of contract prior to March 1, 2014 is dismissed.

C. The Third Counterclaim (Breach of the Implied Covenant of Good Faith and Fair Dealing)

Relying on *Havel v Kelsey-Hayes Co.*, 83 AD2d 380, 383 [4th Dept 1981], the Plaintiffs argue that the there was no implied obligation to use its best efforts and therefore this counterclaim must be dismissed. In opposition, the Defendant asserted at oral argument that the gravamen of the counterclaim is that the Plaintiff breached the implied covenant of good faith and fair dealing by essentially locking up the Defendant with an exclusive license agreement while doing the same with others so as to gain market share, and with the intent, of always paying only the Minimum Guarantee. The problem with this argument is that this is simply not what the Defendant pled.

The Defendant's counterclaim alleged that the Plaintiff breached its implied obligation by failing to undertake good faith efforts to exploit its exclusive license and maximize the Defendant's revenue share and refrain from diverting advertising to the Defendant's competitors, which is not

sustainable at this stage of the proceedings (NYSCEF Doc. No. 24, ¶¶ 75-76). Accordingly, the third counterclaim for breach of the implied duty of good faith and fair dealing is dismissed without prejudice.

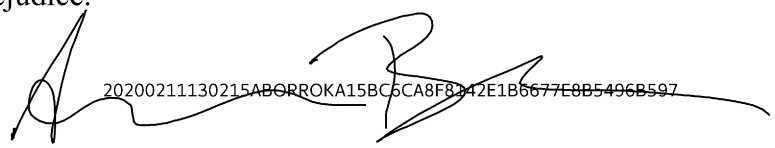
D. The Fourth Counterclaim (Accounting)

An accounting is an action at equity, which requires that a trust or fiduciary relationship exist between the parties (*Terner v Glickstein & Terner, Inc.*, 283 NY 299, 301 [1940]). Although the Defendant pleads that the Plaintiff had a fiduciary duty to calculate the net advertising revenue yearly (NYSCEF Doc. No. 24, ¶ 82), the pleadings do not support any basis for finding that a confidential or fiduciary relationship existed between the parties, who instead appeared to operate on an arms-length basis. Accordingly, the fourth counterclaim for an accounting is dismissed. Notwithstanding the foregoing, the Defendant may nevertheless be entitled to discovery and an accounting as it relates to the second counterclaim for breach of contract because, pursuant to Section 4 of the Amended and Restated Agreement, the Plaintiff was to calculate 50% of the "Net Advertising Revenue" yearly when determining compensation due to the Defendant (NYSCEF Doc. No. 7, at 3-4).

Accordingly, it is

ORDERED that the Defendant's motion to dismiss (Mtn. Seq. 003) is granted solely to the extent that the Plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed without prejudice; and it is further

ORDERED that the Plaintiff's motion to dismiss (Mtn. Seq. 004) is granted solely to the extent that the portion of the Defendant's second counterclaim for breach of contract preceding March 1, 2014 and the fourth counterclaim for an accounting are dismissed and the first counterclaim for fraudulent inducement and the third counterclaim for breach of the implied covenant of good faith and fair dealing are dismissed without prejudice.



2/11/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE