

Crossbeat N.Y., LLC v Liirn, LLC
2020 NY Slip Op 31411(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 652622/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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CROSSBEAT NEW YORK, LLC,

Plaintiff,

DECISION AND ORDER

- v -

Index No. 652622/2017

LIIRN, LLC,

MOT SEQ 005, 006

Defendant.

-----x
LIIRN, LLC

Plaintiff,

Third-Party

-against-

Index No.

BECKY WANG, DAVID JUSTUS

595852/2018

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, *inter alia*, for breach of contract, the plaintiff Crossbeat New York, LLC (Crossbeat) and third-party defendant Becky Wang (Wang), Crossbeat’s managing member, collectively move (i) for partial summary judgment on the first cause of action for breach of contract in Crossbeat’s second amended complaint as against defendant LiiRN LLC (LiiRN), (ii) to dismiss, pursuant to CPLR 3211(a) (7), LiiRN’s breach of contract counterclaim as against Crossbeat, and (iii) to dismiss, pursuant to, CPLR 3211(a) (7), the second and third

causes of action in LiiRN's third-party complaint as against Wang (SEQ 005). LiiRN opposes the motion and cross-moves pursuant to CPLR 3025(b) for leave to amend its answer to Crossbeat's second amended complaint. By separate motion sequence, third-party defendant David Justus (Justus) moves pursuant to CPLR 3211(a)(7) to dismiss LiiRN's third-party complaint as against him in its entirety (SEQ 006). LiiRN opposes the motion. The branches of Crossbeat's motion for partial summary judgment and to dismiss LiiRN's counterclaim are denied. Wang and Justus' respective motions to dismiss are granted. LiiRN's cross-motion to amend its answer is granted.

II. BACKGROUND

By an agreement dated September 13, 2016, entitled Statement of Work (the 2016 SOW), LiiRN engaged Crossbeat to provide LiiRN with consulting services and executive level support services in exchange for LiiRN's agreement to pay \$250,000.00 under the terms of a promissory note that was to be executed by the parties in the future. In a second, separate agreement dated January 5, 2017 also entitled Statement of Work, (the 2017 SOW) LiiRN engaged Crossbeat to design and launch LiiRN's new website for exchange for \$150,000.00 also payable under the terms of the same promissory note. The parties

ultimately executed a promissory note term sheet extending LiiRN's payment obligations such that they would not commence until January 30, 2017, at the earliest. According to Crossbeat, LiiRN has never paid it and has thus breached the 2016 SOW, the 2017 SOW, and the promissory note term sheet.

On June 20, 2017, Crossbeat commenced this action against LiiRN alleging, *inter alia*, breach of contract relating to the 2016 and 2017 SOWs. On October 25, 2018, LiiRN answered the complaint, which included a counterclaim against Crossbeat for breach of contract and third-party claims against Crossbeat's members Wang and Justus, in their individual capacities, for *prima facie* tort (second cause of action), and violation of the Computer Fraud and Abuse Act (the CFAA), 18 U.S.C. § 1030 (third cause of action). Crossbeat has amended the complaint twice with leave of court, but Crossbeat's allegations of breach of contract claim for non-payment have not changed.

In the second amended complaint, Crossbeat also alleges that, *inter alia*, in addition to breaching its payment obligations, LiiRN further breached the SOW by locking Crossbeat out of the website it designed and hijacked the software code Crossbeat designed for which LiiRN had not paid. Then, with the leverage of having locked Crossbeat out of the website, LiiRN allegedly attempted to avoid its payment obligations under the

promissory note by seeking to persuade Crossbeat to exercise its right under the SOWs to convert the amounts owed to it into an equity interest in LiiRN.

In its counterclaim and third party complaint, LiiRN, alleges that it had no payment obligations under the promissory note or the SOWs because Crossbeat's payment obligations vested only upon completion of all work set forth in both SOWs, and that the parties would then jointly decide what percentage of Crossbeat's compensation would be in cash and what percentage would be in equity in LiiRN. LiiRN further claims that in March 2017, Crossbeat ceased performance under the 2017 SOW and demanded that LiiRN make a payment in an amount of no less than \$125,000.00, even though no payment had come due and the manner of compensation had not yet been determined. LiiRN alleges that after it declined to pay, Crossbeat, along with Wang and Justus, retaliated by accessing, disabling, and locking a third-party application service that supported LiiRN's business operations. LiiRN alleges that it had to hire contractors to restore LiiRN's platform and servers that were inaccessible due to the third-party application being disabled. In the course of this restoration work, the contractors discovered that the work under the SOW was not adequately performed inasmuch as Crossbeat failed to maintain proper documentation of the stages, scales, standards, and guidelines concerning LiiRN's software causing

significant delays in developing the software and making the software unsafe for customers to use.

III. DISCUSSION

A. Crossbeat's Motion For Partial Summary Judgment

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York,

supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In its motion for partial summary judgment, Crossbeat argues that there is no dispute that it performed under the 2016 SOW and that LiiRN is liable to Crossbeat in the amount of \$250,000.00. In support of its motion, Crossbeat submits, *inter alia*, the affidavit of Becky Wang, the 2016 SOW, the 2017 SOW, the promissory note term sheet, and the email communications between Wang and Swisher concerning LiiRN’s payment obligations. These submissions fail to establish that Crossbeat is entitled to summary judgment on its first cause of action for breach of contract. The 2016 SOW states that the promissory note term sheet governs LiiRN’s payment obligations. The promissory note term sheet states that “[p]rincipal and unpaid accrued interest on the Notes will be due and payable April 30, 2017,” but also states that “[v]esting will occur pursuant to the completion of work defined in Statements of Work (the “SoW”) and accepted by Company in writing.” These conflicting terms are ambiguous as to whether payment was unconditionally due under the term sheet on April 30, 2017 or if payment was subject to the completion of

the work encompassed in the SOW and accepted by the company. As the plaintiff's submissions do not establish that all work pursuant to the SOWs was completed by April 30, 2017, and the email communications submitted by Crossbeat likewise do not evidence any agreement by Crossbeat to alter these terms in the promissory note, there is a triable issue of fact as to when payment has become due under the term sheet. See US Oncology, Inc. v Wilmington Tr. FSB, 102 AD3d 401 (1st Dept. 2013).

However, LiiRN's current argument that there is a triable issue of fact inasmuch as the form of payment under the 2016 SOW was still open for discussion after Crossbeat's completion of the services is without merit. Wang's affidavit and her and Swisher's correspondence demonstrate that, at this time, Crossbeat has not elected to be compensated for its completion of services through equity rather than money. The promissory note term sheet states that it is Crossbeat who may elect to convert each of the notes into shares of the LiiRN's common stock. As such, LiiRN has not raised a triable issue of fact as to its payment obligations in this regard.

B. Crossbeat, Wang, and Justus' Motions to Dismiss LiiRN's Counterclaim for Breach of Contract, as against Crossbeat, and Third-Party Claims for Prima Facie Tort and Violations of the Computer Fraud and Abuse Act

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is

"to determine whether [the] pleadings state a cause of action."
511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144,
151-152 (2002). To determine whether a claim adequately states
a cause of action, the court must "liberally construe" it,
accept the facts alleged in it as true, accord it "the benefit
of every possible favorable inference" (id. at 152; see
Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin
v Blank, 19 NY3d 46 [2012]), and determine only whether the
facts, as alleged, fit within any cognizable legal theory. See
Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v
Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v
Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept.
2004); CPLR 3026. "The motion must be denied if from the
pleading's four corners factual allegations are discerned which
taken together manifest any cause of action cognizable at law."
511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152
(internal quotation marks omitted); see Leon v Martinez, supra;
Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

The elements of a cause of action to recover damages for
breach of contract are (1) the existence of a contract, (2) the
plaintiff's performance under the contract, (3) the defendant's
breach of contract, and (4) resulting damages. See Harris v
Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Morris v
702 East Fifth St. HDFC, 46 AD3d 478 (1st Dept. 2007).

Here, LiiRN adequately alleges that Crossbeat breached its contract by failing to adequately perform the work required under the SOWs by not performing its work in a manner consistent with industry standards and by demanding payment before completing its work, which it alleges caused damages. These allegations adequately plead a cause of action for breach of contract.

Crossbeat's argument in opposition that LiiRN cannot maintain a breach of contract action in the face of their own nonpayment breach is misplaced. As discussed herein, there is a triable issue of fact as to whether LiiRN was required to pay Crossbeat under the promissory note term sheet because the term sheet is ambiguous as to whether payment was due to Crossbeat upon Crossbeat's completions of its SOWs. Thus, the motion to dismiss the counterclaim for breach of contract is denied.

However, the second counterclaim and the second cause of action in the third-party complaint against Wang and Justus for prima facie tort fail to state a cognizable claim for relief. Prima facie tort is a highly disfavored cause of action in New York, and the Court of Appeals has cautioned that it is not a catch-all alternative for every cause of action which cannot "stand on its legs." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 333 (1983). To survive dismissal pursuant

to 3211(a)(7), a party pleading a cause of action for prima facie tort must allege (1) the intentional infliction of harm (2) which results in special damages (3) without any excuse or justification (4) by an act or series of acts which would otherwise be lawful. See Kickerts v New York Univ., 110 AD3d 268 (1st Dept. 2013). Failure to plead that the defendant's "sole motive" for committing the act alleged is "disinterested malevolence," mandates dismissal of the cause of action. Burns Jackson Miller Summit & Spitzer v Lindner, supra at 333; Brook v Peconic Bay Med. Ctr., 152 AD3d 436, 438 (1st Dept. 2017).

Here, LiiRN has failed to plead a cognizable cause of action for prima facie tort because it does not allege that Crossbeat, Wang, or Justus acted with the "sole motive" of "disinterested malevolence." Id. On the contrary, in addition to failing to allege this required element, the substance of the counterclaims and the answer is that the motives of the plaintiff and the third-party defendants were, at least, in part financial and not solely motivated by malevolence. Thus, the motion to dismiss the counterclaim and causes of action for prima facie tort is granted.

Moreover, to plead a cause of action under the Computer Fraud and Abuse Act (CFAA) U.S.C. § 1030(a)(5)(B) or 18 U.S.C. § 1030(a)(5)(C), a plaintiff need not allege that a person

accessed a computer without authorization, the plaintiff need only allege that the person engaged in computer misconduct with the intent to cause damage to a protected computer, and that person was not authorized to cause such damage. See United States v Yucel, 97 F. Supp. 3d 413, (SDNY 2015). LiiRN alleges that (1) Crossbeat, through Wang and/or Justus, intentionally transmitted a computer command or code in order to cause damage to its computer system and servers by disabling LiiRN's administrative access to its third-party mailing service 'Mailgun', (2) they were not authorized to cause such damage, and (3) the conduct caused damage. However, the third-party complaint acknowledges that Crossbeat, still had "administrative access" to Mailgun when Wang and/or Justus are alleged to have changed the administrative access key on March 28, 2017. LiiRN's first alleged communication that could be construed as a revocation of that access did not take place until the next day when LiiRN's principal told Wang that LiiRN had frozen Crossbeat's access to LiiRN's systems and servers. Without an explicit revocation, Crossbeat, Wang and Justus's access to Mailgun on March 28, 2017 remained authorized and thus did not violate the CFAA. Thus, motion to dismiss LiiRN's third cause of action for violations of the CFAA is granted.

C. LiiRN's Cross-Motion To Amend Its Answer

Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809 (1st Dept. 2008). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

As explained in the affidavit of LiiRN's Chief Executive Officer, George Swisher, the factual allegations in the unverified answer to paragraphs 12, 13, and 54 of Crossbeat's Second Amended Complaint were erroneously admitted rather than denied in whole or in part and Swisher seeks to correct that error now.

Those paragraphs of the Second Amended Complaint provided that:

12. At Defendants' request and pursuant to the 2016 SOW, over the following five (5) months, Crossbeat provided a broad array of consulting services and crucial executive level support to help LiiRN's business off the ground. Among other services, Crossbeat provided expertise to assist LiiRN in its attempts to: (a) define, lead and operate major strategic initiatives; (b) define LiiRN's strategic framework on a department level and make that framework align across groups; (c) establish technical

vision; (d) help direct development and future growth; and (e) help oversee and select LiiRN's external technical partners.

13. Crossbeat, in all respects, complied with all of the its obligations under the 2016 SOW, and provided the types of services and expertise LiiRN needed to develop and commence operating its business model and technological infrastructure; and

54. Crossbeat performed and completed all of its obligations to provide certain services under the 2016 SOW, and LiiRN accepted, approved and is using all of the work performed by Crossbeat under it.

LiiRN responded to those allegations as follows:

12. Denies that the services and support provided by Crossbeat to LiiRN were to help LiiRN's "business off the ground," and otherwise admits the remainder of the allegations in Paragraph 12.

13. Admits the allegations contained in Paragraph 13 of the Complaint.

54. Admits the allegations contained in Paragraph 54 of the Complaint.

Crossbeat contends that Swisher's affidavit admits that this is not a case of erroneous omission or scrivener's error, but rather a case in which "LiiRN's principal reviewed Crossbeat's motion papers, did not like what he saw, and simply changed his position." Despite these contentions, Crossbeat fails to allege substantial prejudice or surprise. Nor could they as a matter of law. Swisher's avers that the errors in his unverified answers were inadvertent and the plaintiff can fully explore whether his responses are true, if it has not done so already. For example, in Hackert v Emmanuel Congregational

United Church of Christ, 130 AD3d 1292 (3rd Dept. 2015), the court granted the defendant leave to amend his answer “to correct what he contend[ed] was an inadvertent error in admitting his status as an independent contractor.” The court reasoned that the plaintiff had ample opportunity to explore this issue in discovery and was therefore not prejudiced.

The plaintiff also fails to establish that the amendment is palpably without merit, particularly in light of the fact that Swisher’s avers that LiiRN originally signed off on work performed by 2016 SOW because of the good working relationship between the parties. However, after the parties’ relationship deteriorated and LiiRN hired contractors to fix the damage allegedly caused by Crossbeat, it came to light that the work Crossbeat had performed under the 2016 SOW was inadequately performed and not up to industry standards. Inasmuch as these allegations bear on the determination of whether Crossbeat breached the SOWs, the plaintiff is not prejudiced and the proposed amendments are not palpably insufficient or devoid of merit, the motion for leave to amend is granted.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of Crossbeat New York, LLC and Becky Wang (MOT SEQ 005) for partial summary judgment and to

dismiss the counterclaims and the third-party complaint is granted to the extent that the second and third counterclaims are dismissed as to Crossbeat LiiRN LLC's third-party complaint is dismissed in its entirety as to Becky Wang, and the motion is otherwise denied; and it is further,

ORDERED that David Justus' motion to dismiss the second and third causes of action in LiiRN LLC's third-party complaint as against him (MOT SEQ 006) is granted; and it is further,

ORDERED that LiiRN LLC's cross-motion to amend its answer pursuant to CPLR 3025(b) is granted except that the second and third counterclaims and the third-party complaint are deemed stricken therefrom; and it is further,

ORDERED that the amended answer, in the form annexed to the defendant's motion papers as limited herein, shall be deemed served upon the plaintiff upon the defendant's service upon the plaintiff of a copy of this order with notice of entry; and it is further,

ORDERED that the defendant shall serve a copy of this order with notice of entry upon the plaintiff within 20 days of this order; and it is further,

ORDERED that the parties shall contact chambers on or before July 10, 2020 to schedule a status/settlement conference, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

Dated: May 14, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

J.S.C.