Match Group, Inc v Rad
2020 NY Slip Op 31669(U)
June 1, 2020
Supreme Court, New York County
Docket Number: 650287/2019
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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MATCH GROUP, INC.,MATCH GROUP, LLC,IAC/INTERACTIVECORP

Plaintiff,

- v -

SEAN RAD,

Defendant.

INDEX NO. 650287/2019

MOTION DATE 02/25/2020

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 194, 198

were read on this motion to/for DISMISSAL.

In these actions, *inter alia*, to recover damages for breach of contract, Sean Rad ("Rad") moves for partial dismissal of the second amended complaint in the 2019 action and the counterclaims asserted in the 2018 action.

In the 2018 action, plaintiffs alleged causes of action against Match Group Inc., Match Group, LLC and IAC/InteractiveCorp. ("IAC") (together "Match") for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, interference with contracts, and interference with prospective economic advantage. Match moved to dismiss that complaint, and in an order dated June 5, 2019, I dismissed the cause of action for breach of the implied covenant of good faith and fair dealing, the cause of action for unjust enrichment, and the cause of action for breach of contract only

as to the merger-related breach of contract claim brought by Alexa Mateen and Justin Mateen.[1]

In January 2019, Match commenced an action against Rad. In its second amended complaint, Match alleges that Rad breached his employment contract by, among other things, misappropriating confidential information, destroying documents in his work email account, and making numerous secret recordings of his supervisors and other work associates. Match claims that, had it known of Rad's misconduct and breaches at the time they occurred, it would have terminated his employment immediately for cause, and Rad would have had to forfeit his options. Based on these allegations Match pleads causes of action against Rad for (1) breach of confidentiality protocols and employment agreements between Rad and Match and or one of its affiliates, *i.e.,* the Hatch Employment and Confidentiality Agreements; IAC Confidentiality Agreement; Tinder Confidentiality Agreement; IAC Code of Business Conduct and Ethics; and Match's Code of Business Conduct and Ethics, for copying, deleting and retaining confidential information; (2) breach of the same confidentiality protocols and employment agreements for secretly recording confidential communications with other employees; (3) breach of a 2014 Amendment Agreement between Match and Rad by soliciting employees to leave the company; (4) violation of California Invasion of Privacy Act by secretly recording confidential communications with other employees; (5) unjust enrichment; and (6) a declaratory judgment stating that Rad is not entitled to advancement of any of his

[1] For a full recitation of the facts and background of the case, see my Decision/Order dated June 5, 2019.

expenses in connection with these lawsuits. Match also asserted these claims as counterclaims in the 2018 action.

Rad now moves to dismiss the breach of contract causes of action and counterclaims, unjust enrichment cause of action and counterclaim, and the California Invasion of Privacy Act cause of action and counterclaim to the extent that it seeks attorneys' fees as damages.

Rad first argues that all of the breach of contract claims must be dismissed because there are no allegations that Rad's purported acts of copying, retaining and deleting company information, recording conversations with employees, and soliciting employees to leave the company caused any injury to the company. Therefore, there can be no recoverable damages.

Rad next contends that, in any event, there is no "claw-back damages" provision included in any of the relevant contracts, and that any damages alleged under this theory would be purely speculative. Further, the second amended complaint does not sufficiently allege that there would have even been grounds to terminate Rad's employment for cause and, to fire him for cause, it would have first had to provide him with notice of any breach he committed and a cure period.

Rad also addresses each basis for the breach of contract claims. With regard to the claim that he breached the contract on the basis of copying, retaining and deleting confidential information, he argues that the 2014 Amendment Agreement authorized him to "use" or "disclose" confidential information in many situations, including disclosure to "any financial, legal, tax or accounting advisor" for any reason during and after his

employment with Tinder. His rights under that agreement existed "notwithstanding" anything to the contrary in the Tinder or Hatch agreements. He further maintains that there is no contractual provision that prohibited him from deleting information.

Rad also argues that his alleged secret recording of conversations with employees does not constitute a breach of contract because, *inter alia,* there is no allegation that Rad improperly used or disclosed the recordings or that Match sustained any harm or loss as a result of the recordings.

Rad contends that the claim that he breached a non-solicitation clause in the 2014 Amendment Agreement must fail. He explains that even though the subject agreement is governed by Delaware law, the parties who were allegedly solicited were California residents and located in California at the time of the alleged solicitation and thus, California law would apply to this claim. Under California law, the subject non-solicitation provision is unenforceable because it violates public policy. Further, none of the individuals that were allegedly solicited actually left their employment.

As to the cause of action under the California Invasion of Privacy Act, Rad contends that Match is not entitled to attorneys' fees because attorneys' fees are not ordinarily recoverable as actual damages under the statute. Rather, at most, Match could be entitled to damages of $5,000 per recording. Finally, Rad maintains that the unjust enrichment claim must be dismissed as duplicative of the breach of contract claim.

In opposition, Match first argues that the relevant contracts clearly provide that Rad was not permitted to copy, retain or delete company documents. Specifically, the IAC Agreement provides that Rad promised to "preserve and protect the confidentiality

of all Confidential Information," and promised not to transmit such information for non-work purposes. In the Hatch Agreement, Rad promised, "I will not make copies of any Confidential Information or remove or transmit any Confidential Information from Hatch Labs' business premises without prior authorization from Hatch Labs." In the Tinder Agreement, Rad promised not to misuse documents and to obey company policies, which expressly barred "copying of electronic files." Further, Rad assigned property rights over all confidential information to IAC, Match and their affiliates pursuant to Section 3.2 of the Hatch Agreement and Section 2 of the IAC Agreement. Match contends that Rad deleted the information so that it could not be used against him in the valuation process or in any litigation.

Match explains that the 2014 Amendment Agreement only adjusted the Hatch and Tinder Agreements slightly to authorize Rad to "disclose" or "use" confidential information in connection with an options valuation or other legal disputes with Match. That amendment did not give him permission to copy or retain the information in his personal possession after his employment was terminated. Even after execution of the 2014 Amendment Agreement Rad was always required to follow company policies, not copy or delete confidential information, and return confidential information if his employment was terminated. Match also notes that the 2014 Amendment Agreement does not reference the IAC Agreement, therefore, the prohibitions set forth in the IAC Agreement are not superseded.

Match next argues that, in any event, even if the 2014 Amendment Agreement did give Rad permission to use and disclose confidential information, the breach of contract

claims cannot be dismissed because Rad admitted that he took confidential documents beginning 2012, at which time the 2014 Amendment Agreement was not in effect. In addition, Rad copied materials beyond those which were contemplated by the 2014 Amendment Agreement.

Match argues that Rad's copying, retaining and deleting confidential information also violated company policy and breached his obligations pursuant to the IAC Code of Business Conduct and Ethics, and Match's Code of Business Conduct and Ethics to act in a manner that was "honest, lawful, and in accordance with high ethical and professional standards." Rad's act of secretly recording company employees also violated his ethical obligations and his obligations to preserve confidential information.

Additionally, Match argues that it adequately pled damages. Rad would have been fired for cause if his breach of the agreements and company policies and unethical secret recordings had been known, and he would have had to forfeit his vested options. Match maintains that Rad cannot claim that he was not given an opportunity to cure misconduct that he actively concealed, and in any event, the contractual notice and cure provisions acknowledge that some breaches, such as the ones alleged herein, would not be curable. Further, whether the breaches were curable or not as a matter of law is an issue not ripe for adjudication at this time. In any event, even if Match was not entitled to money damages, it could be entitled to nominal damages and also equitable relief.

With regard to the claim that Rad breached his non-solicitation obligations, Match argues that pursuant to the 2014 Amendment Agreement, Rad agreed "that during his employment at Tinder and for 12 months following termination of his employment, Mr.

Rad will not solicit any of Tinder's employees to leave their employment at Tinder." Nevertheless, he solicited employees Pambakian and RE-1 to leave. Further, contrary to Rad's contention, California law does not apply to this claim, rather, Delaware law applies. However, even if California law did apply, it does not uniformly prohibit non-solicitation clauses as a matter of law.

Match argues that it has adequately pled a cause of action for violation of the California Invasion of Privacy Act, and Match is entitled to statutory damages, and actual damages as well, such as legal fees. Finally, Match argues that Rad's inequitable conduct can be addressed in the unjust enrichment claim and therefore, this cause of action must not be dismissed.

Discussion

Sufficiency of the Breach of Contract Allegations

The bulk of Match's breach of contract claim against Rad concerns the 2014 Amendment Agreement, which amended earlier employment and confidentiality agreements between the parties. The 2014 Amendment Agreement provides, in relevant part:

> 1. Section 5 of the Hatch Agreement shall be null and void and Section 7 of the Tinder Agreement shall be null and void, and in lieu thereof, Mr. Rad agrees that during his employment at Tinder and for 12 months following termination of his employment, Mr. Rad will not solicit any of Tinder's employees to leave their employment at Tinder; provided, however, that nothing will prevent Mr. Rad from (i) publishing a general solicitation of employment, or (ii) retaining a recruitment firm to make a general solicitation of employment so long as Mr. Rad has directed such recruitment firm not to target Tinder employees. In addition, during such period Mr. Rad will not induce or attempt to induce any contractor or consultant of Tinder to sever that person's relationship with Tinder.

> 2. The term "Confidential Information" in each of the Tinder Agreement and the Hatch Agreement will include any Put Price (as defined in the Tinder 2014 Equity Settlement Plan) but will not include, and confidentiality obligations will cease as to, particular information that: (1) has become publicly known not through a breach of a duty or obligation of confidentiality by Mr. Rad to Tinder or Hatch; (2) is received by Mr. Rad from a third-party whom Mr. Rad reasonably believes has not, directly or indirectly, received the information in confidence from Tinder or Hatch, or in violation or breach of a restriction on disclosure or in breach of any obligations to Tinder or Hatch; (3) has been developed by Mr. Rad completely independent of any confidential information of Tinder or Hatch; or (4) has been approved for public release by written authorization of Tinder or Hatch. Furthermore nothing in the Tinder Agreement or in the Hatch Agreement shall prohibit Mr. Rad's use or disclosure of Confidential Information in connection with his duties as an employee of Tinder, or use in connection with any Qualifying Valuation Process (as defined in the Tinder 2014 Equity Settlement Plan), or disclosure in connection therewith to any Qualified Bank (as defined in such Equity Settlement Plan) or Mr. Mateen in connection therewith, or use or disclosure otherwise to any financial, legal, tax or accounting advisor to Mr. Rad, or in any legal dispute with Tinder, Hatch or any of their respective affiliates.

The 2014 Amendment Agreement modified the prohibitions regarding use and disclosure of confidential information as set forth in the Tinder and Hatch agreements. Thus, upon implementation of the 2014 Amendment Agreement, Rad was additionally able to use or disclose confidential information to "any financial, legal, tax or accounting advisor…or in any legal dispute with Tinder, Hatch or any of their respective affiliates."

Match notes that certain of Rad's alleged misconduct occurred prior to the execution of the 2014 Amendment Agreement, and that the 2014 Amendment Agreement does not specify that it is enforceable "notwithstanding anything to the contrary" in the IAC Agreement, rather, just "notwithstanding anything to the contrary" in the Tinder and Hatch Agreements. Further, while the 2014 Amendment Agreement permitted Rad to use and disclose confidential information for the additional stated purposes, it did not

provide that he was permitted to use and disclose information for his own personal purposes, which is part of Match's allegations in the second amended complaint and counterclaim.

The second amended complaint and counterclaim also allege that Rad's misconduct breached certain ethics and professionalism obligations and policies to which Rad contractually agreed to be bound. Specifically, in the Tinder confidentiality agreement, Rad agreed to comply with all Tinder, IAC and Match policies and procedures, and pursuant to his Hatch employment agreement, he agreed to adhere to the Hatch policies and procedures, including codes of business conduct and ethics.

The interplay of the relevant contracts, standing alone and together with the companies' policies and codes of business conduct and ethics must be considered in determining whether Match has adequately pled that Rad breached his contractual obligations by copying, retaining and deleting confidential information. Reviewing these agreements, policies and codes together, the allegations of the first cause of action and the counterclaim for breach of contract are sufficient to state a claim.

Match has also sufficiently plead the third cause of action and the counterclaim for breach of contract on the basis of Rad's alleged solicitation of Pambakian and RE to leave the company. A Delaware choice of law provision applies to the 2014 Amendment Agreement, which is a part of the Options Agreement. According to Delaware Law, reasonable non-solicitation provisions may be enforced. *See generally FP UC Holdings, LLC v. Hamilton*, 2020 Del. Ch. LEXIS 110 (Del. Ch. March 11, 2020).

However, Rad's recordings of conversations with Pambakian and RE-1 could not have constituted a breach of Rad's employment agreements because it is alleged that Rad was no longer employed by Tinder at the time those recordings were made. In contrast, Match has sufficiently stated a cause of action and counterclaim for breach of contract based on Rad's secret recordings of Blatt and Yagan. In executing the Tinder and Hatch agreements, Rad agreed to adhere to the companies' policies and codes of business conduct and ethics. Thus, the breach of contract allegations based on illicit recordings of Blatt and Yagan have adequately been pled.

Sufficiency of the Breach of Contract Damages Demands

Match demands various forms of damages in its breach of contract causes of action and counterclaims. Match's demand for claw-back damages, common to all of the breach of contract claims, is not sustainable. First, these sophisticated parties meticulously negotiated employment agreements over a number of years, and none of them contain a claw-back provision permitting Match to recoup compensation already paid in prior years for work previously performed.[2] "A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). And, if sophisticated parties omit a term, a court is required to accept that the parties intended to omit it. *See Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549 (2014).

[2] Requiring an employee to repay compensation previously earned and paid out is not a standard, foreseeable element of contract damages for an ordinary breach of employment agreement claim.

Because the parties did not specifically provide for claw-back damages in their various employment and confidentiality agreements, Match cannot seek them in its breach of contract causes of action and counterclaims.

Further, the claw-back damages sought are impermissibly speculative, based on Match's supposition on what it would have done had it known of the alleged breaches, and then a supposed following chain of events. *See generally Lloyd v. Wheatfield*, 67 N.Y.2d 809 (1986); *Kenford Co. Inc. v. Erie County*, 67 N.Y.2d 257, 261 (1986). Thus, Match supposes that if it had known of Rad's misconduct, it would have fired him (even though he was a key employee and one of the driving forces behind Match), first giving him notice and opportunity to cure, but only for certain of the misconduct which was curable. Match further supposes that Rad would not have cured, and would have then had to forfeit his options. The claw-back damages sought are thus "ground in a speculative and retrospective rewrite of the history of the parties' relationship." *Matter of Buffalo Schools Renovation Program*, 54 Misc. 3d 1204(A) *25 (Sup. Ct. Erie Co., 2016). For these reasons I strike the demand for claw-back damages.

Even though claw-back damages are not available to Match, Match may still pursue alternative relief, such as nominal damages or injunctive relief. *See Freund v. Washington Square Press, Inc.,* 34 N.Y.2d 379 (1974); *37 E. 50th St. Corp. v. Rest. Grp. Mgmt. Servs., LLC,* 2014 NY Slip Op 31595(U) *17-*18 (nominal damages are always available in breach of contract actions and "are a way of recognizing the fact that harm is caused by the fact of one party's breaking its contractual promise to another, apart from

any measurable form of damages that might be alleged in a traditional breach of contract claim for monetary damages"). Here, Match has sufficiently pled damages other than claw-back damages in connection with the breach of contract causes of action and counterclaims.

Sufficiency of the Breach of the California Privacy Act Allegations

Match also pleads breach of contract and violation of the California Privacy Act Section 632 based on Rad's alleged surreptitious recording of employee communications. Section 632 states, in relevant part,

> (a) A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation, by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

A Section 632 violation is committed the moment "a confidential communication is secretly recorded regardless of whether it is subsequently disclosed." *Lieberman v. KCOP TV, Inc.,* 110 Cal. App. 4th 156, 164 (Cal. App. 2d Dist. 2003). Statutory damages for violations of Section 632, therefore, occur upon recording and actual damage evidence is not required. *Id.* at 167. "Actual damages may be awarded, but those 'must relate directly to the surreptitious recording,' for example from emotional distress or outrage upon discovering the recording, or to recoup legal expenses to recover the

recording, but damages incurred from any subsequent broadcast are generally not allowed under the statute." *Planned Parenthood Fedn. of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 694 (N.D. Cal. 2019)(internal citations omitted).

Match has sufficiently stated a cause of action and counterclaim for violation of Section 632 based on alleged surreptitious recordings of conversations with Pambakian and RE-1. The availability, type and calculation of damages are also sufficiently pled and not subject to being struck on this pre-answer motion to dismiss.

Sufficiency of the Unjust Enrichment Allegations

"Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009); *see also Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) (where a "complaint alleges an express, enforceable contract that controls the parties' relationship… a claim for unjust enrichment will be dismissed") (internal quotation marks and citation omitted)). Match's causes of action and counterclaims mostly arise from Rad's alleged violations of the relevant employment and confidentiality agreements. Rad does not contest the agreements' existence or validity and therefore a quasi-contract cause of action is unnecessary. *See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987). The cause of action and counterclaim for unjust enrichment are therefore dismissed.

In accordance with the foregoing, it is hereby

ORDERED that Sean Rad's motion for partial dismissal of the second amended complaint in the 2019 action and the counterclaims asserted in the 2018 action is granted only to the extent that (1) the cause of action and counterclaim for unjust enrichment are dismissed; (2) the cause of action and counterclaim alleging breach of contract based on illicit recordings of Pambakian and RE-1 are dismissed; and (3) the demand for "claw-back" damages on the breach of contract causes of action and counterclaims are struck.

This constitutes the decision and order of the Court.

6/1/2020
DATE

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SALIANN SCARPULLA, 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