2 Girls Accys LLC v Larrea
2020 NY Slip Op 33005(U)
September 9, 2020
Supreme Court, New York County
Docket Number: 655786/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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2 GIRLS ACCYS LLC, 2 GIRLS HOLDING CORP. and 9281-5109 QUEBEC INC,

Plaintiffs,

- v -

KATHIE LARREA, KRISTIE LARREA, MEHJEEZ DESIGNS, LLC, SIMPLY GIRLS ACCYS LLC, MADISON LIFESTYLE LLC, EMD GROUP INC., JOHN DOES 1-10, ABC CORPS. 1-10,

Defendants.

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INDEX NO. 655786/2018

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 83, 85

were read on this motion to/for DISMISSAL

Defendants Kathie Larrea (Kathie), Kristie Larrea (Kristie) (together the Larreas), Mehjeez Designs LLC (Mehjeez), Simply Girls Accys LLC (Simply Girls), Madison Lifestyle LLC (Madison), and EMD Group, Inc (EMD) move, pursuant to CPLR 3211 (a) (1), (3), and (7), to dismiss the second amended complaint (Complaint) (NYSCEF Doc. No. [NYSCEF] 73, Second Amended Complaint).

As an initial matter, defendants note that the Complaint violates CPLR 3020 (a), inasmuch as the first amended complaint was verified but the Complaint is not. However, having chosen not to return the Complaint with "due diligence" (*Lepkowski v State of N.Y.*, 1 NY3d 201, 210 [2003]), defendants do not properly move to dismiss the Complaint on that ground.

The gist of the Complaint is that the Larreas, who were employed by plaintiff 2 Girls ACCYS LCC (the Company), plotted to, and did, steal the Company's trade

secrets, and divert the Company's suppliers and customers for the benefit of their own business, Simply Girls, which competed with the Company. Plaintiffs allege in the Complaint 47 causes of action against the various defendants, but the only harm alleged is direct harm suffered by the Company. (NYSCEF 73, Second Amended Complaint ¶ 59 ["The Larreas' ... misconduct has caused, and is continuing to cause the Company to suffer irreparable harm"]; *Id.* ¶ 77 ["caused [the Company] to suffer business disruptions and lose customers that destroyed [the Company's] business"]; *Id.* ¶ 82 ["causing significant loss and damage to the Company and its business relationships"]; *Id.* ¶ 85 ["Such efforts ultimately were unsuccessful, and the Company has failed.") Plaintiffs attempt, but fail, to avoid this problem, by arguing that the claims against the Larreas by plaintiffs 2 Girls Holding Corp. (Holding Corp.) and 0281-5109 Quebec Inc (Quebec):

> "[d]o not constitute claims for 'lost value' in the Company, but rather claims for the distinct injury to them of the loss of the money that they loaned to the Company that the Company has not repaid due to the wrongful conduct of the Larreas and/or MEHJEEZ in *operating the Company*."

(*Id.* at ¶ 70 [emphasis added.]) Plaintiffs thus acknowledge that Holding Corp's and Quebec's injuries result solely from the Company's failure to repay the loans that it received from them, and that the Company's failure to repay the loans resulted from the "wrongful conduct" of the Larreas and/or Mehjeez in the operation of the Company. Plaintiffs offers no explanation of how the "wrongful conduct" could have resulted in the Company's failure to repay the loans, other than by reducing the income and value of the Company.

Plaintiff alleges in the Complaint that Holding Corp.'s and Quebec's claims for breach of contract and breach of fiduciary duty against the Larreas and/or Mehjeez are not derivative claims, but are asserted directly. (*Id.* ¶ 70.) Accordingly, Holding Corp., as a member of the Company, lacks standing to assert a claim based on damages to the Company. (*Schwartz v Schwartz & Schlacter*, 188 AD2d 285, 285 [1st Dept 1992] [citation omitted], *see also Bialobroda v Buchwald*, 51 AD3d 467, 467 [1st Dept 2008] [distinguishing injury suffered by plaintiff individually from injury suffered by corporation of which plaintiff is a shareholder].) Plaintiffs argue that the Larreas owed fiduciary duties to Holding Corp., as a fellow member of the Company. It remains the case, however, that the injury for which Holding Company seeks redress is injury to the Company, an injury that Holding Corp. cannot vindicate.

92815109 Quebec Inc, (Quebec) is the sole owner and member of Holding Corp., which, in turn, has a majority interest in the Company. Quebec alleges no direct injury to itself. It is barred from asserting a derivative claim on behalf of the Company, because it is not a member of the Company. (*Jacobs v Cartalemi,* 156 AD3d 605, 607 [2d Dept 2017] [citation omitted].) While Quebec is a signatory to the "Term Sheet Operating Agreement of 2 Girls Accys LLC, A New York Limited Liability Company" (TSOA) (NYSCEF 74, Term Sheet Operating Agreement), the only damage that it asserts is that caused by the damage to the Company. In sum, neither Holding Corp., nor Quebec, has standing to raise the contractual and breach of fiduciary duty claims that they allege.

Three of the defendants named in the Complaint, Simply Girls, Madison, and EMD, are introduced in paragraphs 7 through 9 of the Complaint, reappear briefly in

paragraphs 62 and 63, and then reappear in the completely conclusory paragraphs of the 28th through 30th, and the 34th through 36th causes of action. The only factual allegation included is that, on August 30, 2018, several months after the Larreas had resigned from the Company, a Kmart buyer mistakenly sent an email, in which he discussed that company's "buy plan" from Simply Girls, to Kristie's former Company email address. From this, plaintiff concludes that Simply Girls:

> "[h]as wrongfully used and/or disclosed the Company's confidential, proprietary and trade secret information, including but not limited to its pricing, sourcing, design, and other business information, as well as the Company's customer, vendor and/or supplier relationships, and diverted business from the Company."

(NYSCEF 73, Second Amended Complaint ¶ 63.) As a stranger to the Company, Simply Girls owed it no duty and was free to compete with it. Accordingly, the 23d through the 25th, and the 28th through the 30th, and 34th through the 36th, causes of action, which, inexplicably include claims by Holding Company, an utter stranger to Simply Girls, are dismissed, and the Complaint is dismissed as against Simply Girls, Madison Lifestyle, and EMD.

On September 28, 2017, Quebec, Mehjeez, 2 Girls Corp., and nonparty Natanel Trust entered into the TSOA (NYSCEF 74, Term Sheet Operating Agreement). The TSOA provides for the employment of the Larreas, and it sets out certain terms to govern their employment, but it is not an employment agreement. (*Id.*) It is an agreement to agree. Paragraph 24 provides:

> "This Term Sheet is intended to be an outline of terms and conditions for the transactions among the parties, forming the basis for definitive agreements with respect thereto." (*Id.* ¶ 24.)

However, the same paragraph also provides:

> "Until such time as the parties execute and deliver such definitive agreements, they shall conduct the business of the Company and their mutual relationship in a manner consistent with the terms of this Term Sheet and will otherwise be bound hereby." (*Id.*)

The TSOA supersedes an earlier agreement between Holding Corp. and the Larreas (the Superseded Agreement): "2 Girls ACCYS LLC . . . [which] did business as '2 Girls Holding Corp.' . . . will be deemed to have contributed the entirety of the existing business to the Company." (*Id.* at NOTE & ¶ 4.)

The first two causes of action allege breach of contract against Kathie and Kristie, in relation to the Superseded Agreement. In almost identical language, the 3rd and 4th causes of action allege breach of contract against the Larreas, in relation to the TSOA. The 5th and 6th causes of action allege breach of the implied covenant of good faith and fair dealing against Kathie and Kristie in relation to the Superseded Agreement. The 7th and 8th allege the same breach in relation to the TSOA. All of these causes of action are represented, indiscriminately, to be based upon sections III (A), (D), and (E) of the Complaint.

All the contractual claims against Kathie and Kristie fail. The 1st, 2nd, 5th, and 6th causes of action pertain to the Superseded Agreement, which is referred to in paragraph 25 of the Complaint, but the Complaint fails to mention which terms. The 3rd, 4th, 7th, and 8th causes of action, which allege violations of the TSOA, fail, because, although that agreement purports to impose various duties on Kathie and Kristie, neither of them is a party thereto. (*See* NYSCEF 74, Term Sheet Operating Agreement, at p. 11.) In the 13th and 14th causes of action, plaintiffs allege contractual violation by Mehjeez. These claims could be viable, but it is elementary that a claim for breach of contract must allege damages resulting from such breach. (*Belle Light. LLC v*

Artisan Constr. Partners LLC, 178 AD3d 605, 606 [1st Dept 2019] [citation omitted].) Plaintiff fails to specify any damages, attributable to the breaches alleged. Accordingly, the first eight causes of action, as well as the 13th and the 14th are dismissed.

Insofar as is relevant here, paragraph 12 of the TSOA provides that a breach of fiduciary duty by either of the Larreas, or by certain other individuals,

> "which breach is not, or cannot be, cured within thirty (30) days after written notice to the breaching party, will result in the entity with which such person is affiliated: (I) being subject to a claim by the Company for damages caused by such breach of fiduciary duty to the Company."

(NYSCEF 74, Term Sheet Operating Agreement ¶ 12.) Accordingly, the Company cannot recover damages from either of the Larreas for an alleged breach of fiduciary duty, but must seek such from Mehjeez, the company formed by the Larreas. Although counsel for plaintiffs suggested, at oral argument, that paragraph 12 of the TSOA does not rule out holding the Larreas personally liable for a breach of fiduciary duty, nothing in that paragraph suggests that the potential liability that it imposes on "the entity with which such person is affiliated" is in addition to, rather than replacing, the liability of "such person." (NYSCEF 85, Tr. 13:21-15:3.) This is all the more evident, inasmuch as neither of the Larreas is a party to the TSOA. Accordingly, the 9th through the 12th causes of action are dismissed. The duty of loyalty claims are subsumed within the breach of fiduciary duty claims (*see Dubbs v Stribling & Assoc.,*96 NY2d 337, 340 [2001]) and are properly not pled separately from them.

The Complaint does allege a breach of fiduciary duty on the part of the Larreas, a breach for which Mehjeez may be held liable. In paragraphs 59 and 77, plaintiffs allege that the Larreas resigned from the Company, without having disclosed to the remaining

owner the computer and email passwords, without which the Company could not remain in business. In paragraph 65, plaintiffs allege that Kathie refused to assign to the Company her right to the "2girlsaccessories.com" domain and website. For such damages as the Company may prove to be attributable to these breaches, Mehjeez will be liable.

The causes of action alleging tortuous interference with contract fail, because the Complaint does not allege that defendants intentionally procured the breach of a contract between the Company and any third party. (*See Trepel v Hodgins,* 183 AD3d 429 [1st Dept 2020][citation omitted].) While the Complaint refers to companies with which it had, or hoped to have, contracts, it does not allege that defendants brought about the breach of any such contract.

The causes of action alleging tortuous interference with prospective economic advantage fail not only because the Complaint does not allege any wrongful or criminal acts directed at third parties, but also because it does not allege that defendants "acted solely out of malice [and] 'for the sole purpose of inflicting intentional harm on plaintiff'." (*Wolberg v IAI N. Am., Inc.,* 161 AD3d 468, 469 [1st Dept 2018] [citation omitted].) To the contrary, plaintiffs repeatedly insist that the Larreas acted in their own economic interest.

In the 17th through 19th causes of action, plaintiffs allege conversion on the parts of Kathie, Kristie, and Mehjeez These claims rest on the allegation that Kathie, or Kristie, stole three computers that belonged to the Company, and thus also, all the information that the computers contained. That allegation, in turn, rests exclusively upon the following allegations: on July 23, 2018, Kathie called an employee of the

Company's landlord and asked whether one of the owners of Quebec would be in the office that day; more than a month later, on or about August 31, 2018, both of the owners of Quebec came to the office, with other people, to empty the office and to terminate the Company's lease. That day, they discovered that three computers were missing. Here, in addition to speculating that one of the Larreas stole the computers, simply because, one month after one of them came to the office, the computers were found to be missing, plaintiffs allege in the Complaint both that the Larreas made illicit use of the Company information that they contained, and that, because the police reported that the computers had not been activated, the Larreas had stolen the computers merely to deny that information to the Company. (NYSCEF 73, Second Amended Complaint ¶¶ 81 and 84.) While a party may plead inconsistent theories (*Kerzhner v G4S Govt. Solutions, Inc.,* 138 AD3d 564, 565 [1st Dept 2016]), here both of the alternative allegations rest on nothing more than speculation. Indeed, while plaintiffs allege that there was no sign of a break-in, they do not allege that, in the month between Kathie's visit and that of the two owners of Quebec, no other person authorized to be there was present. Accordingly, the 17th, 18th, and 19th causes of action are dismissed.

Plaintiffs argue that the Complaint "specifies the Company's misappropriated confidential proprietary and trade secret information, such as its pricing, sourcing, design and other business information," that defendants are alleged to have misappropriated. The Complaint is hardly more specific. Plaintiffs allege that defendants

> "[w]rongfully used and/or disclosed the Company's confidential, proprietary , and trade secret information including but not limited to its

> pricing, sourcing, design and other business information, as well as the Company's customer, vendor and/or supplier relationships."

(NYSCEF 73, Second Amended Complaint ¶ 62; *see also Id.* ¶ 63). Customer lists qualify as trade secrets only if they have been secured by years of effort and advertising effected by the expenditure of substantial time and money. (*Leo Silfen, Inc, v Cream,* 29 NY2d 387, 393 [1972].) There is no allegation of such effort, here. For the rest, the information that was allegedly wrongly disclosed is "described in only the vaguest terms" (*Landmark Ventures, Inc. v InSightec Ltd.,*179 AD3d 493, 494 [1st Dept 2020]), and plaintiffs have failed to allege "what specific data the individual defendants misappropriated or used in their [subsequent] employ." (*H. Meer Dental Supply Co. v Commisso,* 269 AD2d 662, 664 [1st Dept 2000].) Accordingly, the causes of action alleging a misappropriation of trade secrets (the 26th and 27th) are dismissed.

Plaintiffs state that the facts underlying their claims of fraud and fraudulent inducement are set forth in paragraphs 14-16, 39, 47-49, 39, 56-57, 69, and 83 of the Complaint. In paragraph 83, plaintiffs allege that Kathie arranged to have an opportunity to steal the Company computers. Paragraphs 39, 56-57, and 69 all allege a failure on the part of the Larreas to enter Company-related information into the Company's computer system, or otherwise make such information available to the Company's owners, as required by the TSOA. These allegations are redundant of plaintiffs' breach of contract claims. (*See Cronos Group Ltd. v XComIP, LLC,* 156 AD3d 54, 62 [1st Dept 2017].)

The heart of plaintiffs' fraud claims appears in paragraphs 47 to 49. These paragraphs allege that, notwithstanding the representations that the Larreas made to the prospective lenders to the Company, the Larreas "never intended to inform them

about the Company's operations," "intended to conceal from them and misappropriate crucial business information," and "intended to take plaintiffs' money and use it in order to join and/or establish a competing business." (NYSCEF 73, Second Amended Complaint ¶¶ 47-49.) However, a claim of fraud, or of fraudulent inducement, "must allege a misrepresentation of present fact rather than of future intent." (*Perella Weinberg Partners, LLC v Kramer,* 153 AD3d 443, 449 [1st Dept 2017] [citation omitted].) Accordingly, the claims alleging fraud and fraudulent inducement (causes of action 37-39 and 40-42) are dismissed.

To state a claim for the diversion of corporate opportunities, a plaintiff must allege "a tangible expectancy" in the business opportunity, rather than having "simply harbored a mere desire or hope of pursuing them." (*Lee v Manchester Real Estate & Constr., LLC,* 118 AD3d 627, 617 [1st Dept 2014].) Moreover, the opportunity must be such that its diversion would "threaten the viability of the company." (*Alexander & Alexander of N.Y. v Fritzen,* 147 AD2d 241, 248 [1st Dept 1989].) The only allegation of a possible diversion appears in paragraph 78 of the Complaint, which alleges that, after Kathie resigned she failed to apprize the Company that Walmart, one of its largest customers, had been prepared to place an order with it. The paragraph also characterizes that, at best, potential sale as "a significant business opportunity." This is a far cry from alleging either that the loss of the potential sale threatened the viability of the Company, or that that potential sale was diverted elsewhere.

A plaintiff alleging unfair competition must allege a "bad faith misappropriation of a commercial advantage which belonged exclusively to him." (*LoPresti v Massachusetts Mut. Life Ins. Co.,* 30 AD3d 474, 476 [1st Dept 2006].) The Complaint

makes no such allegation. Indeed, it makes "only a vague and conclusory allegation that [plaintiffs] had a reasonable probability of a business relationship with" Walmart, as described above. (*BDCM Fund Adviser, L.L.C. v Zenni,*103 AD3d 475, 478 [1st Dept 2013].)

Finally. Plaintiffs' causes of action alleging civil conspiracy fail, because there is no such independent tort in New York, the allegation of such a tort can be used only "to connect actions of separate defendants to an underlying tort," and conclusory allegations of conspiracy are insufficient. (*Kovkov v Law Firm of Dayrel Sewell, PLLC,* 182 AD3d 418, 418 [1st Dept 2020]). The Complaint fails to identify any specific tort in connection with these causes of action, but merely refers to the allegations spread throughout the Complaint. This is patently insufficient.

Accordingly, it is hereby

ORDERED that the motion of defendants Kathie Larrea, Kristie Larrea, Mehjeez Designs, LLC, Simply Girls Accys LLC, Madison Lifestyle LLC, and EMD Group, Inc. to dismiss the Complaint is granted to the extent that causes of action 1 through 10, 13 through15, and 17 through 47 are dismissed, and the Complaint is dismissed as against Simply Girls Accys, LLC, Madison Lifestyle LLC and EMD Group, Inc. with costs as assessed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

2 GIRLS ACCYS LLC, 2 GIRLS HOLDING CORP. and 9281-5109 QUEBEC INC.,

Plaintiffs,

-against-

KATHIE LARREA KRISTIE LARREA and MAHJEEEZ DESIGNS, LLC,

Defendants.

and it is further

ORDERED that counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendants shall serve their answers to the amended complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall e-mail and e-file a proposed preliminary conference order by October 9, 2020.

Motion Seq. No. 03:

DATE

ANDREA MASLEY, 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

655786/2018 BOCHI, ABE vs. LARREA, KATHIE
Motion No. 003