Comp Trading LLC v Feldman
2021 NY Slip Op 30506(U)
February 23, 2021
Supreme Court, Kings County
Docket Number: 519461/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
--x
COMP TRADING LLC,
Plaintiff,

- against -

GARY FELDMAN,
Defendant,
--x

Decision and order

Index No. 519461/20

February 23, 2021

PRESENT: HON. LEON RUCHELSMAN

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

According to the complaint the plaintiff sells promotional gifts to casinos throughout the United States. On June 13, 2018 two of the owners of Comp Trading essentially purchased the share of the third owner, Joseph Feldman the son of defendant Gary Feldman. Pursuant to the purchase Joseph executed an agreement where he would refrain from soliciting business that competes with Comp Trading for a period of two years. The complaint alleges that Gary Feldman solicited business to compete against the plaintiff and therefore violated the agreement signed by his son. The complaint alleges that many of Gary's actions were done with the knowledge and consent of Joseph. The complaint contains two causes of action, for tortious interference with contract and tortious interference with existing and prospective business relations. The motion seeking to dismiss the complaint has been filed. The defendant asserts the complaint fails to plead sufficient facts which can give rise to the claims noted. The plaintiff counters sufficient facts have been pled and the motion should be dismissed.

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" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [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]).

It is well settled that 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 crux of the complaint is that Gary sought to compete with plaintiff and included Joseph in these competitive plans, thus Gary interfered and caused a breach of Joseph's non-solicitation agreement. The complaint certainly sufficiently alleges that Gary acted together with Joseph to compete against the plaintiff in direct violation of the non-solicitation agreement. The complaint asserts that Gary emailed Joseph about "casino sales" and "casino exclusivity" and formed a new company called NATCO and that Joseph, with Gary's guidance, send the operating agreement of NATCO to former employees of the plaintiff in efforts to recruit them (see, Complaint, ¶¶31-33). The defendant asserts all those allegations are insufficient because the complaint never alleges Joseph actually breached the agreement. However, the complaint surely alleges Joseph acted in ways which violated the non-solicitation agreement. Indeed, the complaint specifically states that Joseph made notes to the operating agreement and sent them to employees of the plaintiff. While the factual nature of those activities require further explanation and discovery, at this stage of the litigation they surely raise the issue Joseph violated the agreement and that those the activities of Gary were instrumental in such breaches. The court, of course, is not making any conclusions in this regard, but rather is merely analyzing the complaint to determine whether it states any claim. Further, the reasonableness of the non-solicitation agreement, the extent of its breadth and enforceability are all factual determinations and are not matters that can be decided on a motion to dismiss (Grassi & Company v. Honka, 180 AD3d 564, 119 NYS2d 466 [1st Dept., 2020]).

Surely, at this stage of the litigation there are sufficient facts demonstrating interference with plaintiff's contract and that such interference was intentional (Alvord and Swift v. Stewart M. Muller Construction Company Inc., 46 NY2d 276, 413 NYS2d 309 [1978]). As the Second Circuit explained in S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery Inc., 751 Fed. Appx. 39 [2d Cir. 2018] when facts are presented concerning intent then summary determination is almost never appropriate since "intent is always a subjective matter of inference" (id). Therefore, before any discovery has taken place the defendant has failed to present sufficient evidence that no such cause of action exists. Consequently, the motion seeking to dismiss the cause of action for tortious interference is denied.

The second cause of action is tortious interference with prospective and existing contractual relations. To establish this tort the plaintiff must demonstrate the defendant engaged in culpable or wrongful 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 (Smith v. Meridian Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]). The wrongful conduct cannot consist of simple persuasion (Godinger Silver Art Ltd., v. Hirschkorn, 433 F.Supp3d 417 [EDNY 2019]). Thus, it must involve conduct that is either an independent crime or tort or done solely out of malice or done with extreme and unfair economic pressure (Carson Optical Inc., v. Prym, 11 F.Supp3d 317 [EDNY 2014]). In this case there have been no allegations the defendant committed any crimes and there are no allegations of fraud, misrepresentation or economic pressure or other torts. Further, there have been no allegations the defendant acted solely out of malice or utilized extreme and unfair pressures. Merely facilitating the breach of the non-solicitation agreement does not establish the tort of tortious interference with prospective contractual relations. Therefore, the motion seeking to dismiss the second cause of action is granted.

So ordered.

ENTER:

DATED: February 23, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC