Priority Capital, LLC v United Credit Solvers, Inc.
2021 NY Slip Op 30618(U)
March 2, 2021
Supreme Court, New York County
Docket Number: 150193/2018E
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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PRIORITY CAPITAL, LLC and CHRISTIAN WOODCOCK, individually and as a shareholder of UNITED CREDIT SOLUTIONS, INC.,

Plaintiffs,

-against-

UNITED CREDIT SOLVERS, INC., INGO NOWOTTNY and WILLIAM NOWOTTNY,

Defendants.

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Index No. 150193/2018E

Motion Seq. No. 002

DECISION AND ORDER

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

In motion sequence number 002, plaintiffs Priority Capital, LLC (Priority) and Christian Woodcock (Woodcock) move to dismiss the seven counterclaims asserted against them by defendants United Credit Solvers, Inc. (Solvers), Ingo Nowottny and William Nowottny (collectively, the Nowottnys).

I. Background

In their amended complaint in this action (complaint [NYSCEF Doc No. 47]), plaintiffs assert direct claims, and Woodcock asserts derivative claims, in their continuing business dispute with defendants.[1] Plaintiffs contend that, among other things, the Nowottnys, through Solvers, committed misappropriation of' United Credit Solutions' (Solutions) corporate assets and opportunities, waste, conversion, breaches of contract and fiduciary duties, fraud, fraudulent

[1] This action is related to another action before this court captioned *Century First Credit Solutions, Inc. v Priority Capital, a Delaware Limited Liability Company, Christian Woodcock, an individual, and John Amato, an individual (and a third-party action)* (Index No. 653287/2015) (*Century First* action). In that matter, defendants sought to amend their answer by, among other things, adding third-party claims against the Nowottnys and Solvers. By decision and order entered July 12, 2017 (NYSCEF Doc No. 46), this court granted plaintiff Century First's motion to dismiss defendants' third-party causes of action, but without prejudice to defendants' commencement of this separate plenary action.

inducement, tortuous interference with contract, and several violations of New York's Business Corporation Law (BCL) (*id.*).

In their answer (NYSCEF Doc No 48), defendants generally deny plaintiffs' allegations and assert seven counterclaims against both Woodcock and Priority, for: (1) fraud; (2) fraudulent inducement; (3) misappropriation of trade secrets; (4) unfair competition; (5) breach of contract; (6) attorneys' fees and expenses under a prevailing party contract provision; and (7) unjust enrichment (*id*. ¶¶ 253 *et seq*.).

Defendants allege that Ingo Nowottny founded Solutions on December 27, 2011 (answer ¶ 256, citing affidavit of Chris "Ingo" Nowottny, sworn to August 14, 2020 [Nowottny aff] [NYSCEF Doc No. 55]). Solutions specialized in settlement of outstanding consumer debt, such as credit card debt, and used cold callers to solicit new clients (*id.* ¶ 258). Woodcock later bought a 50% ownership interest in Solutions (*id.* ¶ 257).

Ingo Nowottny, William Nowottny, and Woodcock decided to open a Solutions branch in Brooklyn and, on January 28, 2013, entered into a written agreement specifying how revenue from the Brooklyn branch would be divided (*id.* ¶ 260, citing Brooklyn Branch Agreement (BBA) [NYSCEF Doc No. 68]).

According to Ingo Nowottny, Woodcock became dissatisfied with the terms of the BBA and with his business relationship with the Nowottnys, and shortly thereafter informed the Nowottnys that he intended to start a new business involving life insurance settlements (Nowottny aff ¶ 4; answer ¶¶ 262-64). On May 22, 2014, Woodcock formed Plymouth Capital to conduct his life insurance settlement business (answer ¶ 265).

In the spring of 2014, Woodcock and Ingo Nowottny bought out the interests of William Nowottny and his partner in Solutions' Brooklyn branch (*id.* ¶ 266). In the fall of 2014,

Woodcock informed Ingo Nowottny that he also wished to sell his interest in Solutions (*id.* ¶ 267). According to Ingo Nowottny, this led Woodcock to draft the Asset Purchase Agreement (APA) (Nowottny aff ¶ 6).

Under the APA (answer, exhibit B [NYSCEF Doc No. 64]), executed on December 1, 2014, Woodcock sold his entire interest in Solutions to defendant Solvers, a Florida corporation owned jointly by Ingo Nowottny and his sister, Marianna Nowottny (see *id.* at 1).

Defendants allege that, despite his representations to the contrary at the time the APA was executed, Woodcock never intended to leave the consumer debt settlement industry. Instead, he purportedly induced Ingo to buy out his stake in the assets of Solutions, just so he could later steal them for his own benefit (answer ¶¶ 268-69). Defendants further allege that, on or about October 17, 2014, Woodcock founded his own consumer debt settlement company, plaintiff Priority (*id.* ¶ 270). Defendants assert that they were unaware of Woodcock's deceptions and would not have entered the APA if they had known of his true intentions (*id.* ¶ 274).

After the APA was executed, Ingo Nowottny moved to Florida, but continued his work in consumer debt settlement through defendant Solvers (*id.* ¶ 276), which maintained several of Solutions' computers in New York City (*id.* ¶ 277).

At or around the start of 2015, Bill Nowottny moved his office to the same floor as Plymouth's office at 1375 Broadway (*id.* ¶ 279), next door to Woodcock's office (*id.* ¶ 280). In July 2015, Woodcock contacted Ingo Nowottny, to ask for the passwords needed to access Solvers' e-mail records (*id.* ¶ 281). Woodcock told Ingo Nowottny that he needed the passwords to retrieve certain personal documents from Solvers' old computer files (*id.* ¶ 282). Defendants claim that Woodcock used this pretext to access Solvers' records and steal its trade secrets and proprietary information (*id.* ¶ 283).

Defendants contend that, in or around August 2015, plaintiffs hired a computer and software consultant (whom defendants do not identify) and told the Nowottnys that the consultant was there to work on plaintiffs' computers (*id.* ¶¶ 84-85), but the consultant was really hired to infiltrate defendants' computer system and to steal their trade secret information (*id.* ¶ 286).

Defendants allege that the trade secret materials plaintiff misappropriated from Solvers' files included the names and contact information of defendants' clients, employees and independent contractors, defendants' leads for potential clients, defendants' contract templates and form client agreements, and defendants' sales scripts (*id.* ¶ 287).

Defendants contend that these materials were not publicly available and comprised material that they purchased by entering the APA (*id.* ¶¶ 288-89). Defendants further allege that plaintiffs misused their trade secret information to contact and solicit Solvers' existing clients and customer leads (*id.* ¶ 291) and, during the course of their contacts, misrepresented defendants' names, credentials and reputations, to induce Solvers' customers and potential customers to abandon defendants and bring their business to plaintiffs, causing defendants substantial damages (*id.* ¶¶ 292-293).

In this motion, plaintiffs assert that each of these seven counterclaims should be dismissed because they are either barred by applicable statutes of limitation, fail to state a cause of action, or are duplicative of claims that have been, or could have been, asserted in the *Century First* action.

II. Discussion

Subsection (a) of CPLR 3211 states, in pertinent part, that

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . .

> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of . . . statute of limitations . . .; or
>
> 7. the pleading fails to state a cause of action".

When a court rules on a motion to dismiss under CPLR 3211, it "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]).

"However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence" (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]).

On a motion to dismiss under CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). "Whether a

plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Dismissal under CPLR 3211 (a) (5)

Plaintiffs assert defendants' counterclaims, other than those sounding in breach of contract and fraud, are subject to three-year limitation periods and so are time barred, as all of defendants' allegations are premised on conduct which occurred in 2014 and 2015. In opposition, defendants assert that their counterclaims for misappropriation of trade secrets, unfair competition and unjust enrichment are not barred because they are premised on plaintiffs' alleged fraudulent conduct and so are entitled to a six-year limitation period.

It is true that "[a]n unfair competition claim is subject to a six-year statute of limitations in New York, because it is based on fraud" (*Continental Indus. Group, Inc. v Ustuntas*, 2020 NY Slip Op 34344[U], *16 [Sup Ct, NY County, Dec 31, 2020], citing *Errant Genere Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 182 AD3d 506, 508 [1st Dept 2020]), and so this facet of plaintiff's motion fails.

With respect to defendants' counterclaim for unjust enrichment, however, the three-year statute of limitations of CPLR 214 (3) governs, since defendants seek monetary relief, as opposed to equitable relief (*Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]). Defendants' reliance on *Williams-Guillaume v Bank of Am., N.A.* (130 AD3d 1016 [2d Dept 2015]) is misplaced, as the plaintiff in that case sought restitution as her remedy for unjust enrichment.

A cause of action for misappropriation of trade secrets is also governed by the three-year statute of limitations (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141 [2009] [claim for misappropriation of confidential and proprietary business information subject to three years limitations period under CPLR 214 (4)]; see also *Andrew Greenberg, Inc. v Svane,*

Inc., 36 AD3d 1094, 1098 [3d Dept 2007] [citing CPLR 214 (4)]; *Chefs Diet Acquisition Corp. v Ghiron*, 2018 NY Slip Op 32865 [U], *3 [Sup Ct, NY County, Nov 13, 2018]). Accordingly, plaintiffs' motion to dismiss defendants' counterclaims as time-barred must be denied with respect to their cause of action for unfair competition but granted with respect to defendants' counterclaims for misappropriation of trade secrets and unjust enrichment.

Alter Ego Liability

Defendants assert each of their counterclaims against Priority and also against Woodcock, individually and as a shareholder of Solutions. As a threshold issue, plaintiffs contend that defendants fail to allege facts to support alter ego liability, which purportedly vitiates their counterclaims insofar as they are asserted against Woodcock individually.

In opposition, defendants argue that they made allegations sufficient to sustain their counterclaims against Woodcock individually, by describing Woodcock's use of Priority in plaintiffs' allegedly fraudulent scheme, and asserting that Priority was created for the specific purpose of facilitating their fraud (answer ¶¶ 271-72, 294-300). Defendants argue further that it would be improper to address the issue of alter ego liability on this motion because the theory of piercing the corporate veil "involves a fact laden inquiry that is not well suited for resolution on a pre-answer, pre-discovery motion to dismiss" (*BT Americas Inc. v ProntoCom Mktg., Inc.*, 2008 NY Slip Op 50401 [U], *4 [Sup Ct NY County, Feb 14, 2008], citing, *inter alia*, *Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007]).

Generally, plaintiffs are not required to plead the elements of alter ego liability with the particularity required by CPLR 3016 (b), "but only to plead in a non-conclusory manner" (*2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016] citing *International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept.1998]).

Defendants fail to allege specifically that Priority is Woodcock's alter ego and that he exercised complete dominion and control over Priority (*Trans Intern. Corp. v Clear View Tech.*, 278 AD2d 1, 1-2 [1st Dept 2000] [citation omitted]). Those elements of this cause of action, however, may be reasonably inferred from defendants' allegations regarding Woodcock's creation of Priority and the uses to which he put Priority (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63). Viewing defendants' counterclaims in the light most favorable to them (*Weil, Gotshal & Manges, LLP*, 10 AD3d at 270-71), defendants have pleaded an adequate basis for alter ego liability for the purposes of this motion.

Fraud and Fraudulent Inducement

Plaintiffs allege that defendants' first counterclaim for fraud and the second counterclaim for fraudulent inducement must be dismissed because they fail to state a prima facie case and fail to plead fraud with the specificity required by CPLR 3016 (b). Plaintiffs further allege that these counterclaims must be dismissed because they seek the same relief as defendants' breach of contract counterclaim.

"'The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages'" (*Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1, 8 [1st Dept 2019], quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). "CPLR 3016(b) requires that 'the circumstances constituting the wrong shall be stated in detail.' The statutory provision is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*Epiphany Community Nursery School*, 171 AD3d at 9, citing, *inter alia*, *Eurycleia Partners, LP*, 12 NY3d at 559). "Further, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*id.* [internal quotation

marks and citation omitted]). "This requirement is to inform a defendant of the acts that the plaintiff is complaining about" (*id.* [citations omitted]).

The elements of a claim for fraudulent inducement are a "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

Defendants allege, among other things, that, in July 2015. Woodcock made false statements about his need for Solvers' email password, his intent to use the password to retrieve old personal documents and his engagement of a computer consultant to work on Plymouth's computers and software. Defendants further allege that all of these representations were known to be false and were made for the purpose of tricking defendants into allowing Woodcock and Priority access to the trade secret information in Solvers' computer files, which plaintiffs misappropriated to defendants' detriment (answer ¶¶ 281-295). These allegations state a cause of action for fraud with sufficient specificity.

Plaintiffs also argue the defendants' fraud counterclaim should be dismissed because it seeks the same relief as their breach of contract counterclaim. As the breach of contract counterclaim does not survive (see *infra*), this rationale for dismissal also fails.

As to fraudulent inducement, the APA has a merger clause which provides: "This Agreement (including the exhibits and any written amendments hereof executed by the parties) constitutes the entire Agreement and supersedes all prior agreements and understandings, oral and written, between the parties hereto with respect to the subject matter hereof" (NYSCEF Doc No. 52). Consequently, the counterclaim alleging fraudulent inducement is barred by the merger

clause contained in the APA (*Chappo & Co. v Ion Geophysical Corp.*, 83 AD3d 499, 500 [1st Dept 2011], citing *Deerfield Communications Corp. v Chesebrough–Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Breach of Contract

Plaintiff argues that the defendants' counterclaim for breach of contract fails because neither Priority nor Woodcock were parties to the APA Agreement. The elements of a claim for breach of contract are "'the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages'" (*Markov v Katt*, 176 AD3d 401, 401-02 [1st Dept 2019], quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept. 2010]). Assuming without deciding that defendants have standing to sue for breach of the APA, they fail to state a cause of action because they have not identified an actionable breach.

Defendants allege that plaintiffs breached the APA by failing to give Solvers and Ingo Nowottny "complete, unfettered possession of the entirety of [Woodcock's] assets in Solutions" (answer ¶ 344). Specifically, they allege that plaintiffs "breached the APA by stealing the assets sold to Solvers and Ingo Nowottny" (*id.* ¶ 346), referring to the alleged trade secret misappropriation which occurred months after the APA was entered. Defendants do not allege that the assets which were the subject of the APA were not fully transferred to them or that the APA was not fully performed. No breach of contract occurred here (*Gutarts v Fox*, 104 AD3d 457, 459 [1st Dept 2013] [no cause of action for breach of contract lies where "the contract as bargained for was performed"]).

In their sixth counterclaim, defendants seek to recover attorneys' fees and expenses under a prevailing party clause in Section 5 (c) to the APA (NYSCEF Doc No. 52). This counterclaim necessarily fails because defendants do not prevail on their counterclaim for breach of contract.

Unfair competition

In their fourth counterclaim, defendants allege that plaintiffs engaged in unfair competition. To state a cause of action for unfair competition, the defendants must allege that the plaintiffs, as counterclaim defendants, **"**misappropriated [their] labor, skills, expenditures or good will, and displayed some element of bad faith in doing so" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015], citing, *inter alia*, *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 57 [1st Dept 2015]). In this context, bad faith can be established by a showing of fraud, deception, or an abuse of a fiduciary or confidential relationship (*id.* [citation omitted]). Plaintiffs do not assert that defendants have failed to state a cause of action for unfair competition. Rather, they allege defendants' counterclaim must be dismissed because it is duplicative of the claim defendants asserted in the *First Century* Action.

As noted, CPLR 3211 (a) (4) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice require."

"Paragraph 4's purpose is to prevent the consequences of duplicative litigation (e.g., conflicting judgments, the parties bearing the expense of litigating multiple, similar lawsuits). Note that paragraph 4 authorizes but does not require dismissal of an action that is similar to another; the provision cautions that a 'court need not dismiss upon th[e] ground [that a similar action is pending] but may make such order as justice requires'" (John R. Higgitt, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:14 [Main Volume]).

To support dismissal, the movant must show that there is "sufficient identity as to both the parties and the causes of action asserted in the respective actions" (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 93 [1st Dept 1997] [citation omitted]). "With respect to the parties, the requirement is that there be substantial identity" (*id.*, 231 AD2d at 93-94 [citations omitted]). "With respect to the subject of the actions, the relief sought must be the same or substantially the same" (*id.* [internal quotation marks and citation omitted]).

The *First Century* Action is also before this court and so there is no danger of conflicting judgments. Defendants' counterclaim for fraud has survived this motion and so this action would not be fully resolved by dismissal of the unfair competition counterclaim. Furthermore, the same allegations regarding plaintiffs' misappropriation and misuse of defendants' trade secrets underlie both the fraud and unfair competition counterclaims in this action and so any duplication of effort and costs will be limited, if not eliminated. Considering these factors, the court, in its discretion, denies plaintiffs' motion to dismiss defendants' unfair competition counterclaim.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiffs Priority and Woodcock to dismiss the counterclaims of defendants Solvers and the Nowottnys for fraudulent inducement, misappropriation of trade secrets, breach of contract, attorneys' fees and costs under a prevailing party contract provision, and unjust enrichment, is granted; and it is further

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims for fraud and unfair competition is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this order along with Notice of Entry on all parties within 20 days.

Dated: March 2, 2021

E N T E R:

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