

<b>Paulmil Cafe, Inc. v Evolver Holdings Corp.</b>
2021 NY Slip Op 30951(U)
March 19, 2021
Supreme Court, New York County
Docket Number: 654950/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

-----X

PAULMIL CAFE, INC., ALAIN PALINSKY

Plaintiffs,

- v -

EVOLVER HOLDINGS CORP., LOUIS SAGAR,

Defendants.

-----X

INDEX NO. 654950/2020
MOTION DATE 03/01/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS

Upon the foregoing documents,

The following read on defendants' pre-answer motion to dismiss for failure to state a cause of action, CPLR § 3211(a)(7), plaintiffs' fifth v) cause of action, breach of implied covenant of good faith and fair dealing; sixth vi) cause of action, tortious interference with plaintiffs' business relations; and seventh vii) cause of action, trade libel and injurious falsehood; and declining to award attorney's fees and costs.

Plaintiff filed a summons and complaint on October 2, 2020. Defendants were served on or about October 27, 2020. Multiple extensions of time to answer were stipulated, and defendant now moves to dismiss only causes of action five through seven. Defendant has not answered. Plaintiff's verified complaint states causes of action for i) breach of sublease agreement; ii) breach of guaranty to sublease; iii) breach of installment agreement; iv) breach of guaranty to installment agreement; v) breach of implied covenant of good faith and fair dealing; vi) tortious interference with plaintiffs' business relations; and vii) trade libel and injurious falsehood.

Plaintiff Paulmil Café, Inc. (“Paulmil Café”) is a domestic corporation organized under the laws of New York, with a principal place of business at 21 E. 1st Street, New York, New York 10003. Alain Palinsky is the controlling shareholder and President of Paulmil Café. Evolver Holdings Corp. (“Evolver Holdings”) is a foreign corporation organized under the laws of Delaware, registered address 251 Little Falls Drive, Wilmington, Delaware 19808, and which maintained business operations at 21 E. 1st Street, New York, New York 10003. Upon information and belief, Evolver Holdings has relocated to 119 Crosby Street, New York, New York 10012.

Paulmil Café is the lessee of certain premises commonly known as commercial unit 2 of 21 East 1st Street, New York, New York 10003. Paulmil Café executed a sublease for a portion of the premises with Evolver Holdings dated February 11, 2019, deemed effective as of January 1, 2018 (see NYSCEF Doc. No. 3). Under the sublease agreement, Evolver Holdings agreed to sublease the premises for the term commencing retroactively on November 1, 2018 and ending on January 20, 2029. On February 11, 2019, Louis Sagar executed a guaranty which he guaranteed payment of rent, obligations, covenants, and conditions.

Pursuant to the verified complaint, “[e]volver [holdings] and Sagar have failed to pay the monthly fixed rent owed under the sublease agreement since March of 2020 totaling \$93,571.27, the additional rent due thereunder since December of 2019 totaling \$12,265.08 as of September 19, 2020, as well as the interest and penalties that have accrued thereon totaling at least \$6,933.38 as of September 21, 2020. In breach of the sublease agreement, defendants have been selling products prohibited by the sublease agreement, resulting in lost profits and business opportunities to plaintiffs. As a material inducement to Paulmil to agree to the terms of the sublease agreement, Evolver and Paulmil executed an installment agreement dated and effective

as of February 11, 2019. Under the installment agreement, Evolver agreed to make payments to Paulmil in the aggregate sum of \$250,000 plus additional monthly installments of \$13,187.50. In spite of repeated demands by Paulmil and Palinsky, Evolver and Sagar have failed to make the ... payments under the installment agreement.”

When considering a motion to dismiss under CPLR § 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hill, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

Plaintiff Alain Palinsky has submitted a verified complaint, affirming the factual contents as true to his personal knowledge. Defendants’ have not submitted an affidavit attesting to the facts surrounding this litigation.

Defendant states the fifth cause of action, breach of implied covenant of good faith and fair dealing must be dismissed as duplicative of their breach of contract cause of action. “Where a complaint, based on the same alleged facts, asserts causes of action for breach of contract and breach of an implied duty of good faith and fair dealing, the latter should be dismissed” (see *Salomon v. Citigroup Inc.*, 123 A.D.3d 517, 518 [1st Dept. 2014]).

CPLR § 3014 provides, “separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency.” CPLR § 3017 states, “every complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a demand for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded.” “A party is permitted to plead

inconsistent theories of recovery under CPLR § 3014 ... this rule does not require a litigant to elect remedies when defending a motion for summary judgment” (see *On the Level Enters., Inc. v. 49 E. Houston LLC*, 104 A.D.3d 500 [1st Dept 2013]).

Defendant states the sixth cause of action, tortious interference with plaintiffs’ business relations, is again duplicative but of the seventh cause of action for trade libel and injurious falsehood. “It is well settled that a claim for tortious interference is duplicative of a defamation claim ... where the entire injury complained of by plaintiff flows from the effect on his reputation” (see *Deaton v. Napoli*, 2019 WL 4736722 at \*9). Again, CPLR § 3017 states, “[r]elief in the alternative or of several different types may be demanded.”

Defendants address the seventh cause of action and highlight that CPLR § 3016 be pled with particularity. “CPLR 3016(a) requires that in a defamation action (libel in this case), ‘the particular words complained of ... be set forth in the complaint’ (see *Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dept. 1999]). “As with a claim of defamation, a plaintiff asserting a claim for injurious falsehood must set forth the particular falsehood uttered by the defendant. The complaint also must allege the time, place, and manner of the false statement and to specify to whom it was made.” (see *Alexander & Alexander of New York v. Fritzen*, 114 A.D.2d 814, 816 – 817 [1st Dept. 1985]).

Plaintiffs’ affirmation in opposition states, “[p]laintiffs have adequately pled a general timeline regarding the statements made by defendants to plaintiffs’ prior third party vendors and have pled the contents of the statements from defendants to said vendors appropriately to comply with the special proceeding requirements of CPLR § 3016. While plaintiffs concede they do not currently have the exact dates and times of the statements made, letter correspondence has been issued to out-of-state vendors requesting copies of the subject communications between

defendants and aforesaid vendors and the subject contents thereof. Upon receipt of these communications from the third-party vendors, plaintiffs will have all of the specifics necessary to establish the precise time and contents of defendants’ defamatory statements.” Plaintiff’s affirmation in opposition notes “that the instant matter is pre-discovery.”

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83, 87 – 88 [1994]).

Defendants’ motion to dismiss the fifth cause of action, breach of implied covenant of good faith and fair dealing; sixth cause of action, tortious interference with plaintiffs’ business relations; seventh cause of action, trade libel and injurious falsehood; and declining to award attorneys fees are DENIED in its entirety.

3/19/2021  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE